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AMERICAN BAR ASSOCIATION

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STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
COMMISSION ON IMMIGRATION
SPECIAL COMMITTEE ON DEATH PENALTY REPRESENTATION
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SECTION OF FAMILY LAW
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SECTION OF BUSINESS LAW
SECTION OF ADMINISTRATIVE LAW
YOUNG LAWYERS DIVISION
COMMISSION ON YOUTH AT RISK

REPORT TO THE HOUSE OF DELEGATES

Recommendation

RESOLVED, That the American Bar Association adopts the black letter and commentary of the ABA Model Access Act, dated August 2010.

104 (Revised)

REPORT

This Resolution Seeks to Create a Model Act for Implementation of the Policy Unanimously Adopted by the ABA in 2006 in Support of a Civil Right to Counsel in Certain Cases.[1]

In August 2006, under the leadership of then-ABA President Michael S. Greco and Maine Supreme Judicial Court Justice Howard H. Dana, Jr., Chair of the ABA Task Force on Access to Civil Justice, the House of Delegates unanimously adopted a landmark resolution calling on federal, state and territorial governments to provide low-income individuals with state-funded counsel when basic human needs are at stake. The policy adopted pursuant to Recommendation 112A provides as follows:

> "**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."

The Report supporting adoption of 2006 Resolution 112A set forth the long history of the ABA's unwavering and principled support for meaningful access to legal representation for low income individuals, as well as the history of the ABA's policy positions favoring a right to counsel. Because of their direct relevance to the present Recommendation and Report, portions of the 2006 Recommendation and Report are quoted here:

> 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.'

[1] This Recommendation and Report is the product of the ABA Working Group on Civil Right to Counsel comprised of representatives from a number of ABA Sections, Committees and other entities. ABA President Carolyn Lamm requested that the Working Group identify a means to advance the cause of establishing a civil right to counsel, as set forth in Recommendation and Report 112A adopted unanimously by the House of Delegates in August 2006, particularly in light of the impact on the lives of countless persons throughout the United States of the current, most severe economic recession in decades.

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.

. . . .

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 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.[2]

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).

The proposed Model Access Act furthers the policy adopted by the House of Delegates in 2006 and directly serves the fundamental goals of the Association. Goal IV, which is to "Advance the Rule of Law," has as its fourth objective that the ABA "[a]ssure meaningful access to justice for all persons."

Since 2006, Progress In Meeting the Civil Need of Low-Income Individuals Has Been Slow While the Need Has Increased.

Since adoption of Recommendation 112A in 2006, a number of states have taken steps to implement a state-funded civil right to counsel in civil cases involving basic human needs. Perhaps the most significant progress to date has been in the State of California which, with enactment of the *Sargent Shriver Civil Counsel Act*, directed the development of one or more pilot projects in selected courts to "provide representation of counsel for low-income persons

[2] *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…"

who require legal services in civil matters involving housing-related matters, domestic abuse and civil harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, or actions by a parent to obtain sole legal or physical custody of a child…." [3]

While other states have recognized through legislative enactment or judicial decision a right to counsel in limited circumstances – primarily involving termination of parental custody – and other pilot projects directed at specific basic needs, such as loss of housing, have been developed largely with private funding in New York City and Massachusetts, by and large the urgent need of low-income individuals for representation of counsel when their rights to health, safety, shelter and sustenance are threatened in adversarial proceedings, remains unmet. Indeed, the 2009 update by Legal Services Corporation of its 2005 Report, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, confirms that "there continues to be a major gap between the civil legal needs of low-income people and the legal help that they receive."

The 2009 update from LSC noted:

> *New data indicate that state courts, especially those courts that deal with issues affecting low income people, in particular lower state courts and such specialized courts as housing and family courts, are facing significantly increased numbers of unrepresented litigants. Studies show that the vast majority of people who appear without representation are unable to afford an attorney, and a large percentage of them are low-income people who qualify for legal aid. A growing body of research indicates that outcomes for unrepresented litigants are often less favorable than those for represented litigants*.

(Italics added). Not surprisingly, as the worst recession in decades continues to grip the nation, millions of individuals who can least afford it have lost their principal source of income -- their employment. The impact is being felt in state courts as more and more individuals without means of support or the ability to afford a lawyer appear without counsel, or *pro se*, for proceedings involving essential needs such as protection of shelter, protection from physical abuse, access to health care benefits, and deprivation of critical financial benefits.

The problems for state courts caused by the recession are exacerbated in at least two more ways. First, many state and local governments are facing severe revenue shortfalls. In some instances, those states are seeking to meet their budget challenges in part by reducing funding to the very courts now faced with a dramatic increase in self-represented litigants seeking to avoid loss of shelter as well as means of sustenance and safety. Second, the recession also has severely

[3] Certain sections of the proposed ABA Model Access Act are based on provisions of the *California State Basic Access Act*, which itself sought to implement the "right to counsel and many of the policy choices reflected in the resolution passed by the ABA House of Delegates in August, 2006," as well as on provisions of the *Sargent Shriver Civil Counsel Act*.

impacted the availability of IOLTA funds, a critical source of revenue for many legal services programs, due to the sharp decline in short-term interest rates paid on deposits in those accounts.

Even prior to the recession, based on *pro se* statistics from state courts, a September 2006 memorandum of the National Center for State Courts reported that:

> *Courts are continuing to see an increase in the numbers of litigants who represent themselves. Self-represented litigants are most likely to appear without counsel in domestic-relations matters, such as divorce, custody and child support, small claims, landlord/tenant, probate, protective orders, and other civil matters. While national statistics on the numbers of self-represented litigants are not available, several states and many jurisdictions keep track of the numbers of self-represented litigants in their courts.* [4]

(Italics added). Among the pre-recession state court statistics set forth in the 2006 NCSC memorandum were these:

- In Utah, a 2006 report found that in divorce cases, 49 percent of petitioners and 81 percent of respondents were self represented. Eighty percent of self-represented people coming to the district court clerk's office seek additional help before coming to the courthouse.

- A January 2004 report in New Hampshire found that, in the district court, one party is *pro se* in 85 percent of all civil cases and 97 percent of domestic abuse cases. In the superior court, one party is *pro se* in 48 percent of all civil cases and almost 70 percent in domestic relations cases.

- In California, a 2004 report found more than 4.3 million court users are self-represented. In family law cases, 67 percent of petitioners are self-represented at the time of filing and 80 percent are self-represented at disposition for dissolution cases. In unlawful detainer cases, 34 percent of petitioners are self-represented at filing and 90 percent of defendants are self-represented.

The ABA, working together with Legal Services Corporation, State Bar Associations and other interested groups, has achieved some success in seeking increased Congressional funding to LSC. The increase in Congressional appropriations to LSC, however, remains far below the amount requested by the LSC Board to meet the need that existed even before the recession, let alone the greater level of need that exists today. The ABA Governmental Affairs Office reports that:

[4] Madelynn Herman, Self Representation Pro Se Statistics Memorandum, September 25, 2006, http://www.ncsconline.org/wc/publications/memos/prosestatsmemo.htm#other.

> For FY 2009, Congress provided a much-needed $40 million increase, raising LSC's funding level to $390 million. Yet, this is still significantly less than the amount appropriated in FY 1995, which would be about $578 million adjusted for inflation, and even further below the inflation-adjusted amount appropriated in FY 1981--$749 million. The President is requesting another $45 million increase, to $435 million; the bipartisan LSC Board recommends $485.1 million for FY 2010 in its attempt to close the justice gap over the next several years.[5]

When combined with the substantial reduction in IOLTA funds available to many legal services programs, financial resources available to existing legal services programs remain woefully short of the levels needed to adequately serve the unmet need of low-income individuals. Indeed, the LSC 2009 update reports that, "*Data collected in the spring of 2009 show that for every client served by an LSC-funded program, one person who seeks help is turned down because of insufficient resources*." Moreover, the referenced data only address individuals who seek assistance at LSC-funded entities. The update concludes, as did the original 2005 report, that "*state legal needs studies conducted from 2000 to 2009 generally indicate that less than one in five low-income persons get the legal assistance they need*." (Italics added).

The Model Access Act is Needed to Provide a Mechanism for State and Territorial Governments to Address the Need for Civil Representation.

With this Recommendation, the ABA again will help to move the nation forward in meeting its commitment to the ideal of equal justice under law by providing a model act that implementing jurisdictions may use as a starting point to turn commitment into action. The Model Act complements the ABA's support of existing LSC-funded and other local legal aid programs by establishing a statutory right to counsel in those basic areas of human need identified in the 2006 Resolution and by providing a mechanism for implementing that right, with Commentary that acknowledges and identifies alternatives to meet local needs by jurisdictions considering implementation of the Model Act.

By providing a Model Access Act, the ABA will assist interested legislators with the means to introduce the concept and begin discussions within their jurisdictions that will lead to implementation of a statutory right to counsel. Although budget concerns might limit the ability of some jurisdictions to implement the Model Access Act, some states may choose to implement a pilot project to provide counsel and develop additional data on a limited range of cases, such as evictions or child custody proceedings as set forth in the proposed Model Access Act.

The Working Group has solicited comment from the legal services community and others throughout the nation. Many individuals and groups generously responded with suggestions and comments, all of which have been carefully considered by the Working Group, and many of which have been adopted in whole or in part in the proposed Model Access Act. The Working

[5] http://www.abanet.org/poladv/priorities/legal_services/2009apr14_lsconepager.pdf

Group benefitted as well from thoughtful comments by four individual members of the legal services community who counsel against adoption of the proposed Model Access Act out of genuine concern that it may be premature, and who suggest that further analysis and data are needed that can best be developed on a state-by-state basis rather than through a uniform national approach. After careful consideration of these comments, the Working Group concluded that (i) in light of existing data that demonstrate an extraordinary and growing number of low-income persons who today face civil adversary proceedings on matters of basic human need, and (ii) because the proposed Model Access Act, together with the Commentary thereto, explicitly contemplates and accommodates modification of its provisions to meet the local needs and circumstances of implementing jurisdictions, it is critical to move forward at this time. Indeed, adoption of the proposed Model Access Act may well spur the discussion, experimentation and data gathering on a state-by-state basis needed to effectively address the vast unmet need in this country.

Overview of The Model Access Act.

The Model Act is structured in five sections. *Section 1* sets forth legislative findings, *Section 2* provides definitions, *Section 3* defines the scope of the right to public legal services, *Section 4* establishes a State Access Board as the entity that will administer the program and *Section 5* creates a State Access Fund to provide funding mechanism while leaving to local officials the decision on the source of funding.

The legislative findings recognize in *Section 1.A* the "substantial, and increasingly dire, need for legal services…." *Section 1.C* makes the essential finding that, "*Fair and equal access to justice is a fundamental right in a democratic society. It is especially critical when an individual who is unable to afford legal representation is at risk of being deprived of certain basic human needs*…." (Italics added). Moreover, as the preliminary results of a survey of state court judges undertaken by the ABA Coalition for Justice plainly demonstrates, providing a right to counsel to low-income persons "will result in greater judicial efficiency by avoiding repeated appearances and delays caused by incomplete paperwork or unprepared litigants, will produce fairer outcomes, and will promote public confidence in the systems of justice." *Section 1.F*.

Importantly, *Section 1.G* makes it clear that funding provided under the Model Act "*shall not reduce either the amount or sources of funding for existing civil legal services programs below the level of funding in existence on the date that this Act is enacted*," and that "*[t]his Act shall not supersede the local or national priorities of legal services programs in existence on the date that this Act is enacted*."

The definitions set forth in Section 2 explain, among other things, the scope of the "Basic human needs" for which the Act is intended to provide a right to counsel. These include the five areas identified in 2006 Report 112A: shelter, sustenance, safety, health, and child custody. Definitions are provided for each of those five categories of need and, as it does throughout the Act, the Commentary following Section 2 recognizes that, "*Adopting jurisdictions may wish to*

make modifications, based on the unique circumstances applicable in their communities," to the list of needs. Also of note is the definition of "Limited scope representation," may be provided "*only to the extent permitted by Rule 1.2(c) of the ABA Model Rules of Professional Conduct or the jurisdiction's equivalent, and when such limited representation is sufficient to afford the applicant fair and equal access to justice consistent with criteria set forth in Section 3 hereof*." (Italics added).

Section 3 defines the scope of the right to public legal services and requires the applicant to meet both financial eligibility and minimal merits requirements. The financial eligibility requirement suggested in *Section 3.D* is 125 percent of the federal poverty level. However, the Commentary at the end of *Section 3* notes that implementing jurisdictions may set the standard to target a larger percentage of the population unable to afford legal services and also use a formula that "takes into account other factors relevant to the financial ability of the applicant to pay for legal services." Those factors may include the applicant's assets as well as medical or other extraordinary ongoing expenditures for basic needs.

The merits requirement represents an initial determination, to be made by the State Access Board, that plaintiffs or petitioners have "a reasonable possibility of achieving a successful outcome." Defendants or respondents must be found to have a "non-frivolous defense." A favorable initial merits determination is subject to further review once counsel is appointed and makes a thorough investigation of the claim or defense. However, where a judge, hearing officer or arbitrator initiates a request to the State Access Board that counsel be provided under the Model Act, the Board determines the financial eligibility of the applicant and whether the subject matter of the case involves a basic human need as defined therein, but there no further merits analysis is undertaken by the Board. It is assumed in such cases that the referring judge, hearing officer or arbitrator has made such a determination.

