

STATE OF NEW HAMPSHIRE
Supreme Court

CASE NO. 2011-0647

IN RE CHRISTIAN M.;
IN RE ALEXANDER M.

INTERLOCUTORY TRANSFER
FROM SULLIVAN COUNTY SUPERIOR COURT

**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Does the Due Process Clause of the New Hampshire Constitution (Part 1, Articles 2 and 15) require the appointment of counsel for an indigent parent-defendant from whom the State seeks to take custody of a minor child based on allegations of neglect or abuse?¹

¹ Consistent with the position set out in the parents' brief, the ABA addresses the question solely under New Hampshire law. See Brief of Larry M. and Sonia M. (Natural Parents of Christian M. and Alexander M.) (November 18, 2011) at 1 n. 1 ("Because the due process requirements of the State Constitution are at least as protective of individual liberties as those requirements of the 14th Amendment of the United States Constitution, consideration of the latter is not necessary"). See also *In re Father*, 155 N.H. 93, 95 (2007) ("We first address this issue under the State Constitution, and cite federal opinions for guidance only."); *In re Shelby R.*, 148 N.H. 237, 239 (2002); *In re Tracy M.*, 137 N.H. 119, 122 (1993).

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The American Bar Association (“ABA”), as *amicus curiae*, respectfully submits this brief in response to the Court’s request that amici “focus on the ramifications of a decision” in this case. The ABA has a long history of examining the ramifications of decisions related to questions of equal access to justice, including the question now before the Court. The ABA therefore focuses this brief on evidence and analysis that supports the ABA’s conclusion that the risk of error inherent in abuse and neglect proceedings where indigent parent-defendants are without legal counsel is too great to comport with due process under the New Hampshire Constitution.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all 50 states as well as foreign jurisdictions. They include attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, in addition to judges, legislators, law professor, and law students.²

For over 90 years, the ABA has worked for equal access to justice for persons with limited financial resources. Its first standing committee was the Standing Committee on Legal Aid and Indigent Defendants (“SCLAID”), which was created in 1920. Today, the charge of that committee continues to include the investigation and study of the administration of justice, as it affects the poor, and the promotion of remedial measures intended to help indigent defendants protect their legal rights. ABA Constitution, Article

² Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to a member of the Judicial Division Council prior to filing.

31.7. The ABA's core goals and objectives include "[w]ork[ing] for just laws, including human rights, and a fair legal process" and "[a]ssuring meaningful access to justice for all persons," reflecting the ABA's concern that all persons in this country be able to obtain effective legal representation.³

In 2006, the ABA's Presidential Task Force on Access to Justice studied the specific question of whether appointed counsel for low income persons is necessary to ensure the protection of basic human needs, such as child custody. When this Task Force presented its Report with Recommendation to the 550 member ABA House of Delegates, it was supported by 25 wide-ranging ABA sections and entities, including SCLAID, as well as by several state bar associations.⁴ The House responded with the adoption, without dissent, of the following as ABA policy:

RESOLVED, That the 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 needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.

³ ABA Mission and Goals, available at <http://www.abanet.org/about/goals.html>.

⁴ The sections, entities, and associations, as listed on the caption of the Report with Recommendation, were: the ABA Section on Business Law, the ABA Commission on Interest on Lawyers' Trust Accounts, the ABA Commission on Law and Aging, the ABA Section of Litigation, the ABA Steering Committee on the Unmet Legal Needs of Children, the ABA Special Committee on Death Penalty Representation, SCLAID, the ABA Commission on Immigration, the Association of the Bar of the City of New York, the King County Bar Association (Washington), the Maine State Bar Association, the New York County Lawyers' Association, the Philadelphia Bar Association, the National Legal Aid and Defender Association, the ABA Section of Administrative Law and Regulatory Practice, the Washington State Bar Association, the Boston Bar Association, the Colorado Bar Association, the New York State Bar Association, the Connecticut Bar Association, the Minnesota State Bar Association, the Los Angeles County Bar Association, the Bar Association of the District of Columbia, the ABA Section of Labor and Employment Law and the ABA Section of Individual Rights and Responsibilities.

ABA Report with Recommendation (2006 Annual Meeting #112A) (the “ABA Report”) at 1.⁵ “Child custody” proceedings include all proceedings “where the custody of a child is determined or the termination of parental rights is threatened.” *Id.* at 13.

The ABA respectfully suggests that the evidence and analysis supporting the ABA’s policy, both leading up to its adoption and thereafter, are directly relevant and material to the question of whether due process under the New Hampshire Constitution requires the right to counsel in abuse and neglect proceedings. Accordingly, the ABA requests that this Court consider this evidence and analysis in making the New Hampshire constitutional determination required in this case.

STATEMENT OF CASE AND STATEMENT OF FACTS

The ABA adopts the statement of facts set forth in the Statement of Interlocutory Transfer Without Ruling Filed Pursuant to Supreme Court Rule 9.

SUMMARY OF ARGUMENT

This Court’s determination of whether due process under the New Hampshire Constitution requires court-appointed counsel for indigent parent-defendants, in order to protect their fundamental right to parent, requires the balancing of three factors—(1) the private interest at stake, (2) the risk of error and the value of procedural safeguards, and (3) the state’s interest. *See In re Shelby R.*, 148 N.H. 237, 240 (2002) (citing *In re Richard A.*, 146 N.H. 295, 298 (2001)). Because there is no dispute that the fundamental right to parent is

⁵ 2006 Annual Meeting #112A is attached as Appendix A. Recommendations become official ABA policy after approval by vote of the ABA House of Delegates, which is the ABA’s policy making body and is composed of representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. Information on the House of Delegates is available at http://www.americanbar.org/groups/leadership/house_of_delegates.html.

at stake in abuse and neglect proceedings,⁶ the ABA focuses its discussion on the second and third factors of the three factor test.

As to the second, so-called “risk of error” factor, the ABA’s conclusion, after years of investigation and analysis, is that the absence of counsel for indigent parent-defendants in abuse and neglect proceedings results in a significant risk of an erroneous determination. This is especially true where the opposing party is the State. As to the third, state’s interest factor, the ABA’s investigation shows that the interests of both the parent and the state are best served where indigent parent-defendants are represented. The ABA respectfully suggests that the evidence and analysis relevant to these two factors is so compelling in most, if not all, abuse and neglect proceedings involving indigent parent-defendants, that a case-by-case balancing of the factors should be rejected in favor of a rule requiring the appointment of counsel for indigent parent-defendants in all such proceedings.

The evidence and analysis supporting the ABA’s policy includes the fact that a substantial majority of states have recognized an unqualified right to counsel for indigent parent-defendants in child custody proceedings. Similarly, other industrial democracies provide indigent parent-defendants with such right to counsel. The ABA respectfully submits that this Court should require no less as a matter of due process under the New Hampshire Constitution.

⁶ Although *In re Shelby R.* resulted in a plurality ruling, the Court was not split on the question of whether or not a natural parent’s role in the family is a fundamental liberty interest protected by the State Constitution. See *In re Shelby R.*, 148 N.H. at 244 (dissenting opinion).

ARGUMENT

I. WHEN THE STATE SEEKS CUSTODY OF A MINOR CHILD BASED ON ALLEGATIONS OF ABUSE AND NEGLECT, COUNSEL IS NECESSARY TO PROVIDE INDIGENT PARENT-DEFENDANTS THE DUE PROCESS GUARANTEE OF THE NEW HAMPSHIRE CONSTITUTION.

The New Hampshire Constitution requires this Court to determine whether indigent parents have a legally protected interest and, if so, to then decide whether due process requires the appointment of counsel as an appropriate procedural safeguard to protect that interest. *See In re Shelby R.*, 148 N.H. 237, 239 (2002)). In making this decision, the Court must weigh three factors: (1) the private interests that will be affected; (2) the risk of erroneous deprivation of the liberty interest through the procedures used and the value, if any, of additional or substitute procedural safeguards; and (3) the state's interest, including the function involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail. *Id.* at 240; *see also In re Father*, 155 N.H. 93, 95 (2007).

This Court has previously concluded as to the first factor that adversary child custody proceedings implicate a fundamental liberty interest—the right to parent. *See In re Shelby R.*, 148 N.H. at 239; *In re Nelson*, 149 N.H. 545, 547 (2003). In this case, the central question thus becomes whether that right is sufficiently protected, as a matter of due process under the New Hampshire Constitution, if counsel to indigent parent-defendants is denied. The ABA respectfully suggests that, in abuse and neglect proceedings, the conclusion that counsel must be provided is so compelling in most, if not all cases, that a case-by-case balancing of the factors should be rejected in favor of a rule requiring the appointment of counsel for low

income parent-defendants in all such proceedings.⁷

A. When Indigent Parent-Defendants Are Unrepresented, The Risk of Erroneous Deprivation Inherent In Abuse And Neglect Proceedings Is Too Great To Be Constitutionally Acceptable.

i. Most Indigent Parent-Defendants Are Incapable Of Performing The Advocacy Functions Required In Abuse and Neglect Proceedings.