As for the availability of "limited scope representation," *Section 3.B.iv* spells out that such limited services may be provided where it "is required because self-help assistance alone would prove inadequate or is not available and where such limited scope representation is sufficient in itself or in combination with self-help assistance to provide the applicant with effective access to justice in the particular case in the specific forum." However, if the forum is one in which representation can only be provided by licensed legal professionals, limited scope representation is only permitted under the circumstances set forth in *Section 3.B.iii*.

Section 4 provides the mechanism for administration of the Model Act. It creates a State Access Board within the state judicial system, while again recognizing in the Commentary following *Section 4* that a different model may be appropriate based on local needs and resources. The Board's duties are set forth in *Section 4.E*, and include ensuring eligibility of applicants, establishing, certifying and retaining specific organizations to make eligibility determinations and scope of service determinations, and establishing a system for appeals of determinations of ineligibility. As detailed in the Commentary, the emphasis in providing such services is "on effective, cost-efficient services," which means the Board may contract with local non-profit

legal aid organizations, with private attorneys, or both. The determination will depend on local circumstances and will take into account limitations on the ability of local legal aid organizations to provide services either due to an ethical conflict, legal prohibitions, lack of sufficient salaried attorneys, or where it lacks particular expertise or experience.

Section 5 creates a funding mechanism, the State Access Fund, but in recognition of the very different and often challenging circumstances faced in many different areas of the nation, leaves entirely to implementing jurisdictions the responsibility to identify funding sources. The Commentary following *Section 5* cautions that while implementing jurisdictions may look to any available source of revenues, it "*should take care to maintain current financial support to existing legal aid providers.*" (Italics added).

Conclusion

We return to the eloquence of the Report submitted in support of Recommendation 112A in 2006, which continues to have great relevance today in light of the economic crisis that has left even more individuals with personal crises involving basic human needs, but without the resources to retain counsel or a source of publicly-funded counsel:

> 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 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.

The members of the ABA Working Group on Civil Right to Counsel and the co-sponsors of this Recommendation and Report strongly urge the adoption of the proposed ABA Model Access Act in order to implement the ABA's unanimously-adopted 2006 policy and help to turn the legal profession's commitment to civil right to counsel into reality.

As it has done on countless occasions during the past 132 years, the ABA must again provide leadership at a time when its members and the people they care about in communities throughout the nation need an effective and meaningful method for providing legal representation to low-income persons in order to secure rights that are basic to human existence.

Respectfully submitted,

Lorna G. Schofield, Chair
Section of Litigation[6]

[6] **Members of the ABA Working Group on Civil Right to Counsel (ABA Entities are indicated for identification purposes only):**

Michael S. Greco, Chair (Past President of the American Bar Association)
Terry Brooks (Counsel, Standing Committee on Legal Aid and Indigent Defendants)
Peter H. Carson (Section of Business Law)
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Margaret Bell Drew (Commission on Domestic Violence)
Justice Earl Johnson, Jr. (Ret.) (Standing Committee on Legal Aid and Indigent Defendants)
Wiley E. Mayne, Jr. (Section of Litigation)
Neil G. McBride (Standing Committee on Legal Aid and Indigent Defendants)
JoNel Newman (Commission on Immigration)
Robert L. Rothman (Section of Litigation)
Judge Edward Schoenbaum (Judicial Division; Coalition for Justice)
Robert E. Stein (Standing Committee on Legal Aid and Indigent Defendants)
Michelle Tilton (Section of Tort Trial and Insurance Practice)
Robert A. Weeks (Standing Committee on Legal Aid and Indigent Defendants)
Lisa C. Wood (Section of Litigation)

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ABA Model Access Act

SECTION 1. LEGISLATIVE FINDINGS

The Legislature finds and declares as follows:

A. There is a substantial, and increasingly dire, need for civil legal services for the poor in this State. Due to insufficient funding from all sources, existing program resources for providing free legal services in civil matters to indigent persons cannot meet the existing need.

B. A recent report from Legal Services Corporation, *Documenting the Justice Gap in America*, concludes that "only a fraction of the legal problems experienced by low-income individuals is addressed with the help of an attorney." It also concludes that, "Nationally, on average, only one legal aid attorney is available to serve 6,415 low-income individuals. In comparison, there is one private attorney providing personal legal services for every 429 individuals in the general population." The report further notes that the number of unrepresented litigants is increasing, particularly in family and housing courts.

C. Fair and equal access to justice is a fundamental right in a democratic society. It is especially critical when an individual who is unable to afford legal representation is at risk of being deprived of certain basic human needs, as defined in Section 2.B. Therefore, meaningful access to justice must be available to all persons, including those of limited means, when such basic needs are at stake.

D. The legal system [of this state] is an adversarial system of justice that inevitably allocates to the parties the primary responsibility for discovering the relevant evidence, identifying the relevant legal principles, and presenting the evidence and the law to a neutral decision-maker, judge or jury. Discharging these responsibilities generally requires the knowledge and skills of a licensed legal professional.

E. Many of those living in this State cannot afford to pay for the services of lawyers when needed for those residents to enjoy fair and equal access to justice. In order for them to enjoy this essential right of citizens when their basic human needs are at stake, the State government accepts its responsibility to provide them with lawyers at public expense.

F. Providing 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, will produce fairer outcomes, and will promote public confidence in the systems of justice.

G. Funding provided pursuant to this Act shall not reduce either the amount or sources of funding for existing civil legal services programs below the level of funding in existence on the date that this Act is enacted. This Act shall not supersede the local or national priorities of legal services programs in existence on the date that this Act is enacted.

Commentary: States in which legal needs studies or analyses have been conducted may consider either adding appropriate language in Section 1.B regarding such studies or replacing the current language referring to the recent federal Legal Services Corporation Report with a reference to state-specific studies or analyses.

SECTION 2. DEFINITIONS.

In this Act:

A. "Adversarial proceedings" are proceedings presided over by a neutral fact-finder in which the adversaries may be represented by a licensed legal professional, as defined herein, and in which rules of evidence or other procedural rules apply to an established formal legal framework for the consideration of facts and application of legal rules to produce an outcome that creates, imposes, or otherwise ascribes legally enforceable rights and obligations as between the parties.

B. "Basic human needs" means shelter, sustenance, safety, health, and child custody.

i. "Shelter" means a person's or family's access to or ability to remain in a dwelling, and the habitability of that dwelling.

ii. "Sustenance" means a person's or family's ability to preserve and maintain assets, income or financial support, whether derived from employment, court-ordered payments based on support obligations, government assistance including monetary payments or "in kind" benefits (*e.g.*, food stamps) or from other sources.

iii. "Safety" means a person's ability to obtain legal remedies affording protection from the threat of serious bodily injury or harm, including proceedings to obtain or enforce protection orders because of alleged actual or threatened violence, and other proceedings to address threats to physical well being**.**

iv. "Health" means access to health care for treatment of significant health problems, whether the health care at issue would be financed by government programs (*e.g.,* Medicare, Medicaid, VA, etc.), financed through private insurance, provided as an employee benefit, or otherwise.

v. "Child custody" means proceedings in which: (i) the parental rights of a party are at risk of being terminated, whether in a private action or as a result of proceedings

initiated or intervened in by the state for the purposes of child protective intervention, (ii) a parent's right to residential custody of a child or the parent's visitation rights are at risk of being terminated, severely limited, or subject to a supervision requirement, or (iii) a party seeks sole legal authority to make major decisions affecting the child. This definition includes the right to representation for children only in proceedings initiated or intervened in by the state for the purposes of child protective intervention.

C. "Full legal representation" is the performance by a licensed legal professional of all legal services that may be involved in representing a party in a court, an administrative proceeding, or in an arbitration hearing, in which by law or uniform practice parties may not be represented by anyone other than licensed members of the legal profession.

D. "Licensed legal professional" is a member of the State Bar or other entity authorized by the State to license lawyers, a law student participating in a State authorized, attorney-supervised clinical program through an accredited law school, or a member of the Bar of another jurisdiction who is legally permitted to appear and represent the specific client in the particular proceeding in the court or other forum in which the matter is pending.

E. "Limited scope representation" is the performance by a licensed legal professional of one or more of the tasks involved in a party's dispute before a court, an administrative proceeding, or an arbitration body, only to the extent permitted by Rule 1.2(c) of the ABA Model Rules of Professional Conduct or the jurisdiction's equivalent, and when such limited representation is sufficient to afford the applicant fair and equal access to justice consistent with criteria set forth in Section 3 hereof. Depending on circumstances, this form of assistance may or may not be coupled with self-help assistance.

F. "Public legal services" includes full legal representation or limited scope representation, through any delivery system authorized under this Act, and funded by the State Access Fund provided in Section 5 hereof.

G. The "State Access Board" (the "Board") is established as a statewide body, independent of the judiciary, the attorney general, and other agencies of state government, responsible for administering the public legal services program defined by and funded pursuant to this Act.

Commentary:

Adopting jurisdictions may wish to make modifications, based on the unique circumstances applicable in their communities, to the list of "basic human needs" set forth in this section. The list set forth in this section is considered the most basic of needs that a civil right to counsel should address; some jurisdictions may wish to expand the list as appropriate to their situation. For example, some jurisdictions may wish to consider expanding the definition of "child

custody" to encompass proceedings involving the establishment of paternity and/or the complete denial of visitation rights.

In proceedings in which a parent who meets the eligibility requirements set forth herein is threatened with loss of child custody as defined in Section 2.B.v, representation should be provided by the State as set forth in the Act. Recognizing that needs, priorities and resources may differ from jurisdiction to jurisdiction, implementing jurisdictions may wish to consider some or all of the following factors: (i) the number of private child custody disputes likely to meet these standards, (ii) the impact of providing legal services in private child custody cases on the ability of the state to serve other basic needs as set forth herein; (iii) the relative impact on the state courts of a lack of representation in private child custody cases as compared to other basic needs cases; and (iv) the availability of alternative financial resources to pay for representation for the applicant, such as cases in which the parent seeking to terminate or to severely limit the other parent's child custody rights has the ability to pay for the applicant's representation. Additionally, implementing jurisdictions are referred to the ABA Standards on the Representation of Children in Child Custody Cases (2003) for suggested criteria to decide when counsel should be appointed for children in custody cases. All children subject to proceedings in which the state is involved due to allegations of child abuse or neglect should have legal representation as long as jurisdiction continues.

In light of the extraordinary level of unmet need, and the limited resources likely to be available to support additional positions for state-funded legal services or other sources of legal representation for the poor, to the extent the jurisdiction permits their use, jurisdictions may consider authorizing paralegals, or other lay individuals who have completed appropriate training programs, to provide certain types of limited, carefully-defined legal services in administrative proceedings to persons qualifying under this Act for representation. If permitted, such services should always be provided under the direct supervision of a licensed lawyer. Moreover, limited scope representation should not be considered a substitute for full legal representation when full legal representation is necessary to provide the litigant fair and equal access to justice, but rather should be employed only when consistent with Section 3 below, and when limited scope representation is determined to be sufficient to meet that high standard.

SECTION 3. RIGHT TO PUBLIC LEGAL SERVICES.

A. Subject to the exceptions and conditions set forth below, public legal services shall be available at State expense, upon application by a financially-eligible person, in any adversarial proceeding in a state trial or appellate court, a state administrative proceeding, or an arbitration hearing, in which basic human needs as defined in Section 2.B hereof are at stake. Depending on the circumstances described in the following Sections, appropriate public legal services may include full legal representation or limited scope representation as necessary for the person to obtain fair and equal access to justice for the particular dispute or problem that person confronts, including, where necessary, translation or other incidental services essential to achieving this goal.

B. In a State trial or appellate court, administrative tribunal, or arbitration proceeding, where by law or established practice parties may be represented only by a licensed legal professional, public legal services shall consist of full legal representation as defined herein, provided pursuant to the following conditions and with the following exceptions:

i. Full public legal representation services shall be available to a plaintiff or petitioner if a basic human need as defined herein is at stake and that person has a reasonable possibility of achieving a successful outcome. Full public legal representation services shall be available to a financially eligible defendant or respondent if a basic human need as defined herein is at stake, so long as the applicant has a non-frivolous defense. Initial determinations of eligibility for services may be based on facial review of the application for assistance or the pleadings. However, the applicant shall be informed that any initial finding of eligibility is subject to a further review after a full investigation of the case has been completed. In family matters, the person seeking a change in either the de facto or de jure status quo shall be deemed the plaintiff and the person defending the status quo shall be deemed the defendant for purposes of this Act, regardless of their formal procedural status. However, any order awarding temporary custody pending resolution on the merits shall not alter which party is deemed to be the plaintiff and defendant in the case. Furthermore, in any case originally initiated by the state, the persons against whom the state moved shall be considered the defendants for all stages of the proceedings.

ii. Eligibility for full public legal representation services in State appellate courts is a new and different determination after the proceedings in a trial court or other forum conclude. If the financially eligible applicant is an appellant or equivalent, full legal representation services shall be available when there is a reasonable probability of success on appeal under existing law or when there is a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law. If the financially eligible applicant is a respondent or equivalent, however, full legal representation services shall be available unless there is no reasonable possibility the appellate court will affirm the decision of the trial court or other forum that the opposing party is challenging in the appellate court. In determining the likely outcome of the case, the Board shall take into account whether the record was developed without the benefit of counsel for the applicant.

iii. Irrespective of the provisions of Sections 3.B.i and 3B.ii above, full public legal representation services shall not be available to an applicant in the following circumstances:

a. in proceedings in any forum where parties are not allowed to be represented by licensed legal professionals (however, this does not preclude

a financially-eligible person from receiving full legal representation if the opposing party in such a forum appeals a decision of that forum that was favorable to the applicant to a forum where licensed legal professionals are permitted to provide representation, and that opposing party is represented by a licensed legal professional in that appeal);

b. if legal representation is otherwise being provided to the applicant in the particular case, such as through existing civil legal aid programs, the services of a lawyer who provides such representation on a contingent fee basis, as the result of the provisions of an insurance policy, as part of a class action that will reasonably serve the legal interests of the applicant and that he or she is able to join, or if the applicant's interests are being protected by counsel in some other way**;**

c. if the matter is not contested, unless the Board determines the interests of justice require the assistance of counsel;

d. if under standards established by the Board, and under the circumstances of the particular matter, the Board deems a certain type and level of limited scope representation is sufficient to afford fair and equal access to justice and is sufficient to ensure that the basic human needs at stake in the proceeding are not jeopardized due to the absence of full representation by counsel (however, limited scope representation shall be presumed to be insufficient when the opposing party has full representation);

e. for matters in designated courts or other forums when the Board evaluates and certifies, after public hearings and in compliance with the State's [statutory code governing administrative procedures], that:

1. the designated court or forum: (1) operates in such a manner that the judge or other dispute resolver plays an active role in identifying the applicable legal principles and in developing the relevant facts rather than depending primarily on the parties to perform these essential functions; (2) follows relaxed rules of evidence; and (3) follows procedural rules and adjudicates legal issues so simple that non-lawyers can represent themselves before the court or other forum and still enjoy fair and equal access to justice; and

2. within such designated court or forum, the specific matter satisfies the following criteria: (1) the opposing party is not represented by a licensed legal professional; (2) the particular applicant possesses

the intelligence, knowledge, language skills (or appropriate language assistance), and other attributes ordinarily required to represent oneself and still enjoy fair and equal access to justice; and (3) if self-help assistance is needed by this party to enjoy fair and equal access to justice, such self-help assistance is made available.

iv. Limited scope representation as defined herein shall be available to financially eligible individuals where the limited service provided is required because self-help assistance alone would prove inadequate or is not available and where such limited scope representation is sufficient in itself or in combination with self-help assistance to provide the applicant with effective access to justice in the particular case in the specific forum. In matters before those courts or other forums in which representation can be provided only by licensed legal professionals, however, limited scope representation can only be substituted for full representation when permitted by Section 3.B.iii above.

C. In addition, any state trial or appellate court judge, any state administrative judge or hearing officer, or any arbitrator may notify the Board in writing that, in his or her opinion, public legal representation is necessary to ensure a fair hearing to an unrepresented litigant in a case believed to involve a basic human need as defined in Section 2.B. Upon receiving such notice, the Board shall timely determine both the financial eligibility of the litigant and whether the subject matter of the case indeed involves a basic human need. If those two criteria are satisfied, the Board shall provide counsel as required by this Act.

D. In order to ensure that the scarce funds available for the program are used to serve the most critical cases and the parties least able to access the courts without representation, eligibility for representation shall be limited to clients who are unable to afford adequate legal assistance as defined by the Board, including those whose household income falls at or below [125 percent] of the federal poverty level.

E. Nothing in this Act should be read to abrogate any statutory or constitutional rights in this state that are at least as protective as the rights provided under this Act.

Commentary: With regard to Section 3.B.ii, in determining whether there is "a reasonable probability of success on appeal" for appellants or equivalents, or "no reasonable possibility the appellate court will affirm the decision of the trial court or other forum" for respondents or equivalents, the Board or its designee shall give consideration to existing law or the existence of a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law.

In Section 3.C, the Model Act does not authorize the Board to apply a merits test or any other limitation, other than financial and subject matter eligibility, upon receipt of notice from a trial judge (or other type of fact-finder named therein) that an unrepresented litigant requires public legal representation. The rationale for this distinction is that, while it may be appropriate for the Board to review criteria relating to areas requiring detailed knowledge of the Model Act and any regulations that may have been promulgated (e.g., financial and subject matter eligibility), it is unseemly for the Board to second-guess the judge on the issue of whether a litigant's position has sufficient merit.

The 125 percent income cap in Section 3.D suggests the minimum economic strata the Model Act seeks to target. Implementing jurisdictions may consider alternative financial eligibility standards that target a larger percentage of the population unable to afford legal services in cases of basic needs, such as 150 percent of the federal poverty level, or a formula that also takes into account other factors relevant to the financial ability of the applicant to pay for legal services. For example, the determination of a particular applicant's financial eligibility ordinarily should take account of the applicant's assets and medical or other extraordinary ongoing expenditures for basic needs. Some of those factors, such as substantial net assets, might make a person ineligible despite a current income that is below 125 percent of the federal poverty level. Other factors might justify providing a person with legal services as a matter of right, even though gross income exceeds 125 percent of the federal poverty level.

The Model Act assumes that services will be provided only in the context of adversarial proceedings. Many legal matters impacting the poor may be resolved without adversarial proceedings (e.g. transactional matters, issues relating to applications for benefits), and advice of counsel may be important to a fair resolution of such matters. While this Model Act does not address services in non-adversarial settings, adopting jurisdictions may wish to consider whether services in such settings would provide a useful preventive approach and might conserve resources that otherwise would need to be expended in the course of supporting adversarial proceedings. If so, such an adopting jurisdiction may wish to adjust the Model Act to provide some services outside of adversarial settings.

SECTION 4. STATE ACCESS BOARD.

A. There is established within the State judicial system an independent State Access Board ("Board") that shall have responsibility for policy-making and overall administration of the program defined in this Act, consistent with the provisions of this Act.

B. The Board shall consist of ____ [an odd number of] members appointed by [such representatives of the different branches of government and/or bar associations to be set forth herein]. A majority of the members shall be persons licensed to practice law in the jurisdiction. The members should reflect the broadest possible diversity, taking into account the eligible client population, the lawyer population, and the population of the state generally.

Board members shall be compensated at the rate of [$___ a day] for their preparation and attendance at Board meetings and Board committee meetings, and shall be reimbursed for all reasonable expenses incurred attendant to discharging their responsibilities as Board members.

C. The Board shall select an Executive Director who shall serve at the pleasure of the Board, and who shall be responsible for implementing the policies and procedures determined by the Board, including recommendations as to staff and salaries, except for his or her own salary, which shall be determined by the Board.

D. The Board is empowered to promulgate regulations and policies consistent with the provisions of the Act and in accordance with the State's [statutory code governing administrative procedures].

E. The Board shall:

i. Ensure that all eligible persons receive appropriate public legal services when needed in matters in which basic human needs as defined in Section 2.B hereof are at stake. It is the purpose and intent of this Section that the Board manage these services in a manner that is effective and cost-efficient, and that ensures recipients fair and equal access to justice.

ii. Establish, certify, and retain specific organizations to make eligibility determinations (including both financial eligibility and the applicable standard defined in Section 3.B hereof) and scope of service determinations pursuant to Section 3 hereof.

iii. Establish and administer a system that timely considers and decides appeals by applicants found ineligible for legal representation at public expense, or from decisions to provide only limited scope representation.

iv. Administer the State Access Fund established and defined in Section 5, which provides the funding for all public legal service representation needs required by this Act.

v. Inform the general public, especially population groups and geographic areas with large numbers of financially eligible persons, about their legal rights and responsibilities, and the availability of public legal representation, should they experience a problem involving a basic human need.

vi. Establish and administer a system of evaluation of the quality of representation delivered by the institutional providers and private attorneys receiving funding for representation through the State Access Fund.

vii. If reliable, relevant data is not otherwise available, conduct, or contract with others to conduct, studies which assess, among other things, the need and demand for public legal services, the sufficiency of different levels of public legal services to provide fair and equal access to justice in various circumstances, the effectiveness of those services in positively impacting people's lives and legal situations, the quality and cost-effectiveness of different providers of public legal services, and other relevant issues.

viii. Prepare and submit an annual report to the Governor, the Legislature, and the Judiciary on the extent of its activities, including any data utilized or generated relating to its duties and both quantitative and qualitative data about the costs, quantity, quality, and other relevant performance measures regarding public legal services provided during the year. The Board also may make recommendations for changes in the Model Access Act and other State statutes, court rules, or other policies that would improve the quality or reduce the cost of public legal services under the Model Access Act.

Commentary: While the size and composition of the Board are matters to be determined based on local circumstances and need, it is suggested that an appropriate number of members to consider is seven, with appointments being made by the Governor, the Chief Justice of the state Supreme Court, and either a representative of the state Legislature or President of a state or metropolitan bar association. Appointments should be allocated to ensure that a majority of members are lawyers. For example, on a seven-person board, the Governor, Chief Justice, Legislative representative and Bar President could each appoint one lawyer and the government representatives could have a second appointment that could be a non-lawyer. It is suggested that terms be for three years, with one renewal possible, and that terms be staggered.

Broad diversity on the Board is of critical importance, particularly in light of the eligible client population. Other diversity factors may be taken into account as well. For example, it may make sense in a particular state to have business and civic leaders on the Board as well as persons representing the eligible population or others.

Also, as an alternative to creating an independent administrative body within the judicial system, a State may consider providing for administration of the program by an entirely independent entity, by the state bar association, the state court system, or the executive branch. Notably, most nations with advanced legal aid programs - including the United States - have chosen to establish some form of independent or semi-independent body to administer their public legal aid systems. Smaller states, however, may find it too cumbersome or expensive to set up a free-standing independent body to administer their public legal aid system.

The emphasis in Section 4.E.i is on effective, cost-efficient services that provide the applicant with fair and equal access to justice. How that is accomplished may vary from state to state depending on the resources available in the community. Thus, the Board may choose to contract with local non-profit legal aid organizations or with private attorneys, or both, as it deems appropriate, to provide the services authorized under the Model Access Act. If the Board chooses to contract with a local non-profit legal aid organization, it nonetheless may choose to contract as well with private attorneys under circumstances it deems appropriate, such as when non-profit legal aid organizations are unable to provide representation to an eligible client because of an ethical conflict, legal prohibition or because there are not enough salaried attorneys properly to represent the number of clients requiring representation in a given court or geographic area at the time representation is required, or in cases when, because of special expertise or experience, or other exceptional factors, a private attorney can provide representation that better serves the goals of effectiveness, cost-efficiency, and fair and equal access to justice.

Assuming it is lawful to do so under the law of the enacting State, Section 4.E.ii may include authority for the Board to delegate eligibility and scope of public legal services determinations to local legal aid organizations, such as legal services organizations funded by the federal Legal Services Corporation, those funded under the State IOLTA program, and any self-help centers the State court system certifies as qualified, all of which would automatically be considered certified to perform these functions. In assessing eligibility, the organization making the determination should be authorized to evaluate both the applicant's financial eligibility and whether the applicable standard defined in Section 3.B is satisfied.

SECTION 5. STATE ACCESS FUND.

A. The State Access Fund supplies all the financial support needed for the services guaranteed by the provisions of this Act as well as the costs of administering the program established under this Act.

B. In conjunction with preparation of the state judicial budget, the Board shall submit an estimate of anticipated costs and revenues for the forthcoming fiscal year and a request for an appropriation adequate to provide sufficient revenues to match the estimated costs. Annually thereafter, the Board shall provide the Governor, the Legislature, and the Judiciary with a status report of revenues and expenditures during the prior year. Within three months after the end of the state's fiscal year the Board shall submit to the Governor, the Legislature, and the Judiciary a request for the funds required from general revenues to make up the difference, if any, between revenues received and appropriated pursuant to the initial budget estimate and the obligations incurred in order to support the right defined in this law.

Commentary: Because of varying financial conditions in implementing jurisdictions, no attempt is made in this Section to identify possible revenue sources. Implementing jurisdictions

may consider using any available source of revenues, but shall ensure that current financial support to existing legal aid providers is not reduced, as set forth in Section 1 G. of this Model Access Act.

PHILADELPHIA BAR ASSOCIATION
CHANCELLOR'S TASK FORCE ON CIVIL GIDEON

PRELIMINARY REPORT, FINDINGS AND RECOMMENDATIONS

NOVEMBER 9, 2009

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ACKNOWLEDGEMENTS

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Joseph A. Sullivan and Andrew F. Susko, Co-Chairs, Civil Gideon Task Force.

I. EXECUTIVE SUMMARY

In 2005-2006, the American Bar Association created a Presidential Task Force on Access to Justice in civil cases to study whether a resolution should be introduced to support the provision of counsel as a matter of right to low-income persons in certain adversarial proceedings where basic human needs are at stake. This inquiry became known as the "Civil Gideon" inquiry. In Spring 2006, the ABA Task Force recommended that the House of Delegates approve Resolution 112A, calling for a system of Civil Gideon "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." Resolution 112A was adopted in August 2006.