Despite the relaxed evidentiary standards in abuse and neglect proceedings, most unrepresented parents cannot perform the advocacy functions—including investigating facts, making an orderly factual presentation, and cross-examining witnesses—that are required.⁸ Cases throughout the country demonstrate that the need for and manner in which evidence must be presented remains beyond the understanding of many indigent parent-defendants. *See, e.g., In re Hudson*, 763 N.W.2d 618, 626 (Mich. 2009) (Weaver, J., concurring) (no evidence presented by unrepresented parent, even though rules of evidence did not apply); *Danforth v. State Dep't of Health and Welfare*, 303 A.2d 794, 799 (Me. 1973) (“The average parent would be at a loss when faced with problems of procedure, evidence, or cross-examination.”); *see also In re the Matter of S.S.*, 90 P.3d 571, 576 (Ok. Civ. App. 2004) (mother did not present opening statement and “was not able to effectively cross-examine”

⁷ In *Lassiter v. Dep't of Soc. Servs. Of Durham County*, the United States Supreme Court held that the right to counsel question under the Due Process Clause of the Federal Constitution is to be decided on a case-by-case basis. 452 U.S. 18, 27-34 (1981). This Court, however, “is the final arbiter of the due process requirements of the State Constitution.” *See In re Brittany S.*, 147 N.H. 489, 491 (2002). For the reasons set forth below, the ABA urges this Court to reject a case-by-case test and conclude that only a categorical right to counsel in such cases is sufficient to assure protection of indigent parent-defendants’ due process rights. *Compare Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (“But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions.”).

⁸ *See also* Nadine Vasser, *The Indigent Parents Right to Counsel in Termination of Parental Rights Proceedings*, 16 J. Contemp. Legal Issues 329, 330 (2007) (“Without competent counsel, parents in [termination of parental rights] proceedings will be unlikely to mount an effective defense.”).

witnesses); *In re Xena X. D.-C.*, 617 N.W.2d 894, 900-01 (Wis. Ct. App. 2000) (mother became “nearly a nonfactor” at proceeding because she was unable to present evidence, conduct cross-examination, and participate in final arguments).

Moreover, abuse and neglect proceedings sometimes involve expert medical and psychiatric testimony. *In re Shelby R.*, 148 N.H. at 241. As this Court noted “few parents [or stepparents] are equipped to understand and fewer still to confute” this kind of evidence. *Id.* (citations and quotations omitted) (insertion original).⁹ See also *In the Interest of Howard*, 382 So.2d 194, 199 (La. Ct. App. 1980).

The legal and factual complexities inherent in adversarial child custody cases can create hurdles the indigent parent cannot overcome. In these cases, “[r]ather than focusing on the facts of isolated acts or omissions, the State’s charges typically address the nature and quality of complicated ongoing relationships among parent, child, other relatives, and even unrelated parties.” *Lassiter*, 452 U.S. at 44 (Blackmun, J., dissenting). Further, “indigent parents often have a limited education and are unfamiliar with legal proceedings . . . [T]he risk is substantial that the parent will lose her child due to intimidation, inarticulateness, or confusion.” *In the Matter of A.S.A.*, 852 P.2d 127, 129 (Mont. 1993). For example, in the case of *State ex rel. T.H. v. Min*, 802 S.W.2d 625, 627 (Tenn. Ct. App. 1990), neither parent had even an elementary school education. The Court concluded that “the education, intelligence and personal experience of the Hs are so minimal that they could barely understand what was going on.” *Id.* Many courts acknowledge difficulties similar to those

⁹ In fact, even practicing attorneys in this state often grapple with the issues presented in child custody cases. In a 2008 survey conducted by the New Hampshire Court Improvement Project, termination of parental rights hearings ranked in the top four of “high priority” training topics identified by attorneys with experience in child abuse and neglect cases. Sarah Fox, *Court Improvement Project Reports Survey Results*, New Hampshire Bar Association (Sept. 5, 2008), <http://www.nhbar.org/publications/display-news-issue.asp?id=4733>.

faced by the Hs, which are demonstrative of the difficulties *pro se* parents often cannot overcome in child custody proceedings. *See, e.g., In the Interest of J.C.*, 108 S.W.3d 914, 916 (Tx. App. Ct. 2003) (concluding that the statutory right to counsel for indigent parents facing termination of their rights “is in obvious recognition of the inability of most—if not all—indigent parents to defend against such a serious matter . . . without the assistance of counsel”).¹⁰

Finally, the intense, emotionally charged backdrop against which custody decisions are often made further exacerbates the inherent disadvantages faced by unrepresented indigent parent-defendants. *See, e.g., In re Emily A. v. Ebrahim A.*, 12 Cal. Rptr. 2d 294 (Cal. Ct. App. 1992) (“Few lay people are equipped to respond to the legal complexity of [custody] proceedings, particularly when . . . they are dealing with the emotionally devastating potential loss of all of, or significant aspects of, their relationship with their children.”); *see also Flores v. Flores*, 598 P.2d 893, 896 (Alaska 1979) (deeming child custody cases “among the most difficult in the law”).

ii. The Need For Counsel For The Indigent Parent-Defendant Is Especially Great Where The Opposing Party Is The State.

The evidence supporting the ABA’s policy demonstrates that the *pro se* indigent parent-defendant is at an even a greater disadvantage when opposed by the State. Indeed, there is “a gross inherent imbalance of experience and expertise between the parties if the

¹⁰ *See also In re Adoption of J.D.F.*, 761 N.W.2d 582, 588 (N.D. 2009) (discussing a *pro se* father’s inability to “present important evidence, cross-examine witnesses, or respond to objections”); *In the Matter of K.L.J.*, 813 P.2d 276, 281-82 (Alaska 1991) (reversing a decision terminating the parental rights of a father where the father was denied the right to counsel, failed to make significant legal objections, did not know about or inform the court of substantial errors of law, and “prejudiced himself in presenting his own testimony”); *Reist v. Bay Circuit Judge*, 241 N.W.2d 55, 63 (Mich. 1976) (“Parents most often involved in neglect and termination proceedings are usually the least equipped, in terms of intellectual and emotional resources, to respond in such proceedings.”).

parents are not represented by counsel”, *In re Adoption of R.I.*, 312 A.2d 601, 602 (Pa. 1973) (citations omitted), that only increases the risk of an erroneous deprivation of the fundamental right to parent. In *State v. Jamison*, 444 P.2d 15 (Or. 1968), the court noted that, while the “case at bar was routine for the welfare workers and other juvenile court staff,” the entire proceedings were “incomprehensible” for the unrepresented mother. *Id.* at 17. Moreover, in abuse and neglect proceedings, “the full panoply of the traditional weapons of the state are marshaled against the defendant parents.” *Danforth*, 303 A.2d at 799. See also *Dep’t of Public Welfare v. J.K.B.*, 393 N.E.2d 406, 408 (Mass. 1979) (finding indigent, unrepresented parent without a meaningful right to be heard when “the State, her adversary, is not only represented by counsel but also has vastly superior resources for investigation and presentation of its case”).

iii. In Abuse And Neglect Proceedings, The Unacceptable Risk Of Error Can Be Avoided By The Appointment Of Counsel.

Not only are indigent parent-defendants ill-equipped to defend their fundamental right to parent, but there is a high probability that whether they are represented by counsel will be outcome determinative. In 2007, sixteen retired Washington State judges, acting as *amici curiae*, reported their findings that unrepresented indigent parents in divorce proceedings received so fewer favorable decisions than represented parties that the “conclusion is inescapable that indigent *pro se* litigants are regularly losing cases that they should win.” Brief for Retired Washington Judges Amici Curiae Supporting Appellant, *King v. King* at 6, 174 P.3d 659 (2007) (No. 79978-4).¹¹ See also *In re Luscier’s Welfare*, 524 P.2d 906, 908 (Wash. 1974) (“[T]he lack of counsel, in itself, may lead improperly and unnecessarily to

¹¹ Available at <http://templeofjustice.org/cases/2007/in-re-marriage-of-king-v-brenda-leone-king/>.

deprivation of one's children.”). In adopting its 2006 Resolution, the ABA, too, found that “studies consistently show that legal representation makes a major difference in whether a party wins in cases decided by courts.” ABA Report at 10.¹²

The recent Michigan case of *In re Hudson* demonstrates the risk of error in abuse and neglect proceedings involving unrepresented indigent parent-defendants. *In re Hudson*, 763 N.W.2d 618, 619-20 (Mich. 2009). There, the parental rights of Melanie Morgan, mother of three, were terminated. As described in a concurring opinion, this occurred despite the fact that witnesses for the Department of Human Services (“DHS”) “indicated that [she] was making progress, and that termination was neither appropriate nor in the children’s best interest.” *Id.* at 626 (Weaver, J., concurring). In fact, less than three months prior to the termination trial, a DHS caseworker testified at a permanency planning hearing that Mrs. Morgan’s therapist “did not support termination and believed that ‘if this case were on the front end without having removal,’ removal would not even have taken place.” *Id.*

Termination nevertheless occurred as a result of errors that could have been avoided if Mrs. Morgan had been represented by counsel. As a threshold matter, Mrs. Morgan, “without full information and understanding the consequences,” admitted to several allegations in the initial petition brought by DHS, *id.* at 624, which “pervaded” the entire proceeding, *id.* at 627. “Had [Mrs. Morgan] been represented by counsel during the preliminary hearing, counsel could have fully advised her of the consequences of a plea of admission.” *Id.* at 624.