In April 2006, the Philadelphia Bar Association Delivery of Legal Services Committee formed a working group to explore strategies to expand the right to counsel pursuant to the overall approach taken by the ABA. In May, 2006, the Board of Governors approved a resolution authorizing the Philadelphia Bar Association to serve as an official supporter of the ABA Task Force and Resolution 112A.

At the start of 2009, Chancellor Sayde Ladov appointed the Philadelphia Bar Association's Civil Gideon Task Force ("Task Force").

In April 2009, the Board of Governors unanimously adopted a Resolution Calling for the Provision of Legal Counsel for Indigent Persons in Civil Matters Where Basic Human Needs Are at Stake. The Resolution called upon the Task Force to, *inter alia*, examine Civil Gideon efforts underway in other jurisdictions, develop strategies for developing Civil Gideon and to focus initially on making recommendations in two areas of basic need: cases involving the imminent loss of shelter and child custody.

The Task Force formed five working groups: Legislative/Lobbying and Court Implementation Strategies Working Group ("Legislative Working Group"), Fundraising Working Group, Housing Working Group, Family Working Group, and Bench, Bar and Community Outreach and Communications Working Group ("Communications Working Group"). Each group was asked to meet and to investigate, analyze and discuss the issues with which it was charged, and to prepare a written report of initial findings and preliminary recommendations, to be incorporated into a Preliminary Report, Findings and Recommendations of the Task Force.

The Legislative Working Group and the Fundraising Groups, working together, reviewed the ample evidence of the lack of legal representation for the majority of low-income persons in adversarial proceedings in areas of basic human need. These groups also conducted a detailed review of the current financial and political situation in Harrisburg and Philadelphia, and determined that the most critical first step is to develop an educational strategy and plan to be presented to all key constituencies. These groups also concluded that broad support from all potential stake holders would be essential to implementing Civil Gideon.

The Legislative Working Group and Fundraising Group reviewed numerous reports on a national and regional scale documenting the legal need, and other national and local reports supplying evidence of societal and economic benefits from funding legal services.

These groups propose a number of specific steps to implement an education strategy in the short term, such as developing a case statement for Civil Gideon, conducting outreach to key legislators, the Chief Justice and other members of the judiciary and to other key sectors of the legal community.

These groups further recommend development of a legislative strategy to follow the educational plan, including the possibility of commissioning an "urgent needs" report and a study of the costs and benefits of fully funding legal services.

These groups also recommend the identification of incremental steps that could lead ultimately to the expansion of access to counsel in cases involving basic human needs, such as the development of pilot projects providing legal representation.

The Housing Working Group conducted a preliminary assessment of the local unmet need for representation in the housing area, and reviewed various studies, scholarly articles and reports, and examined strategies and models employed in jurisdictions around the United States engaged in the Civil Gideon movement.

The Housing Working Group focused on the need for legal representation in mortgage foreclosure cases and eviction cases, noting the overwhelming lack of representation in both areas and the fact that the decline of the overall economy and the mortgage foreclosure debacle have increased the need for legal representation and present a crisis whose magnitude cannot be overstated. The Housing Working Group made similar findings involving eviction cases, noting that in Philadelphia's Municipal Court, 97% of eviction cases in 2007 and 2008 were disposed of without counsel for the tenant.

The Housing Working Group examined Philadelphia's Mortgage Foreclosure Diversion Pilot Project, noting that it has been successful in helping thousands of low-income homeowners, that the representation afforded is limited in scope and that more resources for full legal representation by legal services providers is needed to address the crisis, and to enable homeowners to fully pursue any and all viable legal defenses.

The Housing Working Group similarly examined the CLS Housing Unit's Tenant Representation Project, an effort to address the unmet need by expanding the number of *pro bono* attorneys and law students representing tenants, after training and monitoring by legal services lawyers who practice in this area. As with the mortgage foreclosure project, the Tenant Representation Project has been limited in part by the economic downturn and its impact on the availability of *pro bono* counsel to take cases.

The Housing Working Group recommends first that financial resources be increased for existing legal services providers engaged in the full representation of low-income homeowners in foreclosure and tenants in eviction proceedings.

The Housing Working Group also recommends that the Mortgage Foreclosure Diversion Pilot Project and the Tenant Representation Project serve as "demonstration/pilot projects" and proposes that data from the projects be collected to measure the social and economic effectiveness of the provision of legal representation to homeowners facing foreclosure and tenant facing eviction, and also to serve as a foundation for seeking significant funding from federal, state and other sources to support the expansion of legal services for low-income persons facing imminent loss of shelter.

The Housing Working Group also recommends that the Fundraising Group work with it collaboratively to identify sources of funding; that the Philadelphia Bar Association assist in recruiting pro bono attorneys for the Mortgage Foreclosure Diversion Pilot Project and the Tenant Representation Project as well as VIP's Mortgage Litigation Project, a new undertaking designed to use *pro bono* attorneys to provide full representation to low-income homeowners at risk of foreclosure. The Group also proposes to continue to evaluate and explore the viability of various limited representation projects in the housing area to implement in the short term and to highlight the potential benefits of expanding access to representation.

The Family Working Group noted that in Philadelphia, roughly 90% of litigants in custody cases are unrepresented, and that the lack of representation is particularly serious as family law is a complex system for unrepresented litigants to navigate.

The Family Working Group observed that outcomes of custody disputes can vary greatly depending on whether or not counsel is involved, and that in a case where one party is represented and the other is not, the matter is more likely to be prolonged and to absorb far more resources than when both parties have counsel.

The Family Working Group observed that current models using *pro bono* attorneys and/or finite representation have significant limitations, in some cases because *pro bono* attorneys are reluctant to make a long-term commitment to a case and in others because representation in a single proceeding, without an ongoing role by counsel, can leave a party at a loss when trying to represent himself or herself in subsequent proceedings.

The Family Working Group recommends that financial resources for existing legal services providers who handle custody cases be expanded, in light of their extensive level of expertise and track record in providing high-quality representation.

The Family Working Group also recommends that the Philadelphia Bar Association approve a pilot project providing for the appointment by the Family Court supervising judge of counsel from a "Judge's List" of experienced, and accomplished family law practitioners.

The Family Working Group proposes that to be eligible for inclusion in the Judge's List pilot project, the custody dispute involve allegations of physical and/or mental abuse, drug addiction or other factors that would hinder a parent's ability to nurture a child, as well as cases where there are serious concerns for the safety of the child. Participation

would be limited to seasoned attorneys who have at least five years' experience and are members of the Association's Family Law Section or similar professional organization.

The Family Working Group also recommends that the Bar Association and the First Judicial District implement a "wheel" project that parallels the court appointed counsel system in the Dependency Court in the Juvenile Branch of Family Court, using a uniform screening process to identify cases. Participating attorneys would need to have taken a VIP or other training program and be required to maintain membership in the Family Law Section or similar professional organization. An oversight component would be included. Subject to further research on resources, the Working Group recommends that participating attorneys be compensated at a minimum rate of $50 per hour.

The Family Working Group also offered recommendations on training and mentoring, the scope of future pilot projects and funding.

The Communications Working Group recommends that an education plan be developed, including a communications plan and an outreach strategy to make the case for Civil Gideon with the public at large, the judiciary, the legislature, the private bar and other key stakeholders.

The Communications Working Group proposes to incorporate the recommendations of the Legislative Working Group, including the development of educational materials, including case statements highlighting the unmet need, the benefits of representation to individuals and to the larger society, and case studies of real people to foster persuasive arguments for funding and general support.

The Communications Working Group recommends the development of a communications strategy to include articles and op-ed pieces in various publications, as well as public service announcements and appearances on radio and television programs and in other media to which the public turns on issues of community-wide importance.

The Communications Working Group also recommends that various venues and forums be identified in which to present focused outreach to specific stakeholders that address their concerns and build momentum for Civil Gideon initiatives.

The Communications Working Group concludes that the Philadelphia Bar Association would be instrumental in disseminating educational materials, and supporting the execution of communications and outreach strategies.

II. HISTORY AND BACKGROUND OF CIVIL GIDEON EFFORTS

THE UNMET NEED FOR LEGAL REPRESENTATION FOR LOW-PERSONS IN CIVIL MATTERS

The Philadelphia Bar Association has a long history of action promoting access to justice for all, without regard to ability to pay for legal counsel. The Association's efforts over many decades to expand access to justice in areas of basic human need to those who cannot afford counsel have been broad in scope and extensive in reach, and have included but not been limited to:

- Incubating and promoting public interest law centers focused on substantive legal areas involving basic human needs such as shelter, health care, sustenance, safety, parental rights and child custody, among others;

- Establishing and supporting Association sections and committees devoted to promoting collaborations between the private bar and legal services organizations to provide legal services involving basic human needs;

- Encouraging and facilitating *pro bono* legal services in areas of basic human needs through training, mentoring and organizational support;

- Creating educational programs and forums to highlight the fundamental legal needs of the poor in areas such as shelter, sustenance and parental rights; and

- Collaborating with the judiciary, the legislature and the private sector to expand opportunities for all sectors of the legal community to render legal services to the disadvantaged in areas of basic need.

Despite these efforts, studies by the American Bar Association, state and local bar associations, universities, government agencies and others estimate that at most 20% of disadvantaged persons who require legal services in areas of basic need are able to obtain such services.[1] In September 2009, the Legal Services Corporation (LSC), the institution charged by Congress with the administration of the federally-funded civil legal assistance program, issued a report that updates an earlier comprehensive report and concludes that there continues to be a major gap between the civil legal needs of low-income people and the legal help that they receive. [2] The specific findings in this report include the following:

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[1] See *Summary of Legal Needs Studies*, memorandum written by Mark C. Brown, University of Pennsylvania Law School, October 2009, attached as Appendix 1.

[2] Legal Services Corporation, *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans* (September 2009), available at http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

- Data collected in the spring of 2009 show that for every client served by an LSC-funded program, one person who seeks help is turned down because of insufficient resources.

- Recent state legal needs studies have added depth to a body of social science knowledge that has produced consistent findings for a decade and a half, documenting that only a small fraction of the legal problems experienced by low-income people (less than one in five) are addressed with the assistance of either a legal services lawyer or a private attorney (*pro bono* or paid).

- Analysis of the most recent available figures on attorney employment shows that nationally, on the average, only one legal aid attorney is available for every 6,415 low-income people. By comparison, there is one private attorney providing personal legal services for every 429 people in the general population (i.e., among those above the LSC poverty threshold).

- New data indicate that state courts, especially those courts that deal with issues affecting low-income people, and such specialized courts as housing and family courts, are facing significantly increased numbers of unrepresented litigants. Studies show that the vast majority of people who appear without representation are unable to afford an attorney, and a large percentage of them are low-income people who qualify for legal aid. A growing body of research indicates that outcomes for unrepresented litigants are often less favorable than those for represented litigants.[3]

The LSC report notes that the number of people in poverty has significantly increased because of the recession and high unemployment rate. [4] Lack of resources continues to be the major factor why LSC-funded programs turn away half of those seeking help.[5]

A survey of the Pennsylvania legal services providers by the Pennsylvania Bar Association confirms that only approximately 20% of eligible clients applying for legal services are provided full representation by legal services providers.[6] While comparable data from the Philadelphia legal services providers is not available, anecdotal reports from local legal services providers support the conclusion that thousands of low-income people in Philadelphia with critical civil legal problems are turned away each year due to a chronic shortage of legal aid resources. These reports also confirm that the gap in available resources to meet the unmeet

[3] *Id*.at 1-2.

[4] *Id*.at 5.

[5] *Id*.at 9.

[6] See Pennsylvania Bar Association Legal Services to the Public Committee, Resolution in Support of Recognizing a Right to Counsel For Indigent Individuals in Certain Civil Cases (2007), available at http://www.pabar.org/public/committees/lspublic/resolutions/right%20to%20counsel%20resl%20boardapprovddoc.pdf.

need has only worsened in the past several years due to the economic downturn that has resulted in both the reduction of funding and resources for providers, and an increase in the poverty rate.

New census data suggests that the problem is likely to get worse. The American Community Survey conducted by the U.S. Census Bureau and released in September 2009 reports that the percentage of households receiving food stamps in Philadelphia increased by nearly 3 percentage points between 2007 and 2008. The poverty rate also increased in Philadelphia from 23.8 % in 2007 to 24.1 % in 2008. Philadelphia remains one of the five counties with the highest percentage of people with income below the poverty level in the state. These numbers are only expected to increase in 2010 due to the weak economy.

National Civil Gideon Efforts

In 2003, the legal community across the nation celebrated the 40th Anniversary of *Gideon v. Wainwright*, the landmark United States Supreme Court decision that established a constitutional right to appointed counsel in state criminal cases for indigent defendants.[7] This celebration included the publication of numerous articles on the subject, educational programs, conferences and other activities held throughout the nation, and coincided with an emerging national movement to explore strategies to expand the right to counsel for indigent people in certain critical civil cases. These emerging efforts have become known as "Civil Gideon."[8] In some states, litigation was initiated in an effort to compel expanded provision of counsel in certain civil cases; other states created Access to Justice Commissions, often by state Supreme Court orders, to assess the unmet legal civil needs of the indigent and develop strategies to better address those needs. [9] The National Coalition for a Civil Right to Counsel (NCCRC) was formed to facilitate collaboration among advocates nationwide and provide training, research and other support to legal services programs, bar associations, law schools, private law firms, and others in their local efforts to establish a civil right to counsel.[10]

In 2005-2006, American Bar Association President Michael Greco formed a Presidential Task Force on Access to Justice in Civil Cases ("ABA Task Force") to study and recommend whether a proposed resolution should be introduced to support the provision of counsel as a matter of right to low-income persons in certain adversarial proceedings where basic human needs are at stake. In the Spring of 2006, the ABA Task Force recommended that the ABA House of Delegates approve proposed Resolution 112A, as follows:

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[7] Gideon v. Wainwright, 372 U.S. 335 (1963).