This error was compounded by Mrs. Morgan’s failure to challenge the evidence presented by DHS. There was no cross-examination, no challenge to hearsay testimony

¹² See, e.g., Barbara Bzedek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in the Legal Process*, 20 Hofstra L. Rev. 533 (1992); 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*, 36 Law & Soc. Rev. 419 (2001).

presented by DHS, and no evidence presented on Mrs. Morgan's behalf. *Id.* at 625-26. "Although the rules of evidence do not apply at dispositional and permanency planning hearings . . . , counsel for respondent could have challenged the evidence presented by the DHS and could have called and cross-examined the individuals who prepared the many reports DHS witnesses referenced in their testimony at these hearings." *Id.* at 625. In fact, "there is a real possibility that counsel could have prevented the removal of the children from the home [at the initial hearing]." *Id.* at 626.

Case law demonstrates that the risk of error when indigent parent-defendants are forced to proceed unrepresented is a real risk with grave consequences. Some reviewing courts have been able to pinpoint those consequences with specificity. *See In re "A" Children*, 193 P.3d 1228, 1257-58 (Haw. Ct. App. 2008) (detailing "chain of events that could have been broken if Father had had counsel"); *R.V. v. Commonwealth*, 242 S.W.3d 669, 673 (Ky. Ct. App. 2007) ("At the very hearing in district court at which [parents] were unrepresented, . . . the court made an erroneous finding of fact"); *Jamison*, 444 P.2d at 17 (finding that, if both sides had been represented, "most, if not all, of the alleged errors would have been avoided"). A case-by-case approach requires the trial court to determine, before the presentation of evidence, whether legal representation is required, but under this standard, it is often nearly impossible for reviewing courts to determine whether the lack of counsel resulted in the parent suffering an unconstitutional deprivation. This is because "[t]he pleadings and transcript . . . at most will show the obvious blunders and omissions of the defendant parent. Determining the difference legal representation would have made becomes possible only through imagination, investigation and legal research focused on a particular case." *Lassiter*, 452 U.S. at 51 (Blackmun, J., dissenting).

Because indigent parent-defendants are unlikely to understand what is required to comply with their due process right to a fair hearing, and will often be too intimidated to ask, a case-by-case approach to the appointment of counsel creates an unacceptable risk that they will be erroneously deprived of their children and that the deprivation may escape review. *See id.* at 50 (case-by-case approach to appointment of counsel “entails serious dangers for the interests at stake and the general administration of justice.”);¹³ *In the Matter of K.L.J.*, 813 P.2d at 282 n. 2 (expressly rejecting a case-by-case approach to the appointment of counsel in adoption proceedings because of the difficulties and costs associated with such an approach). This risk can be avoided by a categorical right to the appointment of counsel when indigent parents are defendants in abuse and neglect proceedings.

B. Providing Indigent Parent-Defendants With Legal Representation Serves The Interests Of Both The Parents And The State.

The appointment of counsel for indigent parents in child custody proceedings not only protects the fundamental interest of the parents, but also serves the state’s interests. Although the state’s primary interest in dependency proceedings is the “best interest of the child,” it also has an umbrella interest in “providing *all* parties a fair hearing.” *In re Shelby R.*, 148 N.H. at 241 (emphasis added). *See also Watson v. Div. of Family Svcs.*, 813 A.2d 1101, 1110 (Del. 2002) (“The State has an interest in the welfare of children and in fostering an accurate decision.”). As demonstrated above, legal representation for the indigent parent-defendants in abuse and neglect proceedings will necessarily result in more correct outcomes for parents and their children and, thus, serves the state’s interest in fair hearings for all. *In re Jay R.*, 197

¹³ The ABA notes that in the criminal context, the United States Supreme Court recognized that applying a case-by-case approach to the right to counsel question in criminal cases was unworkable and, thus, overturned it in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

Cal. Rptr. 672, 681 (Cal. Ct. App. 1983) (appointing counsel “will make the fact-finding process more accurate.”).

In addition, the state has an interest in conserving funds. See *In re Jay R.*, 197 Cal. Rptr. at 681 (“The state’s interest is largely financial.”). This interest, too, is benefited by appointing counsel for indigent parent-defendants.¹⁴ The Supreme Court of West Virginia expressly considered the savings in judicial efficiency associated with the appointment of counsel to indigent parent-defendants:

The ultimate benefit should be earlier finality of whatever dispositional order is justified by the law and the evidence. Financial economy follows from the true achievement of judicial economy . . . Real savings are likely to be realized because of the timely prosecution, defense and disposition of these cases, that is to say, lower public expense overall, more than enough to compensate for the relatively few cases in which counsel may be appointed

In the Matter of Lindsay, 473 S.E.2d 110, 124 (W. Va. 1996). See also *Joni B. v. State*, 549 N.W.2d 411, 417 (Wis. 1996) (“It would be in no one’s best interest, least of all the child’s, if the finality of an adoption were later challenged on the basis of a constitutionally flawed prior CHIPS or termination proceeding.”). In fact, legislation to expand the right to counsel in other states has been “premised on a belief that providing counsel would decrease the number of children taken from their parents and speed the return of children to their parents, thus benefiting the individual children and *saving the government money.*” Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 Loy. L.A. L. Rev. 1087, 1110 (2009) (emphasis added).

¹⁴ In 2010, the ABA adopted the Model Access Act, having concluded after investigation that “[p]roviding legal representation to low-income persons at public expense will result in greater judicial efficiency by avoiding repeated appearances and delays caused by incomplete paperwork or unprepared litigants” See ABA Model Access Act § 1.F (adopted Aug. 2010). See also ABA MODEL ACCESS ACT, 2010 Report with Recommendation #104 (blackletter and commentary of Model Act adopted Aug. 2010) available at http://new.abanet.org/sdl/Documents/2010_AM_104.pdf.

Thus, while the appointment of counsel protects against the substantial risk of erroneous deprivation of indigent parent-defendants' fundamental right to the care, custody, and management of their children, it simultaneously furthers the government's substantive, financial, and efficiency interests.

II. A SUBSTANTIAL MAJORITY OF STATES AS WELL AS OTHER INDUSTRIAL NATIONS HAVE RECOGNIZED AN UNQUALIFIED RIGHT TO COUNSEL FOR INDIGENT PARENT-DEFENDANTS.

If this Court concludes the appointment of counsel for indigent parent-defendants is not required in all abuse and neglect proceedings, New Hampshire will stand with the clear minority of states that do not provide for legal representation for these parties by statute or common law.¹⁵ See, e.g., Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents*, 36 Loy. U. Chi. L.J. 363, 368 & n. 30 (2005) (collecting cases and stating that throughout the country "most indigent parents continue to be entitled to free counsel when they are forced to respond to charges of parental unfitness brought by the state."). In fact, the liberty interest in the parent-child relationship is held in such esteem under the Florida state constitution that "the only civil proceeding in which a person is entitled to free public counsel in Florida is a proceeding to terminate parental rights." *In the Matter of Adoption of Doe*, 543 So.2d 741, 749 (Fla. 1989) (Barkett, J., concurring).

¹⁵ Most states have established by statute or common law an unqualified right to counsel for indigent parent-defendants in dependency proceedings. See, e.g., Ala. Code § 12-15-305(b); Colo. Rev. Stat. § 19-3-202; Conn. Gen. Stat. § 46b-135(b); Ga. Code Ann. § 15-11-6; Ind. Code § 31-34-4-6; Iowa Code § 232.89(1); Kan Stat. Ann. § 38-2205(b); Mass. Gen. Laws Ann. ch. 119, § 29; Mont. Code Ann. § 41-3-425; 42 Pa. Cons. Stat. Ann. § 6337; R.I. Gen. Laws. § 14-1-31; S.C. Code Ann. § 63-7-1620(3); *In re Ella B.*, 285 N.E.2d 288 (N.Y. 1972); *Danforth*, 303 A.2d 794 (Me. 1973); *State ex. Rel. Lemaster v. Oakley*, 203 S.E.2d 140 (W. Va. 1974); *In re Pima County Juvenile Action J-64016*, 219 P.2d 1073, 1075 (Ariz. App. Ct. 1980); *Hughes v. Division of Family Svcs.*, 836 A.2d 498, 509 (Del. Super. Ct. 2003). In addition, federal laws provide for counsel to specific types of individuals, including Native American parents in any removal, placement, or termination proceeding. See Indian Child Welfare Act, 25 U.S.C. § 1912.

Moreover, the right to counsel for indigent litigants in certain civil cases—including child custody cases—has long been accepted in other industrial nations. For example, thirty years ago in a case involving an indigent litigant in a child custody dispute, the European Court of Human Rights determined that the guarantee of a “fair hearing” required that the government provide counsel to an indigent mother in a separation proceeding. *Airey v. Ireland*, 2 E.H.H.R. 305 (Eur. Ct. H.R. 1979) (finding mother denied effective access to court in violation of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms where Irish government refused to appoint her counsel). *See also J.G. v. New Brunswick*, 177 D.L.R. (4th) 124 (1999), available at 1999 WL 1556609 (Supreme Court of Canada held that a mother “needed to be represented by counsel for there to have been a fair determination of the child’s best interests”).

As Justice Lewis Powell, Jr. stated, when he was president of the ABA, “[Equal] justice under law is not merely a caption on the façade of the Supreme Court building, it is perhaps the most inspiring ideal of our society.” ABA Report, at 2. The ABA’s long history of examining whether counsel should always be provided when indigent parents are faced with state-initiated abuse and neglect proceedings and the ramifications, including a risk of erroneous deprivation of their fundamental right to parent when they are unrepresented, has led the ABA to join with the majority of states and other industrial nations in concluding that fair and equal access to justice requires the appointment of counsel for indigent parent-defendants in these cases.

CONCLUSION

For the foregoing reasons, *amicus curiae* the American Bar Association urges this Court to find that the Due Process Clause of New Hampshire Constitution requires that counsel be appointed for indigent parent-defendants in all abuse or neglect proceedings brought by the State seeking custody of their minor child.

DATED this 12th day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing **BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE** were delivered to counsel of record by First Class Mail this 12th day of December, 2011.



Doreen F. Connor

ADDENDUM

Report with Recommendation to the House of Delegates # 112A.....19

Unanimously Approved by ABA House of Delegates August 7, 2006

AMERICAN BAR ASSOCIATION

**TASK FORCE ON ACCESS TO CIVIL JUSTICE
SECTION OF BUSINESS LAW
COMMISSION ON INTEREST ON LAWYERS' TRUST ACCOUNTS
COMMISSION ON LAW AND AGING
SECTION OF LITIGATION
STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN
SPECIAL COMMITTEE ON DEATH PENALTY REPRESENTATION
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
COMMISSION ON IMMIGRATION
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
KING COUNTY BAR ASSOCIATION (WASHINGTON)
MAINE STATE BAR ASSOCIATION
NEW YORK COUNTY LAWYERS' ASSOCIATION
THE PHILADELPHIA BAR ASSOCIATION
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
WASHINGTON STATE BAR ASSOCIATION
BOSTON BAR ASSOCIATION
COLORADO BAR ASSOCIATION
NEW YORK STATE BAR ASSOCIATION
CONNECTICUT BAR ASSOCIATION
MINNESOTA STATE BAR ASSOCIATION
LOS ANGELES COUNTY BAR ASSOCIATION
THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA
SECTION OF LABOR AND EMPLOYMENT LAW
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 **RESOLVED**, That the American Bar Association urges federal, state, and territorial
2 governments to provide legal counsel as a matter of right at public expense to low income
3 persons in those categories of adversarial proceedings where basic human needs are at stake,
4 such as those involving shelter, sustenance, safety, health or child custody, as determined by
5 each jurisdiction.

REPORT**This Resolution is the Logical Next Step in the ABA's Long History of Support for Achieving Equal Justice in the United States**

The ABA has long held as a core value the principle that society must provide equal access to justice, to give meaning to the words inscribed above the entrance to the United States Supreme Court – “Equal Justice Under Law.” As one of the Association’s most distinguished former Presidents, Justice Lewis Powell, once observed:

“Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status.”

The ABA also has long recognized that the nation’s legal profession has a special obligation to advance the national commitment to provide equal justice. The Association’s efforts to promote civil legal aid and access to appointed counsel for indigent litigants are quintessential expressions of these principles.

In 1920, the Association created its first standing committee, “The Standing Committee on Legal Aid and Indigent Defendants,” with Charles Evans Hughes as its first chair. With this action, the ABA pledged itself to foster the expansion of legal aid throughout the country. Then, in 1965, under the leadership of Lewis Powell, the ABA House of Delegates endorsed federal funding of legal services for the poor because it was clear that charitable funding would never begin to meet the need. In the early 1970s, the ABA played a prominent role in the creation of the federal Legal Services Corporation to assume responsibility for the legal services program created by the federal Office of Economic Opportunity. Beginning in the 1980s and continuing to the present, the ABA has been a powerful and persuasive voice in the fight to maintain federal funding for civil legal services.

These actions are consistent with and further several of the ABA’s key goals including:

GOAL II To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition.

When the ABA adopted this Goal, the following objectives for achieving it were listed:

1. Increase funding for legal services to the poor in civil and criminal cases.
2. Communicate the availability of affordable legal services and information to moderate-income persons.
3. Provide effective representation for the full range of legal needs of low and middle income persons.
4. Encourage the development of systems and procedures that make the justice system easier for all persons to understand and use.

The ABA Has Adopted Policy Positions Favoring a Right to Counsel

The ABA has on several occasions articulated its support for appointing counsel when necessary to ensure meaningful access to the justice system. In its amicus brief in *Lassiter v. Dept of Social*

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Services of Durham County, 425 U.S. 18 (1981), the ABA urged the U.S. Supreme Court to rule that counsel must be appointed for indigent parents in civil proceedings that could terminate their parental rights, “[I]n order to minimize [the risk of error] and ensure a fair hearing, procedural due process demands that counsel be made available to parents, and that if the parents are indigent, it be at public expense. *Id.* at 3-4. The ABA noted that “skilled counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal. . . . Pro se litigants cannot adequately perform any of these tasks.”

In 1979 the House of Delegates adopted Standards Relating to Counsel for Private Parties, as part of the Juvenile Justice Standards. The Standards state “the participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.” These standards were quoted in the *Lassiter* amicus brief. Also, in 1987, the House of Delegates adopted policy calling for appointment of counsel in guardianship/conservatorship cases.¹

The ABA stated these positions some years ago, but its continuing commitment to the principles behind the positions was recently restated when it championed the right to meaningful access to the courts by the disabled in its amicus brief in *Tennessee v. Lane*, 541 U.S. 509 (2004). The case concerned a litigant who could not physically access the courthouse in order to defend himself. In terms that could also apply to appointment of counsel, the brief states, “the right of equal and effective access to the courts is a core aspect of constitutional guarantees and is essential to ensuring the proper administration of justice.” ABA Amicus Brief in *Tennessee v. Lane* at 16.

Echoing the Association’s stance in *Lassiter*, the brief continued “the right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights . . . [W]hen important interests are at stake in judicial proceedings, the Due Process Clause requires more than a theoretical right of access to the courts; it requires *meaningful* access. . . . To ensure meaningful access, particularly when an individual faces the prospect of coercive State deprivation through the judicial process of life, liberty, or property, due process often requires the State to give a litigant affirmative assistance so that he may participate in the proceedings if he effectively would be unable to participate otherwise.” *Id.* at 17-18 (internal citations omitted).

Despite 130 Years of Legal Aid in the United States, Existing Resources Have Proven Inadequate to Fulfill the Promise of Equal Justice for All.

The right to representation for indigents in civil proceedings goes back to the earliest days of the common law when indigent litigants had a right to appointment of counsel so they could have access to the civil courts. Most European and Commonwealth countries have had a right to counsel in civil cases for decades or even centuries, entitling all poor people to legal assistance

¹ See House of Delegates Resolution adopted in August, 1987 offered by the Special Committee on Legal Problems of the Elderly: “BE IT RESOLVED, That the American Bar Association supports efforts to improve judicial practices concerning guardianship, and adopts the following Recommended Judicial Practices and urges their implementation for the elderly at the state level: . . . I. Procedure: Ensuring Due Process Protections . . . C. Representation of the Alleged Incompetent . . . 1. Counsel as advocate for the respondent should be appointed in every case...”

when needed. The United States, in contrast, has relied principally on supplying a fixed number of lawyers and providing representation only to however many poor people this limited resource is able to serve. As of today, the level of resource does not approach the level of need² and only a fortunate few of those unable to afford counsel enjoy effective access to justice when facing serious legal problems

For the first 90 years of legal aid in this country, the only financial support for civil legal aid came from private charity. It started in 1876 with a single legal aid society serving German-American immigrants in New York City. Bar associations and social service organizations later established legal aid programs in a few cities elsewhere in the country. Starting in 1920, prompted by the publication of Reginald Heber Smith's landmark expose of injustice in America, *JUSTICE AND THE POOR*, and under the leadership of Charles Evans Hughes, the ABA, as noted above, sought to nurture development of such programs and managed to foster legal aid societies in most major cities and many smaller communities around the nation. But those societies were grossly underfunded and understaffed.