[8] See Russell Engler, *Shaping a Context-Based Civil Gideon From the Dynamics of Social Change*, TEMP. POL.& CIV. RTS. L. REV. 497 (2006) available on the National Coalition for a Civil Right to Counsel web site at http://civilrighttocounsel.org/pdfs/englercontextbased.pdf

[9] *Id.* at 698-700.

[10] *Id.* at 698-99. For more information about the National Coalition for A Civil Right to Counsel generally, see http://civilrighttocounsel.org.

> **RESOLVED**: That the American Bar Association urges state, territorial and federal jurisdictions to provide 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.[11]

In August of 2006, the ABA unanimously passed Resolution 112A. The history of efforts to support the creation of a right to counsel in civil cases was outlined in a report that accompanied the resolution; the report noted that the resolution represented an incremental approach, limited to those cases where the most basic of human needs are at stake.[12] The report also noted that the categories identified in the resolution involve the threat of losing fundamental and critical human needs and interests that justify providing attorneys at no cost to low-income persons who otherwise cannot obtain counsel.[13]

The ABA resolution established a mandate for local jurisdictions to explore how to create and implement a right to counsel in civil cases involving critical human needs. During the past several years, legal service programs, bar associations, law schools, private law firms, courts, and other key stakeholders across the nation have begun working to create a right to counsel for low-income individuals in a variety of civil cases through a variety of approaches, including legislative and litigation strategies.[14]

Some states have decided to pursue a litigation strategy in child custody cases (Maryland). Other jurisdictions have pursued a legislative strategy. For example, in New York City, a bill is pending before the New York City Council that would expand the right to counsel in eviction and mortgage foreclosure cases for low-income seniors.[15]

In Massachusetts, the Boston Bar Association organized a Civil Right to Counsel Task Force, which proposed the development of five pilot projects statewide in the following substantive law areas: juvenile, immigration, housing, family and collateral consequences of criminal convictions.[16] In 2008, the Boston Bar Association task force recommended

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[11] See ABA Resolution 112A and Report, available at http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredtwelvea.doc

[12] *Id*. at 2-8, 12.

[13] *Id*. at 12.

[14] Laura K. Abel and Paul Marvey, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 TOURO L. REV. 131 (2009), available at http://www.tourolaw.edu/lawreview/pdfs/_8_WWW_Abel_Marvy_CurrentDevelopment_SM_Final_12.23.08_.pdf; see also related articles in Symposium, *An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State*, 25 TOURO L. REV. 1 (2009) (published in partnership with the New York State Bar Association) available at http://www.tourolaw.edu/lawreview/Vol25_No1_2009.html

[15] *Id.* at 141-42.

[16] See Boston Bar Association, *Gideon's New Trumpet* 5-6 (2008), available at http://bostonbar.org/prs/reports/GideonsNewTrumpet.pdf

implementing pilot projects in each of these substantive areas, with a study component and funding plan for each project.[17] In 2009, the Boston task force launched a pilot project exploring the impact of full legal representation in eviction cases, with funding from the Boston Foundation, the Boston Bar Foundation, and the Massachusetts Bar Foundation. The project includes an evaluation tool to measure the efficacy of the program, testing the theory that representation leads to a preservation of shelter as well as cost savings. The results will be used in an effort to convince the legislature to provide increased funding for the provision of legal counsel statewide in eviction cases.

On October 11, 2009, California Assembly Bill 590 was signed into law by Governor Arnold Schwarzenegger, creating a right to counsel for indigent individuals in critical human-needs cases and establishing pilot projects in selected courts that will study and demonstrate the cost savings of providing counsel.[18] This is the first law in the nation to recognize a right to representation in key civil cases. Local legal aid programs will partner with the courts in applying for the funding and determining the types of cases to be included in the projects. The pilot projects will be funded by a $10 surcharge of fees assessed on certain court services, including those for issuing a writ to enforce an order, recording or registering a license or certificate, issuing an order of sale, and filing and entering an award under the state's Worker's Compensation law.

Civil Gideon Efforts in Pennsylvania

In April 2006, the Philadelphia Bar Association's Delivery of Legal Services Committee formed a working group, known as the DLSC Civil Gideon Subcommittee, to explore strategies to expand the right to counsel for low-income individuals in civil cases. The initial work of this subcommittee included researching developments in expanding the right to counsel in civil cases in Pennsylvania and nationwide, and reaching out to the then-incoming President of the Pennsylvania Bar Association, Andrew F. Susko, to enlist the support of the state bar association for the subject of its work. The Civil Gideon right also was comprehensively evaluated at the University of Pennsylvania Law School's Edward R. Sparer Symposium held in May 2006 in conjunction with the 2006 Equal Justice Conference in Philadelphia, co-sponsored by the ABA and the National Legal Aid and Defender Association at which overwhelming support for Civil Gideon was expressed.

In May 2006, the Philadelphia Bar Association's Board of Governors approved a resolution offered by the DLSC authorizing the Association to serve as an official supporter of a Report and Recommendations of the ABA's Presidential Task Force on Access to Justice in Civil Cases and Resolution 112A.[19] Following the adoption of the ABA resolution, in

[17] *Id.* at 5-6.

[18] 2009 Cal. Legis. Serv. 457 (West).

[19] The Philadelphia Bar Association's May 25, 2006, Resolution to Cosponsor the Report and Recommendation of the ABA's Presidential Task Force on Access to Justice in Civil Cases is available at

(continued...)

September 2007, the Pennsylvania Bar Association's House of Delegates passed a resolution urging the state to provide counsel as a matter of right in civil cases involving basic human needs.[20]

The Philadelphia Bar Association's Public Interest Section and its DLSC Civil Gideon subcommittee partnered with the Pennsylvania Bar Association to co-sponsor the presentation of an educational symposium on Civil Gideon, which was held in Philadelphia on April 10, 2008.[21] The purpose of this program was to educate the legal community about the strategies being pursued nationwide to obtain and implement a right to counsel in civil matters and to begin a discussion about strategies to implement a right on the local level. Panelists included Pennsylvania State Representative Kathy Manderino; Debra Gardner, Legal Director of the Public Justice Center and Coordinator of the National Coalition for a Civil Right to Counsel; and Laura K. Abel, Deputy Director of the Justice Program at the Brennan Center for Justice at New York University School of Law. Following the symposium, the DLSC Civil Gideon Subcommittee proposed the formation of a Task Force on Civil Gideon to Chancellor-Elect, Sayde J. Ladov in the late fall of 2008.

Currently, Pennsylvania provides a right to court-appointed counsel for indigent people in a limited number of civil proceedings, which include child dependency cases, termination of parental rights, paternity, civil commitment proceedings for sexually violent delinquent children, and involuntary commitment pursuant to the Mental Health Procedures Act.[22] The creation of the right to counsel in these cases was achieved through litigation or legislative action.

Formation of the Philadelphia Bar Association Task Force

Chancellor Sayde Ladov appointed the Civil Gideon Task Force ("Task Force") in early 2009, calling for the Task Force to investigate and consider all aspects of establishing an effective system of Civil Gideon in Philadelphia. Members of the Task Force include judges, private attorneys, representatives from the Public Interest, Family Law and Real Property

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http://www.philadelphiabar.org/page/BoardResolution0525200606?appNum=2&wosid=j3wuqyaFghq79dcHDerVDw

[20] Pennsylvania Bar Association Resolution, *supra* note 6, at 1.

[21] A podcast of this program is available at http://www.philadelphiabar.org/page/Podcasts_Speaker_Programs?appNum=2&wosid=PXlUJgZod14KrvFgmSc9T0

[22] Pennsylvania Bar Association Resolution, *supra* note 6, at 2. This Resolution sets forth a list of the known civil cases in which court appointed counsel is required in Pennsylvania. The Resolution also cites an extensive list of states and the most common substantive areas where some level of right to counsel has been identified by statute, as well as the status of Civil Gideon activities in selected states. Available at http://www.pabar.org/public/committees/lspublic/resolutions/right%20to%20counsel%20resl%20boardapprovddoc.pdf.

Sections, public interest legal attorneys, and future leaders of the Association.[23] The Task Force convened its first meeting in March 2009, and determined that its initial goal would be to formulate an enabling resolution that would be presented to the Philadelphia Bar Association's Board of Governors. The Task Force's resolution was endorsed by the Public Interest Section, Real Property Section, Family Law Section, and the Civil Rights Committee, and on April 30, 2009, the Philadelphia Bar Association's Board of Governors unanimously adopted the Resolution Calling for the Provision of Legal Counsel for Indigent Persons in Civil Matters Where Basic Human Needs Are at Stake.[24]

After the resolution was adopted, the Task Force determined that its first steps would include examining Civil Gideon efforts underway in other jurisdictions and developing a process to begin working on the objectives and goals set forth in the resolution. At its second meeting, the Task Force invited Laura Abel of the Brennan Center for Justice at New York University School of Law, to present an overview of developments nationwide. Ms. Abel outlined a number of key strategies to consider, including demonstrating to the legislature, judiciary and county and municipal governments that the provision of counsel in civil matters furthers judicial economy, is cost effective and is socially and economically beneficial.

The April resolution directed the Task Force to examine strategies for developing full, no-cost representation of low-income persons in areas of basic human need as well as to examine a range of possible intermediate steps and models that might be adopted on the way to full Civil Gideon.[25] While no hard definition of the full scope of Civil Gideon has been adopted, the consensus of Bar leaders and the Task Force was to focus initially on making recommendations to expand the provision of counsel in two areas of basic need: cases involving the imminent loss of shelter and child custody.[26]

Five working groups, including Task Force members and other knowledgeable members of the legal community, were convened to begin this process and each working group was directed to make recommendations for future action steps for the Task Force, including identifying possible pilot projects to advance Civil Gideon and outlining key strategic considerations. Each of the working groups was assigned, at a minimum, to conduct appropriate research, identify the range of relevant communications needs and issues, and to conduct a review of existing resources. The five working groups are: Legislative/Lobbying and Court Implementation Strategies Working Group ("Legislative Working Group); Fundraising Working Group; Housing Working Group; Family Working Group; and the Bench, Bar and Community Outreach and Communications Working Groups ("Communications Working Group").

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[23] See List of Task Force Members, attached as Appendix 2.

[24] Philadelphia Bar Association, Resolution Calling for the Provision of Legal Counsel for Indigent Persons in Civil Matters Where Basic Human Needs are at Stake**,** available at http://www.philadelphiabar.org/page/RESOLUTION_CALLING_FOR_THE_PROVISION_OF?appNum=2

[25] *Id.*

[26] *Id.*

Each working group was asked to provide a written report of its initial findings and preliminary recommendations for consideration by the Philadelphia Bar Association's Board of Governors by the end of 2009. The Civil Gideon Task Force is pleased to present the following preliminary reports and recommendations.

III. LEGISLATIVE/LOBBYING AND COURT IMPLEMENTATION AND FUNDRAISING WORKING GROUPS PRELIMINARY REPORT AND RECOMMENDATIONS

Introduction:

Recognition of the overall lack of representation of low income persons in categories of adversarial proceedings where basic human needs are at stake has been emerging rapidly in recent years. The sense of urgency in addressing the need for Civil Gideon has been underscored by the 2006 ABA report, the Board of Governor's April 2009 resolution, and in numerous reports outlined or referenced in this Report. For these reasons, the Legislative/Lobbying and Court Implementation Working Group ("Legislative Group") and the Fundraising Group began their work with a sense that a principled analysis, a strategic plan and practical steps were all essential to creating a path to move Philadelphia and the state closer to Civil Gideon. At the same time, members of both working groups recognized that the economic and financial crises that began in mid-2008 and have continued into 2009 pose a particular set of challenges to the effort to gain the legislative and judicial traction and financial support that is key to implementing Civil Gideon.

Findings:

The Legislative Group and the Fundraising Group began their work with a detailed review of the current financial and political situation in Harrisburg and Philadelphia. In light of the overall financial downturn and the budget impasse that caused an extensive delay in adopting the state budget in 2009, both groups concluded that the time was not ripe to seek from the state legislature and City Council a wholesale adoption of Civil Gideon, or to develop specific implementation strategies for how Civil Gideon might be achieved through legislation.

Rather, members of the Legislative Group and the Fundraising Group concluded that the most critical first step is to develop an education strategy and plan to be presented to all key constituencies, including the state legislature, City Council, the courts, the legal community as a whole and the general public. Members concluded that broad support from all potential stakeholders would be essential to implementing Civil Gideon.