It was not until 1965 that government funding first became available for civil legal aid as part of the War on Poverty. In 1974, the federal Legal Services Corporation was established as the central funding entity for legal aid programs nationwide. During the early years the federal government expanded legal aid funding considerably. But the expansion of federal appropriations soon stalled, when LSC proved vulnerable to political attack. Thus, local legal aid agencies began to more aggressively seek diversified funding from other sources including Interest on Lawyers Trust Accounts (IOLTA), state and local governments and private sources.³ Despite these innovative and often heroic efforts, however, taking account of inflation and the growth in numbers of poor people civil legal aid funding is no higher today in real terms than it was a quarter century ago.⁴

Given this persistent shortage of legal aid resources, it is not surprising to find a vast and continuing unmet need for the services of lawyers among those unable to afford counsel. While the nationwide Legal Services Corporation-funded system for providing legal services assists as many as one million poor people with critical legal problems each year, a recent survey shows that the legal aid programs within that system have to turn away another million people who come to their offices⁵. Millions more are discouraged and don't bother seeking legal aid because

² See *Documenting the Justice Gap in America, A Report of the Legal Services Corporation* (2005) documenting the percentage of eligible persons that LSC funded-programs are unable to serve due to lack of sufficient resources.

³ Some of these funding sources also have come under attack. See, e.g., *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Wieland v. Lawyers Trust Fund of Illinois*, Docket # 5-03-0419, App. Ct. of Ill, 5th Jud Dist. (2003).

⁴ Expenditures of public resources to address the legal needs of the poor in the United States compare poorly with funding in many other industrialized nations. At the lower end, Germany and Finland invest over three times as much of their gross domestic product as the United States in serving the civil legal needs of lower income populations. At the upper end, England spends 12 times as much of its GDP as the U.S. does to provide civil legal aid to its citizens. In between, New Zealand spends five times more than the U.S. and the Netherlands over seven times as much. Even Hong Kong, now a part of the People's Republic of China, invests more than six times as much as the U.S.

⁵ See n. 1, *Documenting the Justice Gap* at p. 5. It also should be noted that many of the cases in which local programs reported they provided services were ones where limited resources meant they only were able to supply

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they know help is not available. Despite all the efforts of legal aid programs and pro bono lawyers, an ABA nationwide legal needs study in 1993 showed that legal help was not obtained for over 70% of the serious legal problems encountered by poor people.

More than ten years have passed since that ABA research, and matters have only gotten worse. Poverty has not significantly abated and indeed has increased since the 2000 census. Similarly, the civil legal needs of the poor remain substantially unfulfilled. For example, a September 2003 report by the District of Columbia Bar Foundation estimates that less than 10% of the need for civil legal assistance is being met in that jurisdiction. A similar study in Washington State, also released in September 2003, found that 87% of the state's low-income households encounter a civil legal problem each year, and that only 12% of these households are able to obtain assistance from a lawyer. In Massachusetts - a state with significant legal services resources - the occurrence of civil legal problems among the poor increased significantly in the period 1993-2002. By 2002 at least 53% of the poor households in the state had at least one unmet civil legal need and only 13% of those households were able to resolve all the problems they experienced.⁶

Both Constitutional Principles and Public Policy Support A Legally Enforceable Right to Counsel to Achieve Effective Access to Justice in Many Civil Cases

In *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) the U.S. Supreme Court held:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries....From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

It appears just as difficult to argue a civil litigant can stand "equal before the law . . . without a lawyer to assist him." Indeed just a year after *Gideon*, the Supreme Court made a similar observation about civil litigants. "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries...." *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964). Yet, in 1981, the Supreme Court, in a civil matter, said that there is no absolute right to court appointed counsel for an indigent litigant in a case brought by the state to terminate parental rights. *Lassiter v. Department of Social Services*, 425

self-help assistance, but believed full representation would have led to a better outcome for the clients. (*Id.* at p. 6, fn 8.)

⁶ Seven additional states have recently examined the kinds of legal problems experienced by low-income residents of the state and what they do about them: Oregon (2000), Vermont (2001), New Jersey (2002), Connecticut (2003), Tennessee (2004), Illinois (2005) and Montana (2005). These studies, too, demonstrate that only a very small percentage of the legal problems experienced by low-income people (typically one in five or less) is addressed with the assistance of a private or legal aid lawyer.

U.S. 18 (1981). While the Court recognized that the complexity of a termination of parental rights proceeding might “overwhelm an uncounseled parent,” the Court found--by a 5-4 vote--that the appointment of counsel was not required in every case. *Id.* at 30. Instead, trial courts were instructed to balance three factors to determine whether due process requires that a parent be given a lawyer: “the private interest at stake, the government’s interest and the risk that the procedures used will lead to erroneous decisions.” *Id.* at 27. The court went on to apply the standard in such a way that it virtually excluded the appointment of counsel except in the most extraordinary circumstances, in particular by overlaying on the three-part due process test an additional presumption against appointed counsel where there is no risk of loss of physical liberty.

It is to be hoped that the U.S. Supreme Court will eventually reconsider the cumbersome *Lassiter* balancing test and the unreasonable presumption that renders that test irrelevant for almost all civil litigants. There would be precedent for such a reversal, as seen in the evolution of the criminal right to counsel from *Betts v Brady*, 316 U.S. 455 (1942) to *Gideon* in 1963. In *Betts*, the Court said the appointment of counsel was required in criminal cases only where, after a case-by-case analysis, the trial court determined that counsel is necessary to ensure that trial is not “offensive to the common and fundamental ideas of fairness and right.” *Id.* at 473. But by 1963, the Court realized that the *Betts* approach was unworkable, and overturned it in *Gideon*.

Powerful common law, constitutional, and policy arguments support a governmental obligation to ensure low income people are provided the means, including lawyers, to have effective access to the civil courts. These arguments have equal and sometimes greater application at the state level than they do at the federal level.

Common Law Antecedents Support a Right to Counsel in Civil Matters

The common law has a long history of granting indigent litigants a right to counsel in civil cases. As early as the 13th and 14th centuries English courts were appointing attorneys for such litigants, a right that Parliament codified in 1495.⁷ Several American colonies imported this statute and its right to counsel as part of the common law they adopted from the mother country and, it has been argued, this nascent right continues to the current day.⁸ But at a minimum the venerable age and persistence of this right⁹ in the common law tradition suggests the fundamental importance

⁷ The critical language from the Statute of Henry VII, which also relieved indigent civil litigants from the obligation to pay fees and costs, reads as follows: “[T]he Justices...shall assign to the same poor person or persons counsel,... which shall give their counsel, nothing taking for the same;...and likewise the Justices shall appoint attorney and attorneys for the same poor person or persons....” II Hen VII, c. 12 (1495), An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, reprinted in 2 Statutes of the Realm 578 (1993).

⁸ See, e.g., Brief for Appellant, *Frase v. Barnhart*, 379 Md. 1000 (2003) at pp. 33-42, arguing the Statute of Henry VII is part of the English common law the colony and later the state of Maryland adopted as its own and this right to counsel remains part of Maryland law in the current day. Nor is this common law argument limited to the original 13 states. Many if not most other states expressly incorporated the English common law as it existed at the moment of their statehood as the common law of those states. See Johnson, *Beyond Payne: The Case for A Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOYOLA OF LOS ANGELES L. REV. 249, 251-259 (1978) for an explanation why the Statute of Henry VII the California Supreme Court used as the basis for finding a common law right to waiver of fees and costs also appears to justify the provision of free counsel to those same indigent litigants.

⁹ The Statute of Henry VII was not replaced until 1883, when it was succeeded by a law designed to make the right more effective. In 1914 the English Parliament passed another reform of legal aid. Then in 1950 it enacted a

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that tradition, which is the basis of American law, accords guaranteeing poor people equality before the law and furnishing them the lawyers required to make that guarantee a reality.

Other European and commonwealth countries also have come to recognize a statutory right to counsel in civil cases. France created such a statutory right in 1852, Italy did so when Garibaldi unified the country in 1865, and Germany followed suit when it became a nation in 1877. Most of the remaining European countries enacted right to counsel provisions in the late 19th and early 20th century. Several Canadian provinces, New Zealand and some Australian states have provided attorneys to the poor as a matter of statutory right for decades, although the scope of the right has changed in response to legislative funding and priorities.¹⁰

As of this time, no American jurisdiction has enacted a statutory right to counsel at public expense nearly as broad as these other countries. But many states have passed laws conferring a right to counsel in certain narrow areas of the law. The most common are those guaranteeing counsel to parents – and sometimes children -- in dependency (often called neglect) proceedings, and to prospective wards in guardianship and similar proceedings in which interference with personal liberties are at stake. A handful of states also have extended a statutory right to counsel in other situations. It is encouraging that state legislatures have recognized the truth that poor people cannot have a fair hearing in these particular adversarial proceedings. Yet many other proceedings that threaten loss of basic human needs are equally adversarial and often more complex. In those cases, just like dependency proceedings, no civil litigant can be “equal before the law...without a lawyer.”

Courts perhaps more than legislatures are familiar with the truth of this principle embodied in the common law right to counsel and implemented, to a limited degree in many state statutes in the U.S., and to a broader extent, in the laws of many other countries. On a regular basis, the judiciary witnesses the helplessness of unrepresented parties appearing in their courtrooms and the unequal contest when those litigants confront well-counseled opponents. Judges deeply committed to reaching just decisions too often must worry whether they delivered injustice instead of justice in such cases because what they heard in court was a one-sided version of the law and facts. Nearly a decade ago, one trial judge, U.S. District Court Judge Robert Sweet, gave voice to this concern in a speech to the Association of the Bar of New York, and also tendered a solution. “What then needs doing to help the courts maintain the confidence of the society and to perform the task of insuring that we are a just society under a rule of law? . . . To shorthand it, we need a civil *Gideon*, that is, an expanded constitutional right to counsel in civil matters. Lawyers, and lawyers for all, are essential to the functioning of an effective justice system.”¹¹

State and Federal Constitutional Principles Support a Civil Right to Counsel

sophisticated civil legal aid program that remains the most comprehensive and generously funded legal aid system in the world.

¹⁰ These developments in other countries are surveyed in Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 *Loyola of Los Angeles Law Review* 341 (1985). Several of the foreign statutes are translated in Cappelleiti, Gordley and Johnson, *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* (Milan/Dobbs Ferry: Giuffrè/Oceana, 1975, 1981).

¹¹ Sweet, *Civil “Gideon” and Justice in the Trial Court (The Rabbi’s Beard)*, 42 *THE RECORD* 915, 924 (Dec. 1997).

In the years between *Gideon* and *Lassiter*, a few state supreme courts took some promising steps toward a constitutional right to counsel in civil cases. The Maine and Oregon Supreme Courts declared the constitutional right to due process required that their state governments provide free counsel to parents in dependency/neglect cases.¹² The Alaska Supreme Court ruled that counsel must be appointed at public expense to an indigent party in a child custody proceeding if the other party was provided free representation.¹³ The California Supreme Court found a due process right to counsel for defendants in paternity cases¹⁴ and an equal protection right for prisoners involved in civil litigation.¹⁵ The New York Court of Appeal fell only one vote short of declaring a constitutional right to free counsel for poor people in divorce cases.¹⁶

During that era, between *Gideon* and *Lassiter*, academic articles also frequently appeared discussing the many legal theories which would support a constitutional right to counsel in civil cases.¹⁷ In common with the state supreme court decisions mentioned above, these articles usually articulated arguments based on the due process clauses found in the federal and state constitutions and their implicit guarantees of a fair hearing in civil proceedings. But they carried the argument beyond the narrow categories of cases covered by the then existing state court decisions to embrace a far broader range of civil litigation. They emphasized the serious consequences losing litigants face in many other civil cases poor people commonly experience – and the empirical and other evidence suggesting the lack of counsel virtually guarantees these people in fact would lose those cases.

Some of these articles likewise found strong support for a right to counsel in the equal protection clauses common to the federal and most state constitutions. Some pointed to the fundamental interest all citizens have in enjoying “like access to the courts” for the protection of their rights – as the essential handmaiden of the right to vote without which laws enacted to give them substantive rights cannot be enforced. As a fundamental interest, it warrants the “close scrutiny” to which the courts are to subject any policies denying that access. It also was observed that some states have made “poverty” a “suspect class.” This again would mandate close scrutiny of a state’s denial of counsel to poor people in judicial proceedings structured in a way that requires a lawyer if one is to have effective access to those courts.

Over the years after *Gideon*, lawyers continued to pursue litigation seeking to establish the right to counsel in civil cases, with considerable success, initially on traditional notions of due

¹² *Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794 (Me. 1973); *State v. Jamison*, 444 P.2d 15 (Ore. 1968).

¹³ *Flores v. Flores*, 598 P. 2d 893 (Ak, 1979).

¹⁴ *Salas v. Cortez*, 24 Cal.3d 22, 593 P.2d 226 cert. den. 444 U.S. 900 (1979).

¹⁵ *Payne v. Superior Court*, 17 Cal.3d 908 (1976).

¹⁶ *In re Smiley*, 369 N.Y.S.2d 87, 90 (N.Y. 1975).

¹⁷ See, e.g., Note, *The Right to Counsel in Civil Litigation*, 66 Colum.L.Rev. 1322 (1966); O’Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio St. L.J. 5 (1967); Note, *The Indigent’s Right to Counsel in Civil Cases*, 76 Yale L.J. 545 (1967); Note, *The Indigent’s Right of Counsel in Civil Cases*, 43 Fordham L. Rev. 989 (1975); Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U.Mich.J.L. Ref. 554 (1976); Comment, *Current Prospects for an Indigent’s Right to Appointed Counsel and Free Transcript in Civil Litigation*, 7 Pac. L.J. 149 (1976); Johnson, *Beyond Payne: The Case for a Legally Enforceable Right to Representation for Indigent California Litigants*, 11 Loyola of Los Angeles L.Rev. 249 (1978).

process. In Michigan and other states, a detailed blueprint was developed to take a series of cases through the appellate courts to establish the right to counsel in various circumstances. After several victories, the initiative was set aside in part because of the *Lassiter* decision.

After *Lassiter* and its narrow construction of due process, most of the possible constitutional theories remain untested in either the federal or state courts. But they have been reinforced by constitutional decisions abroad. As early as 1937, a quarter century before *Gideon* and over four decades before *Lassiter*, the Swiss Supreme Court found the analog of our constitution's equal protection clause, the "equality before the law" provision of that nation's Constitution, mandated appointment of free counsel for indigent civil litigants.¹⁸ Then in 1979 the European Court of Human Rights issued a historic decision, *Airey v. Ireland*¹⁹, based on an analog of due process--a provision in the European Convention on Human Rights and Fundamental Freedoms which guarantees civil litigants a "fair hearing."²⁰ In a decision that now applies to 41 nations and over 400 million people, the court held indigents cannot have a "fair hearing" unless represented by lawyers²¹ and required member states to provide counsel at public expense to indigents in cases heard in the regular civil courts.²² As a direct result of this decision, the Irish legislature created that nation's first legal aid program which is now funded at three times the level of America's. The *Airey* decision and its progeny also have influenced the scope of legal aid legislation in several other European countries.²³

Policy Considerations Support Recognition of a Civil Right to Counsel

Underlying all the constitutional theories are several undeniable truths. The American system of justice is inherently and perhaps inevitably adversarial and complex. It assigns to the parties the primary and costly responsibilities of finding the controlling legal principles and uncovering the relevant facts, following complex rules of evidence and procedure and presenting the case in a cogent fashion to the judge or jury. Discharging these responsibilities ordinarily requires the expertise lawyers spend three years of graduate education and more years of training and practice acquiring. With rare exceptions, non-lawyers lack the knowledge, specialized expertise and skills to perform these tasks and are destined to have limited success no matter how valid their position

¹⁸ *Judgment of Oct. 8, 1937, Arrêts du Tribunal Federal (ATF) 63, I, 209 (1937)*, discussed in O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio St. L.J. 5 (1967).

¹⁹ *Airey v Ireland*, 2 Eur. Ct. H.R. (ser.A) 305 (1979).

²⁰ "In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, para.1, 213 U.N.T.S. 222.

²¹ As the court explained: "The Convention was intended to guarantee rights that were *practical and effective*, particularly in respect of the right of access to the courts, in view of its prominent place in a democratic society....The possibility of appearing in person before the [trial court] did not provide an *effective* right of access. . . [I]t is not realistic,...to suppose that,...the applicant could effectively conduct her own case, despite the assistance which,...the judge affords to parties acting in person...." (*Id.* at p. 315, emphasis supplied.)

²² A constitutional "fair hearing" guarantee likewise formed the basis for the Canadian Supreme Court's recent declaration of a right to counsel at public expense for indigent litigants, in this instance parents involved in dependency/neglect cases. *New Brunswick v J.G.* 177 D.L.R. (4th) 124 (1999).