Developing An Education Strategy

The Legislative and Fundraising Groups examined both the extent of the need for civil legal services among persons unable to retain legal counsel on their own and the potential societal benefits of expanded and ultimately full free legal representation in areas of basic human need, in order to conceptualize the appropriate educational strategy to be developed. This strategy would include developing a concise case for and message in support of the right to counsel in certain civil matters.

Evidence of Legal Need

Group members reviewed the ample evidence of the lack of legal representation for the majority of low income persons in adversarial proceedings in areas of basic human need, as outlined in a number of sophisticated reports referenced in this Report. Notably, the national

report of the Legal Services Corporation (LSC) entitled *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-income Americans*, originally published in 2005 and updated as of September 2009, sets forth a number of statistics outlining the breadth and depth of the problem, including such key findings as:

- The LSC surveyed 137 grantee programs, with 918 offices across the nation, to document the number of people seeking legal assistance that could not be served due to insufficient program resources, and concluded that for every client who contacted and was served by an LSC-funded program, at least one eligible person seeking help will be turned away. Based on an annualized projection from a two-month sample period in March-May 2009, LSC will be unable to serve 944,376 people in need of help in 2009.

- The inability to provide representation to substantial numbers of low income persons was remarkably consistent across the nation, as LSC learned in the process of developing nationally applicable conclusions based on its comparison of study methodologies and findings in seven different states since 2005 (Virginia, Utah, Wisconsin, Nebraska, Alabama, Georgia and New Jersey.)

- In the seven state studies reviewed by LSC, on average, low-income households experienced from 1.3 to 3 legal needs a year, and in all states, the majority of low-income persons surveyed said their legal needs were extremely important or very important. In New Jersey, for example, 58.2% of the respondents said their legal problems were "most serious."

- Attorney-low-income population ratios were extremely high. In 2007, there were a total of 7,931 legal aid attorneys available to provide legal services in areas of basic human need for an estimated 50,876,000 persons living at or below 125% of the federal poverty guidelines.[27]

Similarly, the 2009 report of Pennsylvania's IOLTA (Interest on Lawyer Trust Accounts) board entitled *Results of the Pennsylvania Access to Justice Act: A Report on the Filing-Fee Surcharge Law, FY 2004-2008* demonstrates both the extensive need for legal representation among low income Pennsylvanians and the benefits of providing additional revenues to help fund legal services:

- 1.7 million Pennsylvanians live on incomes less than 125% of the federal poverty guidelines, and nearly half of that population, or 47%, experience legal problems each year, translating into 712,000 legal matters annually.

- Pennsylvania legal aid intake workers turn away one out of every two people who apply for services.

[27] LSC Report, *supra* note 2, at 9, 14-22.

- Only one in five low-income people who experience a legal problem is able to get help from any source.[28]

The 2009 IOLTA report demonstrates, however, the difference additional funding, from whatever source, can make. In particular, the report reveals that:

- The Access to Justice Act (AJA) produced $36.5 million cumulatively through 2008, accounting for 18% of total funding for legal services; the AJA funded 70,700 cases over the 2004-2008 period, directly benefitting 138,000 individuals.

- Most recently, in FY 2007-2008, AJA funded 20,300 of Pennsylvania Legal Aid Network's 94,400 cases that year.[29]

Evidence of Societal and Economic Benefits from Funding Legal Services

In addition to considering the extent of the unmet need among low-income Pennsylvanians for legal representation in matters involving basic human needs, the members of the Legislative and Fundraising Working Groups reviewed studies that have been conducted across the nation on the larger benefits to society of providing greater, if not full, representation to low-income persons in areas of basic need such as housing, parental rights and child custody.

One notable study published this year is entitled: *The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential,* and was funded by the Texas legislature.[30] Among its notable conclusions are:

- Currently, legal aid services lead to a sizeable stimulus to the Texas economy. The study estimates that the gain in business activity includes an annual $457.6 million in spending, $219.7 million in gross output and 3,171 jobs.

- For every direct dollar expended in the state for indigent civil legal services, the overall annual gains to the economy are $7.42 in total spending, $3.56 in gross output and $2.20 in personal income.

- Further, this activity generates approximately $30.5 million in yearly fiscal revenues to state and local government entities, well above the state's then-current $4.8 million in contributions for legal services.[31]

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[28] Pennsylvania IOLTA Board, *Results of the of the Pennsylvania Access to Justice Act: A Report on the Filing-Fee Surcharge Law, FY 2004-2008* (February 2009), p. 2, available at http://www.paiolta.org/AJAReport/Report.pdf.

[29] *Id.* at 3-5.

[30] The Perryman Group, *The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential* (February 2009), available at http://www.texasatj.org/FINAL%20Econ%20Impact%20Study%2002-12-09.pdf.

In Pennsylvania, the 2009 IOLTA report on the total economic impact of legal assistance funded by the Access to Justice funding between the years 2004 -2008 included the following:

- Total economic impact was $154 million, including $68 million in economic activity in local communities.

- Benefits included $37 million in direct dollar benefits for clients, $8 million savings in emergency shelter costs; $23 million savings in costs relating to domestic abuse and $55 million for low-income utility customers.[32]

Implementing an Education Strategy in the Short Term

The Legislative Group and Fundraising Group then identified the following specific items as short term implementation strategies that should be included in an educational plan:

- a case statement outlining the results of recent national studies that highlight the unmet need, including the absolute need for a truly accessible justice system that makes the system fair for all Pennsylvanians;

- a web page with educational resources;

- identification of legislators from around the state likely to express interest at an early stage, followed by a series of preliminary meetings with them to outline the issues, provide further details and obtain their input;

- outreach to the Chief Justice and other key judicial leaders, such as Justice Baer who has championed new pilot projects in family court matters;

- outreach to the leadership of all bar associations;

- outreach to law schools, including an exploration of how to incorporate Civil Gideon topics in the curriculum;

- identification of important events that could serve as a forum to discuss Civil Gideon issues, such as the annual Judicial Conference and Bench Bar Conference; and

- outreach to managing partners at law firms.

(continued...)

[31] *Id.* at 3.

[32] IOLTA Board Report, *supra* note 28, at 7-8.

Developing a Legislative Strategy to Follow the Education Strategy

The Legislative Group examined the key issue of the scope of the Task Force's efforts to address legislative support for Civil Gideon. In particular, the Group discussed whether legislative/lobbying and court implementation strategies should be conducted as a statewide effort, on the one hand, or whether if it could be led by the Philadelphia Bar Association directly. Since the implementation of Civil Gideon will ultimately occur at a statewide level, one suggested approach was to have the Philadelphia bar lead efforts to promote a statewide approach on Civil Gideon, and to partner with every county bar association and the state bar association. Group members noted that pilot projects to provide a form of Civil Gideon, or some legal assistance short of Civil Gideon, were being conducted in various counties in the Commonwealth, and that information sharing and consensus building were invaluable.

It was noted that only 20% of Pennsylvania legislators are attorneys and that in the absence of a legal background, many legislators might not readily grasp the importance of Civil Gideon without being provided with extensive educational materials, supplemented with personal meetings and discussions. Members of the Legislative Group concluded that key legislators should be approached early in the process to inform them of the Task Force's efforts and obtain insights on strategies and input on other legislators who may be helpful to the effort. Such efforts should be conducted in conjunction with local bar associations.

The central role of the statewide judiciary in developing a system of Civil Gideon was recognized by all members of the Legislative and Fundraising Groups. Chief Justice Ronald D. Castille has demonstrated through various Court initiatives his steadfast support for legal services in Pennsylvania. It was recommended that the Chief Justice be approached early in the process to secure his leadership in developing both an educational plan and an implementation plan.

Considering a Report on Unmet Need vs. a Study of Cost-Benefit Analysis

The Legislative Group discussed at length the possibility that the Philadelphia Bar Association might take the lead in developing a study or a report, which could be incorporated into the educational plan and be used to educate legislators and the general community on the unmet legal needs.

The Group reviewed a number of studies and reports, including the recent studies on legal needs released by the Brennan Center on mortgage foreclosures, and the national report of the Legal Services Corporation (LSC) entitled *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-income Americans*, originally published in 2005 and updated as of September 2009, as well as the 2009 IOLTA Board report entitled entitled *Results of the Pennsylvania Access to Justice Act: A Report on the Filing-Fee Surcharge Law, FY 2004-2008*, discussed above.[33]

[33] See LSC Report, *supra* note 2, and IOLTA Board Report, *supra* note 28. See also *Summary of Economic Benefit Studies*, a memorandum written by Sarah Levin, University of Pennsylvania Law School, attached as

(continued...)

The Group also reviewed a number of studies examining the economic benefits of providing legal services to low-income people such as the Texas study completed in 2009. As noted, the Texas study found that every $1 spent on indigent civil legal services led to an overall gain to the economy of $7.50. This study concluded that legal services programs generated millions of dollars for the state, which helped convince the legislature to recently allocate approximately $26 million in the state budget for legal services.[34]

Ira Goldstein, Director of Policy and Information Services for The Reinvestment Fund, addressed a combined meeting of the Legislative Group and the Fundraising Group, to outline his current work on a study of the benefits of Philadelphia's Mortgage Foreclosure Diversion Project for homeowners in the project and the greater Philadelphia region. The Reinvestment Fund study has been commissioned by the Soros Open Society Institute (OSI). The possibility that one or more local foundations may be interested in funding a cost-benefit study and/or that one or more local universities may also be a resource for conducting a study or report was considered.

The working groups concluded that a report on the "urgent need" for legal representation, which may include an analysis of the costs and benefits, would help to accelerate general awareness of the need for legal services for individuals who cannot afford counsel in areas of basic need, as well as the wide-ranging benefits Civil Gideon might provide to the larger community. It was agreed that the report should be prepared by an independent and objective group. Further work is needed to determine the scope of the report, and whether the report should focus on the "urgent needs" in Philadelphia, or include other areas of Pennsylvania.

The members of both groups agreed that the report should definitely include qualitative issues and feature case studies and issues involving real people and their issues would be more persuasive and useful in developing a case for funding with legislators and other possible funding sources. It was also suggested by members that the report include both success stories, where legal representation led to good results, and stories where legal representation was not available, leading to unfavorable results. Additional research is needed to determine what type of report would be most helpful in persuading the legislature, judiciary and county and municipal governments as well as corporate partners and other potential funders that the provision of legal counsel in civil cases involving critical human needs is essential to the economic and societal well being of the city and/or state, and furthers judicial economy. The Task Force also needs to continue to explore possible partners for such a report, which may include seeking funding for the report from one or more foundations and/or utilizing the expertise of research resources that may be available at one or more local universities.

(continued...)

Appendix 3; and *Summary of Legal Needs Studies*, memorandum written by Mark C. Brown, University of Pennsylvania Law School, attached as Appendix 1.

[34] Texas Report, *supra* note 30, at 3.

Recommendations:

The Legislative Group and the Fundraising Group make the following preliminary recommendations:

1. Develop an educational plan for outreach to legislators, the executive branch; the judiciary; leadership of all bar associations, law schools, the larger legal community and to general public, including individuals at every level who are considering running for office or higher office.

2. Explore the possibility of commissioning an "urgent needs" report, which may include the economic and societal benefits to the community from providing low-income persons with legal representation in civil cases.

3. Consider pursuing a comprehensive cost-benefit analysis, guided by the 2009 IOLTA report on the economic benefits of the filing fee surcharge during the 2004-2008 period, the Texas study and other studies around the nation to help make a convincing case for full Civil Gideon. To accomplish this, the Task Force should continue its investigation of possible support for the study not only with the state legislature, but with foundations and the private sector as well.

4. Identify incremental steps that will result in the expansion of the provision of counsel in cases involving basic human needs, such as the development and implementation of pilot projects, which may help improve access to justice; and

5. Although no consensus was reached on the issue, the Group concluded that the Task Force also should continue to evaluate the possibility of a legal challenge in an appropriate, active court case to establish a right to counsel in an area of basic need.

IV. HOUSING WORKING GROUP PRELIMINARY REPORT AND RECOMMENDATIONS

Objective:

The Housing Working Group (Group) was charged with recommending strategies to expand the right to counsel for low-income people threatened with an imminent loss of shelter and to develop housing pilot projects or identify existing local housing projects to serve as Civil Gideon pilot/demonstration projects. In the short term, such projects would expand representation to low-income individuals facing the imminent loss of shelter while also serving as the source of data or information regarding the social and economic benefits of recognizing a Civil Gideon right in the housing area. Accordingly, the Group was also charged with developing an evaluative component for each of the selected pilot projects and identifying potential sources of funding for the staffing of the pilots as well as the completion of any evaluative studies. Finally, the Group was asked to explore the development and implementation of limited representation models ranging from advice-only clinics, court-based "help desks" and one-time or "zipper" appearances, as well as mediation and conciliation and full representation by private attorneys. The aim is to expand legal assistance to housing litigants while also promoting the recognition of a Civil Gideon right to counsel in the housing area.

Findings:

In a few short months, the Group conducted a preliminary assessment of the local unmet need for representation in the housing area; reviewed various studies, law review articles and reports; examined various strategies and models employed by different jurisdictions engaged in the Civil Gideon movement; and begun evaluating limited representation housing models as stop gap, short term solutions to meet the existing need and to improve access to the courts for low-income self-represented litigants.