²³ See, e.g., *Steel and Morris v. The United Kingdom*, Eur.Ct.H.R. (Judgment of Feb. 15, 2005) which found England's legal aid statute denying counsel to indigent defendants in defamation cases violated the right to counsel required to satisfy the European Convention's guarantee of a "fair hearing."

may be, especially if opposed by a lawyer. Not surprisingly, studies consistently show that legal representation makes a major difference in whether a party wins in cases decided in the courts.²⁴

There are other problems, too, when parties lack counsel in civil proceedings. In seeking to insure that justice is done in cases involving pro se litigants, courts must struggle with issues of preserving judicial neutrality (where one side is represented and the other is not), balancing competing demands for court time, and achieving an outcome that is understood by pro se participants and does not lead to further proceedings before finality is reached. Meantime large numbers of pro se litigants lose their families, their housing, their livelihood, and like fundamental interests, losses many of them would not have sustained if represented by counsel. Furthermore, the perception the courts do not treat poor people fairly has consequences for the system itself. As California Chief Justice Ronald George recently observed, “[E]very day the administration of justice is threatened...by the erosion of public confidence caused by lack of access.”²⁵

Whether cast as a constitutional imperative or a policy finding compelling a legislative remedy, when 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. Absent a systemic response, access to the courts will continue to be denied to many solely because they are unable to afford counsel. Considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a right of meaningful access to the courts.

Current Efforts to Establish a Civil Right to Counsel

For over two decades, the *Lassiter* decision appeared to paralyze serious consideration of a right to counsel in civil cases. But in the last few years advocates around the country have taken up the challenge with renewed vigor and strategic thinking.²⁶ Some are exploring state law common law

²⁴ See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in the Legal Process*, 20 Hofstra L.Rev. 533 (1992); Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of A Randomized Experiment*, 35 Law & Soc'y Rev. 419 (2001).

²⁵ Chief Justice Ronald George, State of Judiciary Speech to California Legislature, 2001.

²⁶ This renewed interest also is reflected in the academic literature. Marvy, Paul and Gardner, Debra, *A Civil Right To Counsel For the Poor*, 32 Human Rights 8 (Summer 2005); Boyer, Bruce, 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 (2005); Nethercut, John, *This Issue Will Not Go Away...: Continuing to Seek the Right to Counsel in Civil Cases*, 38 Clearinghouse Review 481 (2004); Smith, Jonathan, *Civil Gideon*, 18 MIE Journal 4:3 (2004); Perluss, Deborah, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 Seattle J. for Soc. Just. 571 (2004); Klienman, Rachel, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 Fordham Urb. L.J. 1507 (2004); Johnson, Earl, *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 Seattle J. for Soc. Just. 201 (2003); Johnson, Earl, *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 Fordham Int'l L.J. 83 (2000); Sweet, Robert, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503 (1998); Sweet, Robert, *Civil Gideon and Justice in the Trial Court (the Rabbi's Beard)*, 52 The Record of the Ass'n of the Bar of the City of N.Y. 915 (1997); Young, Rosalie, *The Right to Appointed Counsel In Termination Of Parental Rights: The States' Response to Lassiter*, 14 Touro L. Rev. 247 (1997); Scherer, Andrew, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 Harv. C.R.-C.L. L. Rev. 557 (1988); Werner, F. *Toward a Right to Counsel for Indigent Tenants in Eviction Proceedings*, 17 Housing L. Bull. 65 (1987). Estrelle, Mark, *Gideon's Trumpet Revisited: Providing Rights of Indigent Defendants in Paternity Actions*, 29 J. Fam. L. 1, 9 (1985);

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rights and constitutional guarantees of open courts and access to the courts as well as due process and equal protection, through appellate advocacy and litigation. Others are pursuing a range of legislative approaches. In each of what is already a significant number of states, a local broad-based team of advocates has determined the route they believe is most likely to achieve success.

Many of those advocates have come together as the National Coalition for a Civil Right to Counsel (NCCRC). The coalition provides information-sharing, training, networking, coordination, research assistance, and other support to advocates pursuing, or considering pursuing, a civil right to counsel. It includes well over a hundred advocates from legal services programs, private law firms, state bar associations, law schools, national strategic centers and state access to justice commissions, representing over 30 states. At present, there are active civil right to counsel projects underway in at least eight jurisdictions and discussions are taking place in a number of others.

Courts are also now being asked to revisit the issue. For example, a nonprofit poverty and civil rights program and two major private firms in Maryland are actively pursuing recognition of the civil right to counsel through an appellate strategy raising claims under the state's constitution as well as the common law this state imported from the mother country. In 2003, in the case of *Frase v. Barnhart*, 379 Md. 1000 (2003), they brought the question whether a poor person has the right to appointed counsel in a civil case before Maryland's highest appellate court. As part of a coordinated effort, the state bar association and legal services programs filed amicus briefs in support of the appellant's right to counsel. The court avoided ruling on the issue by a 4-to-3 vote, finding in favor of the unrepresented litigant without reaching the issue. But an impassioned 3-judge concurrence would have declared a civil right to counsel for the indigent mother who faced a contested custody dispute without the assistance of counsel.

In Washington, advocates from the private bar, legal services, the state's three law schools, and others have joined together to pursue judicial recognition of the civil right to counsel under the state's constitution. To date, the group has litigated two cases. One involved a local city seeking to remove a 77-year old disabled man from the home he built nearly 50 years earlier for alleged building code violations. The other case involved an abusive husband asserting false allegations through his attorney in order to obtain sole custody of his children. Both cases were ultimately resolved in the appellate courts in ways that did not result in rulings on the right to counsel issue.

In Wisconsin advocates have filed appeals on behalf of indigent mothers seeking to retain custody of their children from their abusive estranged husbands, contending the Wisconsin state constitution guarantees them the right to counsel to defend their custodial rights. In Georgia, the federal District Court, relying in part on the Georgia state constitution's due process clause, recently held that foster children have a right to counsel in all deprivation cases (elsewhere known as dependency cases, abuse and neglect proceedings, etc.).²⁷ And, in a recently filed test case the Canadian Bar Association is seeking to establish a national right under their Constitution to obtain civil legal aid in certain types of cases and challenging British Columbia's current legal aid plan as inconsistent with required standards for legal aid delivery for low-income Canadians.

Besharov, Douglas, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After Lassiter v. North Carolina*, 15 Fam. L. W. 205, 219, 221 (1981).

²⁷ *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353 (D. Ga. 2005).

In other states, new focus on legislative recognition of a right to counsel has emerged. In California an effort is underway to draft a “model” statute, with alternative provisions regarding certain key issues, which creates and defines the scope of a statutory entitlement to equal justice including a right to counsel in appropriate circumstances. Recently, the State Bar of Texas sought legislation providing a civil right to counsel for low income tenants in certain eviction appeals cases. In New York this past June, the City Council appropriated \$86,000 for a study of the need for counsel in eviction proceedings and the costs and benefits of providing counsel to tenants facing eviction. In addition, the New York State Equal Justice Commission has made advocacy for a civil right to counsel a prominent part of its agenda.

The effort to establish a right to court appointed counsel is a part of the struggle to make justice a matter of substance over form. More than 50 million people have incomes so low that they are eligible for legal services from Legal Services Corporation-funded programs²⁸ and millions more survive on incomes so low they cannot afford lawyers when in serious legal jeopardy. Many also have physical or mental disabilities or experience other barriers to navigating the legal system without a lawyer. Yet over the past quarter century the federal government has reduced its commitment to legal services by over 50%.

There is a crisis in equal justice, as documented above, and advocates are pursuing litigation and legislative strategies that might force a change in prevailing practices. The resolution voices the ABA’s support for these primarily state-law-based approaches. While it remains important to look for the right in federal due process and equal protection law as the ultimate objective, the resolution seeks to foster the evolution of a civil right to counsel on a state-by-state basis, rooted in the unique provisions of each state’s constitution and laws. This approach is likely to achieve significant results and provide doctrinal support for a future reconsideration of the right to civil counsel under the federal constitution.

The Proposed Resolution Offers a Careful, Incremental Approach to Making Effective Access to Justice a Matter of Right, Starting with Representation by Counsel in those Categories of Matters in which Basic Human Needs Are at Stake.

The right proposed in this resolution is long overdue and deeply embedded in the nation’s promise of justice for all. But it also represents an incremental approach, limited to those cases where the most basic of human needs are at stake. 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 resolution does not suggest that jurisdictions should limit their provision of counsel and other law-related services to these high-priority categories. Rather it indicates that in these categories they should *guarantee* no low income person is ever denied a fair hearing because of their economic status. In other categories of legal matters, it is expected that each jurisdiction will continue to supply legal services on the same basis as they have in the past. This includes jurisdictions where courts have the constitutional, statutory, or inherent power to appoint counsel in other categories of cases or for individuals who suffer impairments or unique barriers which

²⁸ “CPS Annual Demographic Survey, March Supplement,”
http://pubdb3.census.gov/macro/032005/pov/new01_125_01.htm

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make it impossible for them to obtain a fair hearing in any cases unless they are represented by lawyers.

The right defined in this resolution focuses on representation in adversarial proceedings; it does not propose a generalized right to legal advice or to legal assistance unrelated to litigation in such forums. “Adversarial proceedings” as defined in the resolution are intended to include both judicial and some quasi-judicial tribunals, because many of the disputes involving the basic human needs described below are, in one jurisdiction or another, allocated to administrative agencies or tribunals. Indeed the label is often arbitrary. Cases a forum labeled a court would hear in one jurisdiction will be heard by a tribunal labeled an administrative agency or hearing officer or something else in other jurisdictions. The emphasis of the right articulated here is on the adversarial nature of the process, not what the tribunal is called. Some courts as well as some tribunals bearing another name function in an inquisitorial manner and without legal counsel. (In many states, for instance, parties in the small claims court are not allowed to be represented by lawyers and judges are expected to take an active role in developing the relevant facts. Similarly, some states have created pro se processes through which litigants can quickly and effectively access legal rights and protections without the need for representation by an attorney, for example in simple uncontested divorces.)

The basic human needs identified in this resolution as most critical for low income persons and families include at least the following: shelter, sustenance, safety, health and child custody.

- “Shelter” includes a person or family’s access to or ability to remain in an apartment or house, and the habitability of that shelter.
- “Sustenance” includes a person or family’s sources of income whether derived from employment, government monetary payments or “in kind” benefits (e.g., food stamps). Typical legal proceedings involving this basic human need include denials of or termination of government payments or benefits, or low-wage workers’ wage or employment disputes where counsel is not realistically available through market forces.
- “Safety” includes protection from physical harm, such as proceedings to obtain or enforce restraining orders because of alleged actual or threatened violence whether in the domestic context or otherwise.
- “Health” includes access to appropriate health care for treatment of significant health problems whether that health care is financed by government (e.g., Medicare, Medicaid, VA, etc.) or as an employee benefit, through private insurance, or otherwise.
- “Child custody” embraces proceedings where the custody of a child is determined or the termination of parental rights is threatened.²⁹

The above categories are considered to involve interests so fundamental and important as to require governments to supply low income persons with effective access to justice as a matter of right. There is a strong presumption this mandates provision of lawyers in all such cases. Trivial threats, however, even to a basic human need would not warrant such an investment of legal

²⁹ See generally, ABA Standards of Practice for Lawyers Representing Children in Custody Cases (2003) which includes suggested criteria to decide when counsel should be appointed for children in custody cases.

resources. Nor need counsel be supplied at public expense in cases where a lawyer is available to the litigant on a contingent fee basis. Furthermore, in some instances, there are informal proceedings, such as welfare fair hearings, in which government expressly permits trained and supervised non-lawyer advocates to represent both sides and where providing such representation is often sufficient. In still other instances, jurisdictions have redesigned a few select proceedings so they are not adversarial and also furnish self-help assistance sufficient to permit a litigant to have a fair hearing without any form of representation before the court. In such proceedings, the test is whether it can be honestly said the litigant can obtain a fair hearing without being represented by a lawyer. With rare exceptions, this will be true only when certain conditions are met: the substantive law and procedures are simple; both parties are unrepresented; both parties are individuals and neither is an institutional party; both parties have the intellectual, English language, and other skills required to participate effectively; and, the proceedings are not adversarial, but rather the judge assumes responsibility for and takes an active role in identifying the applicable legal standards and developing the facts.

This resolution focuses the right on "low income persons," but leaves to each individual jurisdiction the flexibility to determine who should be considered to fit within that category. Rather than being bound by the current national LSC eligibility guidelines (which are widely considered to be under-inclusive), it is anticipated jurisdictions will create their own criteria taking account of the applicant's income, net assets (if any), the cost of living and cost of legal services in the state or locality, and other relevant factors in defining the population to which this right attaches.

Because a civil right to counsel is likely to evolve in different ways in different jurisdictions, and also because states presently invest at very different levels, it is difficult to estimate how much a given jurisdiction will have to spend in additional public resources in order to implement such a right. It is possible to estimate the maximum possible exposure at the national level, however, from two sources – legal needs studies in the U.S. and the experience in other countries which have implemented a right to counsel in civil cases. Although there are major disparities among states, the United States is estimated to provide on average less than \$20 of civil legal aid per eligible poor person. Most needs studies conclude the U.S. is already meeting roughly 20 percent of the need. This suggests the full need could be met if the U.S. raised the average to \$100 per eligible person. But the right advocated in this resolution is substantially narrower and thus could be funded for substantially less than that. This conclusion is reinforced by the experience in England which has a much broader right to counsel than proposed in this resolution and the most generously funded legal aid program in the world, and furthermore uses a more costly delivery system than the U.S.³⁰ Yet it only spends in the neighborhood of \$100 per eligible poor person. Thus, it is reasonable to anticipate the narrower right advocated in this resolution at the worst would result in a tripling of a jurisdiction's current investment in civil legal aid – although it might require somewhat more for states well below the national average and somewhat less for those presently above that average.

³⁰ England provides partially-subsidized counsel to those above its poverty line. But completely free civil legal aid is available for the approximately 26 percent of the population below its poverty line, which amounts to approximately 13.5 million people. The English legal aid program currently spends about 1.36 billion dollars providing civil legal services to those in this lowest income stratum who are entitled to free legal services. That amounts to slightly more than \$100 per eligible person in this income category.

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In any event, put in perspective the increase would be a comparatively minor budgetary item in most states. Compared to Medicaid, for example, which nationally costs over \$200 billion a year and spends nearly \$4,200 per eligible person,³¹ devoting even as much as \$60 to \$100 per eligible poor person in order to give them meaningful access to justice in their most urgent cases appears to be a minimal and justifiable investment. Funding this right also would only bring the total civil legal aid investment to about 1.5 percent of what American society currently spends on lawyers in this country, about the same share as they had in 1980.³²

It is often difficult to obtain clear public understanding of the needs of the justice system. The third branch has historically struggled to obtain sufficient resources to fulfill its constitutional mandates.³³ Yet a peaceful and orderly society depends upon the effective functioning of the justice system. Within the sphere of justice system funding, there is a hierarchy of poor and poorer agencies. The courts are frequently under-funded. Even more resource starved are systems for providing constitutionally-mandated services to indigent persons accused of crimes. Last on the list are programs supplying civil legal aid. Implementation of a civil right to counsel as proposed herein is not intended to set up a struggle for the crumbs of finite resources between deserving, but oft-ignored constituencies. The result should not be a diminution of current or future funds allocated for public defense, which is an area that has all too often been inadequately supported by states and counties. Rather, it will be necessary for bar and judicial leaders to assist in educating the public and policy-makers about the critical functions of these parts of the justice system, and the need for our society to guarantee true access to justice for all.

Conclusion

In a speech at the 1941 meeting of the American Bar Association, U.S. Supreme Court Justice Wiley Rutledge observed:

“Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion.”

If Justice Rutledge’s self-evident statement required proof, the past 130 years of legal aid history have demonstrated its truth. Not only has equality before the law remained merely a matter of charity in the United States, but that charity has proved woefully inadequate. The lesson from the past 130 years is that justice for the poor as a matter of charity or discretion has not delivered on

³¹ 2006 Statistical Abstract of the United States, Table 136, reflecting Medicaid alone provided \$213 billion in health care to low income people. (This does not include the Medicare funds devoted to elderly poor in addition to their Medicaid benefits. Nor does it include other public funds used for health clinics and other special health care programs for low income patients. In 2003, a total of \$279 billion was spent on the combination of Medicaid and other health care for the nation’s low income residents. Table 122. This figure still did not include Medicare payments for the elderly poor, however.)

³² According to the Statistical Abstract of the United States, Table 1263, individuals and institutions spent \$194 billion on the services of lawyers in 2002. \$3 billion would represent only 1.5 percent of that total societal expenditure on lawyers. This 1.5 percent would be about the same share of total legal resources as low income Americans had in FY 1980. That year the LSC budget was \$321 million with other public and private resources supplying several million more in civil legal aid, while the total societal investment in lawyer services was \$23 billion. This gave civil legal aid roughly 1.5 percent of the nation’s legal resources in that year.

³³ See *Funding the Justice System*, A Report by the American Bar Association Special Committee on Funding the Justice System (August, 1992).

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the promises of “justice for all” and “equal justice under law” that form the foundation of America’s social contract with all its citizens, whether rich, poor, or something in between. The Task Force and other proponents of this resolution are convinced it is time for this nation to guarantee its low income people equality before the law as a matter of right, including the legal resources required for such equality, beginning with those cases where basic human needs are at stake. We are likewise convinced this will not happen unless the bench and bar take a leadership role in educating the general public and policymakers about the critical importance of this step and the impossibility of delivering justice rather than injustice in many cases unless both sides, not just those who can afford it, are represented by lawyers.

Respectfully submitted,

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