Preliminary data and information collected by the Group confirms the need for the expansion of full legal representation of low-income litigants in mortgage foreclosure and eviction cases. The Group's initial efforts to gather data have included collecting anecdotal reports from housing attorneys in Philadelphia and a preliminary survey of legal services agencies engaged in the representation of homeowners in foreclosure and/or tenants in eviction cases to ascertain the number of requests for assistance and the percentage of those requests for which the agencies are providing representation**.** Additional data regarding the volume of eviction filings and the disposition of cases involving unrepresented litigants was obtained directly from the Court of Common Pleas and the Municipal Court.

The Need for Legal Representation in Mortgage Foreclosure Cases

It is widely known that the nation is in the midst of a foreclosure crisis which threatens the heart of the American Dream. In a recently- released study by the Brennan Center for Justice, entitled *Foreclosures: A Crisis in Legal Representation*, it was noted that the foreclosure crisis is also a crisis in legal representation: low-income homeowners are losing their homes in foreclosure because they are not represented by attorneys in these complicated legal proceedings

and they are unaware of potential legal defenses.[35] Legal aid organizations are ill-equipped today to handle the increased demand for legal services due to underfunding by the Legal Services Corporation (LSC) as well as the impact of the recession, which has resulted in state and local governments and private charities cutting funding for legal services. [36]

The Brennan Center study underscores the difference that legal representation can make in helping many low-income homeowners preserve their homes and avoid homelessness, which in turn prevents urban blight and helps stabilize property values and at-risk neighborhoods. [37] The study notes that providing legal representation in these cases may result in identifying violations of state and federal laws, enforcing consumer protection laws, obtaining protection through the bankruptcy laws, and raising other defenses that facilitate the renegotiation of the loans, or slow the foreclosure proceedings to provide time for the homeowner to secure alternative housing. [38] Recommendations in the study include the following: increased state and federal funding should be provided to foreclosure legal assistance; states should expand access to the courts and to other dispute resolution mechanisms for homeowners facing foreclosure proceedings by requiring lenders to participate in a mediation conference with homeowners before a foreclosure is permitted to proceed; and foreclosure proceedings should be deferred until the homeowner has consulted with either a trained housing counselor, or, where lending violations are suspected, a lawyer.[39]

In Philadelphia, the decline of the overall economy and the mortgage foreclosure crisis have presented a crisis whose magnitude simply cannot be overstated.

Philadelphia, a city historically known for the availability of affordable housing for low-income homeowners, has seen a dramatic rise in the rate of foreclosures.

Unlike many of the other 10 largest cities in America, Philadelphia has a high percentage of total housing stock consisting of row homes and other single-family dwellings, as opposed to high-rise apartment buildings. Low-income residents living in those houses have many of the loans now being subject to foreclosure proceedings. Philadelphia also has the largest percentage of senior citizens among the 10 largest cities in the United States. Low-income and senior citizen homeowners often took on these loans without proper financial advice or an adequate understanding of their new obligations. Many of the foreclosures were the result of unaffordable

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[35] See Melanca Clark and Maggie Barron, *Foreclosures: A Crisis in Legal Representation*, Brennan Center for Justice, New York University School of Law, October 6, 2009, available at http://www.brennancenter.org/content/resource/foreclosures. For more information about the study and the Brennan Center generally, see www.brennancenter.org.

[36] *Id.* at 2-3.

[37] *Id.* at 12-26.

[38] *Id.* at 2.

[39] *Id.* at 3.

subprime loans that were sold to unsophisticated, low-income homeowners targeted by brokers or mortgage companies.

In 2008 alone, approximately 10,000 mortgage foreclosure cases were filed in Philadelphia County, and the filings are only expected to increase in volume in the coming year.[40] Philadelphia's legal services programs are nationally known as experienced and sophisticated advocates in mortgage foreclosure and predatory lending cases. However, these legal services organizations are unable to meet this escalating demand for services due to a lack of adequate funding to support the staff needed to provide full legal representation in these cases.

In Philadelphia, the Residential Mortgage Foreclosure Diversion Program (Diversion Program)[41] has alleviated some of the need for counsel for low-income homeowners facing foreclosure. The Residential Mortgage Foreclosure Diversion Pilot Program was established in April 2008 by a Joint General Court Regulation issued by the Court of Common Pleas and provides early Court intervention in residential owner occupied mortgage foreclosure cases to allow homeowners the resources and time to facilitate a loan work out or other resolution to prevent the loss of their home.[42]

Housing counselors, legal services attorneys or *pro bono* attorneys provide representation to low-income homeowners at the Conciliation Conference stage of the Diversion Program only. Since the inception of the Diversion Program, approximately 6,300 conferences have been scheduled, resulting in approximately 1,600 homes being saved outright from Sheriff sales, and 3,000 cases are pending for future resolution as the parties continue to negotiate and await responses from lenders. [43] While the Diversion Program has been extremely successful in helping thousands of low-income homeowners, the legal representation of low-income homeowners afforded by the Diversion Program is limited in scope and more resources for full legal representation by legal services providers is needed to address this crisis and permit homeowners to pursue any and all viable defenses.

In Philadelphia, limited resources are available to provide legal advice and full representation for low-income homeowners through the following existing legal services providers: Community Legal Services (CLS), Philadelphia Legal Assistance (PLA), SeniorLAW Center, Legal Clinic for the Disabled, and the AIDS Law Project. VIP has recently created the Mortgage Litigation Project to recruit and train *pro bono* volunteers in foreclosure defense. The project is a joint collaboration between VIP and CLS, with CLS foreclosure attorneys serving as

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[40] See *Hearing on Foreclosure Mitigation Efforts Under TARP Before the Congressional Oversight Panel*, September 24, 2009 (Testimony of Honorable Annette M. Rizzo, Court of Common Pleas, First Judicial District, Philadelphia County); and Honorable Annette M. Rizzo, White Paper on The Philadelphia Mortgage Foreclosure Diversion Pilot Project. Both may be found in the Appendices, respectively as Appendix 4 and Appendix 5.

[41] *Id.*

[42] First Judicial District of Philadelphia, Court of Common Pleas of Philadelphia County, Joint General Court Regulation No. 2008-01 (April 16, 2008), attached as Appendix 6.

[43] Testimony of Honorable Annette M. Rizzo, *supra* note 40, at 8.

legal resources for volunteers accepting foreclosure referrals from VIP. The expansion of the Project is contingent upon VIP's ability to staff the project with a Fellow or through other funding sources. All of these legal services providers report that the rising demand and declining resources limit representation in foreclosures to a small number of homeowners who meet the criteria and priorities set by their organizations.[44] There are fewer than 17 full-time legal service attorneys from these organizations available to handle this work in the entire city, and representing homeowners in full blown foreclosure litigation can be very time consuming.

While the data has not been studied in detail, legal services attorneys are convinced that attorney representation in litigation can make it much more likely that a homeowner remains in his or her house; the legal services lawyers drawing this conclusion have had years of successes in handling these cases. The small number of legal services attorneys underscores the critical need for increased resources for the legal services providers to provide legal representation to thousands of low-income homeowners who have underlying meritorious defenses in mortgage foreclosure cases that are unable to be resolved through the Diversion Program.

The Need for Legal Representation in Eviction Cases

Anecdotal reports from Philadelphia legal services housing attorneys who are members of the Group establish that thousands of low-income families in Philadelphia find themselves forced to live in substandard housing every year because their landlords will not comply with state and local landlord tenant law and make necessary repairs. Hundreds more find themselves wrongfully evicted because they could not present their cases adequately, due to lack of legal counsel. Families evicted from their homes often end up in homeless shelters, making it extremely difficult to retain a job or send children to school every day. Worse, families living in substandard housing can face losing custody of their children because of the inability to provide a safe and sanitary home.

Studies from other jurisdictions support the above findings and further indicate that providing legal representation for tenants in eviction cases results in preventing evictions and homelessness, and provides a substantial cost savings for the community.[45] One New York study found that when low-income tenants were provided with legal counsel, they experienced significantly more beneficial procedural outcomes than their *pro se* counterparts, and that they were much less likely to have a final judgment and order of eviction against them and more

[44] Preliminary data was obtained from a survey of these providers, which was incomplete as of the date of this report. Anecdotal reports from the providers, however, confirm the lack of sufficient legal services resources to meet the need. Further, it should be noted that some of these providers are relatively small, highly specialized programs that deliver high quality legal services in a manner that is very sensitive to the client, who is often a client with special needs. It could be misleading, however, to give the impression by including the smaller programs in the list of available legal services providers that they are able to represent anywhere near the number of clients represented by CLS and PLA, the larger legal service providers in Philadelphia. This would understate the critical need which is not being met.

[45] For a summary of studies and reports, see Raymond H. Brescia, *Sheltering Counsel: Towards A Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187 (2009), available at http://www.tourlaw.edu/lawreview/Vol25_No1_2009.html.

likely to benefit from a stipulation requiring rent abatement or repair to their apartment.[46] Moreover, this study noted that these outcomes do not appear to come at much expense in terms of the efficiency of the Court; in fact, the presence of an attorney at the tenant's side may actually enhance efficiency by reducing the number of motions, particularly post-judgment motions.[47] Another study conducted by the New York City Department of Social Services estimated that every one dollar spent on providing legal services in eviction cases saved the city four dollars in the costs associated with homelessness.[48]

Data obtained from the Municipal Court indicates that approximately 97% of eviction cases in Philadelphia in 2007 and 2008 were disposed of without counsel for the tenant.[49] In 2008 alone, there were a total of 27,347 eviction cases disposed of in Municipal Court, and, of these cases, only 942 or 3% were cases in which tenants were represented by counsel.[50] Municipal Court also provided data on eviction cases initiated by the Philadelphia Housing Authority ("PHA"). In 2008, there were 2,177 eviction cases filed by PHA. Of these cases, 1,885 were disposed of in Municipal Court. Unrepresented tenants in these cases were particularly vulnerable given the fact that there is an attorney for PHA present in Municipal Court who represents PHA in all eviction cases.

As in foreclosures, full representation of low-income tenants in Philadelphia is only available through legal service programs including: CLS, the SeniorLAW Center, AIDS Law Project, Philadelphia VIP and the Legal Clinic for the Disabled, and as in foreclosures, existing legal resources are insufficient to meet the large demand for representation in eviction cases.[51] There are only the equivalent of 7 full-time legal service attorneys from these organizations available to handle eviction cases in the entire city. According to anecdotal reports from Group members and preliminary data obtained from a survey of these agencies, only a small fraction of the 27,347 eviction cases disposed of in Municipal Court in 2008 were handled by the legal services providers.[52] CLS has only the equivalent of 5 full-time attorneys available to work on public and private rental housing, eviction and tenant legal issues, and they can only represent a limited number of tenants in eviction actions since they are also responsible for training and

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[46] Carroll Seron, et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 429 (2001).

[47] *Id*.

[48] Legal Services Project, *Funding Civil Legal Services For The Poor: Report To The Chief Judge* 7 (1998); see also Brescia, *supra* note 45, at 209.

[49] Chart containing Municipal Court data on Landlord/Tenant Cases Filed in 2007 and 2008 is attached as Appendix 7.

[50] *Id.*

[51] *Supra*, note 44.

[52] *Id*.

advising tenants, law students, and volunteer attorneys, handling appeals and working on systemic problems, including housing access issues and class action litigation.

In 2007, CLS's Housing Unit created the Tenant Representation Project in an effort to address the unmet need and expand the number of attorneys or qualified law students available to represent low-income people with private landlord tenant issues, primarily eviction. The cornerstone of the Project is to leverage the knowledge of highly skilled legal services housing attorneys by training and mentoring *pro bono* attorneys and law students to provide full legal representation in eviction cases filed in the Philadelphia Municipal Court and in the Philadelphia County Court of Common Pleas. The Tenant Representation Project makes direct referrals of cases to *pro bono* attorneys who have been extensively trained by CLS to provide legal representation for low-income tenants. *Pro bono* attorneys and law students are able to consult with CLS experts as needed and rely upon them for technical expertise on each case. In 2008, *pro bono* counsel and law students represented approximately 104 clients in landlord-tenant matters. The Project has been successful in expanding the availability of representation for low-income people in eviction matters. However, the economic downturn has made it difficult to recruit sufficient *pro bono* attorneys to meet the need. Increased representation by legal services attorneys, as well as *pro bono* attorneys and law students, is needed to help these low-income families stay in their homes and ensure that those homes meet legal standards for safety and sanitation, thus preventing homelessness and the break-up of families.

Proposed Pilot Projects:

As part of its work, the Group examined Civil Gideon models implemented in other jurisdictions, ranging from multi-stage, long term efforts to more direct legislative approaches. The models evaluated included among others: the Boston Pilot Project model, employing pilot projects in specific areas of need that are intended as sources of data collection to support the case for Civil Gideon,[53] and the California model that relies on legislation to create and fund Civil Gideon Pilot Projects.[54] After a close examination of pilot projects developed in other jurisdictions, the Group concluded that the Tenant Representation Project and the Residential Mortgage Foreclosure Diversion Program, the two local efforts that afford legal representation to low-income housing litigants, should serve as the Pilot Projects for the Civil Gideon Task Force and be expanded to include study components that will create a case for support of increased funding to legal services organizations to provide representation to low-income clients threatened with an imminent loss of shelter. This strategy is consistent with current political, social and economic conditions and trends in philanthropy and governance that demonstrate a preference for solutions and outcome based programs.[55]

[53] Chart outlining model projects, prepared by Lindsay Martin, Penn Law School, is attached as Appendix 8.

[54] See California Assembly Bill 590, *supra* note 18.

[55] *Supra*, note 45, 238-246.

An evaluation of the Diversion Program is currently being conducted by The Reinvestment Fund and funded by the Open Society Institute, which will evaluate the impact of the Diversion Pilot Program on Philadelphia's foreclosure crisis, in general, as well as the impact of the program on the specific homeowners engaged by the program. This study will include a small sample of mortgage foreclosure cases in which full representation was provided by CLS and PLA. The Group discussed exploring the possibility of supplementing this study to specifically evaluate the benefits and outcomes from providing full legal representation in foreclosure cases, and the Group is prepared to explore funding options should an alternative study be necessary.

In addition, the CLS Housing Unit and its Tenant Representation Project are under consideration by NPC Research as a potential study site that would be part of a national study of economic and social benefits of providing counsel to tenants in eviction cases.[56] NPC Research is an independent research and evaluation firm based in Portland, Oregon, that has been engaged by the National Coalition of the Civil Right to Counsel to design and conduct the national study. At the July 29, 2009 meeting of the Civil Gideon Task Force, the CLS Tenant Representation Project was endorsed as a pilot project of the Task Force, and Chancellor Sayde Ladov sent a letter to NPC Research urging them to select this project as one of the research sites for the proposed study.[57] NPC is currently seeking funding for the study, which will include some funding for staff participation in the study.

The efforts currently underway to evaluate the selected demonstration projects preclude the immediate need for the Group to develop its own study and to determine how to fund such a study. However, the Group is prepared to develop and explore funding options should an alternative study of either project be necessary to further the efforts of Civil Gideon. Further work by the Group is also needed to explore strategies to obtain more funding to enable existing legal service organizations to provide increased full representation in mortgage foreclosure and eviction cases.

Recommendations:

Based upon the preliminary findings outlined above, the Housing Working Group makes the following initial recommendations:

1. Seek to increase the financial resources of existing legal services providers engaged in the full representation of low-income homeowners in foreclosure and tenants in eviction cases. Philadelphia public interest legal organizations are excellent providers of legal services on the housing front; the work these programs are now doing should serve as the "pilot projects" to be studied rather than starting new projects,

[56] A description of the NPC Research study is attached as Appendix 9. Further clarification is needed from NPC to determine if cases handled by both CLS's Tenant Representation Project and Housing Unit will be included in its study.

[57] Chancellor Sayde Ladov's letter to NPC Research, August 10, 2009, attached as Appendix 10.

2. The existing Residential Mortgage Foreclosure Diversion Project and the Tenant Representation Project should serve as Civil Gideon demonstration/ pilot projects that can be surveyed and from which data can be collected to further the efforts of the Civil Gideon Task Force to expand the provision of full legal representation to low-income people threatened with the imminent loss of shelter,

3. Data should be collected to measure the social and economic effectiveness of the provision of legal representation to homeowners facing foreclosure, and tenants facing evictions. Results from a study of these pilot projects may be used to provide a foundation for seeking significant funding from the federal government, and local and state legislatures, as well as other funding sources, to support the expansion of legal services for low- income people facing the imminent loss of shelter,

4. The Fundraising Working Group should work with the Housing Working Group to identify a source of potential funding for evaluations of the pilot projects if the Housing Working Group is unable to meet its data collection and analysis needs through the study efforts currently in progress,

5. The Philadelphia Bar Association should assist in the recruitment of *pro bono* resources for the Tenant Representation Project and VIP's Mortgage Litigation Project, and

6. The Housing Working Group should continue to evaluate and explore the viability of limited representation projects in foreclosure and eviction cases to implement in the short term. [58]

[58] The legal community has been investigating ways to provide some form of legal assistance, short of representation, in areas for which the availability of counsel is extremely limited, and the prospect of full representation in the short term is unlikely. For example, this fall, the Philadelphia Court of Common Pleas, in cooperation with the Philadelphia Bar Association and volunteer lawyers, will launch an initiative aimed at mediating and resolving legal disputes between landlords and tenants. The mediation, to be provided by trained *pro bono* settlement masters under the Court's supervision, will take place in the time between the filing of a statutory appeal from judgment entered in Municipal Court and the trial date in the Court of Common Pleas. Both parties, with counsel if represented, will be mandated by the Court to meet with a settlement master in an effort to reach a mutually beneficial agreement prior to the trial. See also a memorandum describing the New York City Volunteer Lawyer for a Day Project, written by John Caddell, law student at the University of Pennsylvania Law School, attached as Appendix 11.

V. FAMILY LAW WORKING GROUP PRELIMINARY REPORT AND RECOMMENDATIONS

Objective:

The Civil Gideon Task Force has acknowledged that the loss of access to one's child through severely curtailed physical custody or visitation can be as devastating as the complete termination of a parent's rights. The Task Force thus decided that the initial efforts of the Family Working Group should include examining approaches to provide legal representation to indigent parents seeking to establish or maintain their parental custodial rights. The Family Law Working Group was also charged with developing or identifying existing pilot projects that would provide expand legal representation to parents in these types of custody cases, and making recommendations on how to implement such projects.

Findings:

The Need for Legal Representation in Custody Cases

The Family Law Working Group ("Group") conducted an informal study to assess the extent to which the need for representation in custody cases is being met in Philadelphia. The Group surveyed various legal services organizations to determine how many requests for representation in custody matters were received in the 2008 calendar year, and how many clients were provided with direct representation.[59] The Group also surveyed Family Court to ascertain what percentage of custody filings (initial complaints for custody, petitions to modify, and petitions for contempt) were filed by attorneys.[60] While the statistical analysis used in this informal survey admittedly is not sophisticated,[61] the Group determined that in Philadelphia, approximately 90% of litigants in custody cases are unrepresented by legal counsel. These findings were consistent with a prior report issued by the Women's Law Project in 2003.[62]

The Group survey reported almost 17,000 child custody cases were filed directly with Family Court in 2008. Of that number, only 1,805 were filed by attorneys. Therefore, without considering those cases in which a legal service agency is involved, more than eighty-nine percent (89%) of child custody cases that proceeded through Family Court in 2008 did not involve attorneys.

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[59] A Chart outlining the results of this survey is attached as Appendix 12.

[60] *Id.*

[61] The data collected by the survey of legal service providers may include some duplication as it is possible that some clients approached more than one of the organizations surveyed. In addition, while legal services organizations have become adept at tracking cases, tracking methodologies may vary from organization to organization.

[62] Women's Law Project**,** *Justice in the Domestic Relations Division of Philadelphia Family Court: A Report to the Community* (April 2003), available at http://www.womenslawproject.org/resources/WLP_FamlyCourt.pdf

Considering the Need In the Family Law Context

The Group acknowledged that family law is an area in which an adult's legal rights and obligations (and violations of them) directly impact the security of the lives of others, perhaps to a greater extent than any other area of law. That impact may explain why child custody is the category with the greatest number of existing civil right-to-counsel statutes.[63] Federal law requires that states receiving federal child abuse prevention and treatment funding appoint a representative for children involved in abuse or neglect proceedings, so virtually all states, including Pennsylvania, have statutes guaranteeing either the right to an attorney or the right to a guardian *ad litem* for children in abuse and neglect cases.[64] Correspondingly, many, though not all, states also guarantee counsel to parents in state-initiated termination-of-parental-rights proceedings and/or abuse and neglect proceedings. In Pennsylvania, state law provides for the appointment of counsel for a child and for a parent when a parent's rights are threatened with involuntary termination.[65] There is also authority for a court to order appointment of an attorney to represent a child in a custody proceeding.[66] However, there is no corresponding right to counsel for a parent in a custody proceeding.

Family law is a complex system for unrepresented litigants to navigate, particularly if they have limited education and minimal resources, yet what is at stake is of the greatest importance. The right to see and raise one's own child is no less a basic human need than the oft-cited duo of shelter and sustenance both for parents *and* for children, who are dependent upon adults for their well-being. It is the recognized policy of this Commonwealth to assure reasonable and continuing contact of the child with both parents when such is in the best interests of the child.[67]

The outcomes of custody disputes between private parties can vary greatly depending on whether or not counsel is involved. For example, parents represented by counsel are more likely to request and retain joint custody arrangements,[68] shared decision making arrangements[69] and reasonable visitation arrangements than parents who proceed *pro se*.[70] These more cooperative

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[63] Laura K. Abel and Judge Lora J. Livingston, *The Existing Civil Right to Counsel Infrastructure*, JUDGE'S JOURNAL, Fall 2008, at 24, 25. Available at http://brennan.3cdn.net/070f13df803e4174cd_jrm6bhgvp.pdf

[64] See, e.g., 42 PA. CONS. STAT. ANN. § 6311 (2001).

[65] See, e.g., 23 PA. CONS. STAT. ANN. § 2313 (2001).

[66] Pa.R.C.P. 1915.11

[67] 23 PA. CONS. STAT. ANN. § 5301 (2001).

[68] ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 108-13, 300 (Harvard Univ. Press 1992).

[69] Jane Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REFORM 65, 114, 132 (1990).

[70] *Id.* at 132-33.

outcomes are often more sustainable and agreeable to both parties and consequently both positively impact the minor children involved and minimize further dependence on the courts. This in turn saves the courts' time and preserves precious financial resources.

If one party is represented by counsel and the other is not, perhaps due to indigency, the case is more likely to be prolonged, and absorb increasingly more resources. Further, such situations can have gender-based implications. Because men are already likely to have greater financial assets than women, the likelihood of mothers proceeding *pro se* against fathers represented by counsel is increased. Domestic violence is also a pervasive problem in many cases in which custody is contested.

Limits of Pro Bono/Limited Representation Models

Custody cases are not always complicated, but many attorneys are reluctant to provide *pro bono* legal assistance in custody matters because these cases are often highly emotionally-charged and acrimonious. Also, custody cases are rarely "settled" in a single proceeding. The reality that custody fights can be litigated continuously throughout a child's minority contributes to the reluctance of many private attorneys to handle *pro bono* custody cases.

These fears are not entirely without merit. Family law is a field that *is* often highly emotionally-charged, and there are procedural barriers that make an attorney's swift exit from a custody case difficult. Once an attorney has entered an appearance for a custody client, he or she is legally obligated to appear or act in each successive proceeding unless another attorney enters an appearance. Often, it is highly unlikely that another *pro bono* can be found given the high level of demand. If the volunteer attorney petitions for leave to withdraw, the likelihood that the petition will be granted is further restricted by the right of the client to object, or by an objection from the other party.

Yet these challenges need not be dispositive. A variety of mechanisms have been proposed, and in some cases implemented, in other jurisdictions to address the fears of volunteer attorneys that they may be trapped in interminable custody proceedings. For example, Philadelphia could adopt and implement a procedure to allow volunteer attorneys to enter their appearance for a single proceeding. Other jurisdictions such as Allegheny County allow attorneys to volunteer in child custody cases for a finite proceeding. However, the Group recognizes the difficulty with providing direct representation to low-income clients in custody cases for a single hearing. If the case does not resolve at that proceeding and if the attorney's representation is limited to that single court event, the client is then left with trying to prepare for subsequent hearings before a judge without the assistance of legal counsel. Any benefit gained by providing the limited representation may well be lost.

Another proposal, to create a staffed custody "help desk", was considered. The Group recognized the appeal of this low-commitment model among volunteer attorneys, and further that providing legal information via the help desk may enable some cases to resolve without legal representation, theoretically freeing up attorneys to provide direct representation for others. However, the Group recognizes that providing legal information without legal representation does not directly comport with Civil Gideon. Members of the Group noted that, nevertheless,

such a program might serve as a stepping stone toward the ultimate goal of direct representation in child custody cases.

The Group also acknowledges that judicial support is essential for any legal advice, mediation or other legal assistance program that is less than full representation, and that the development of any such program would require support of the administration of the Domestic Relations Branch of Family Court. Further investigation and discussion with the leadership of Family Court will be needed to determine whether a model can be created to allow for finite representation that assists individuals who cannot afford to retain counsel for full representation while meshing with the overall priorities of the Family Court.

Recommendations:

The Family Working Group makes the following preliminary recommendations to expand the provision of legal counsel to low-income litigants in custody cases:

1. *Increase the financial resources for existing legal services agencies to provide expanded legal representation in custody cases.*

The Group remains convinced that legal services agencies are best able to serve indigent clients, based on their extensive level of expertise combined with an excellent track record of providing high quality legal services in these sometimes difficult cases. Efforts should be made to increase the financial resources of the legal service providers to expand legal representation in custody cases. However, given the challenges of this approach in the current economic crisis, the Group also recommends consideration and implementation of the alternative pilot projects described below in the short term.

2. *Increase direct representation through the formation of a new pro bono appointment program.*

The Group recommends that the Philadelphia Bar Association propose, and the First Judicial District approve, a pilot project which would provide for the appointment of *pro bono* counsel for low-income litigants for a "Judge's List." In cases that meet the income and case-specific requirements of the model, a volunteer attorney would be assigned the case from a list maintained by the Supervising Judge of the Domestic Relations Branch of the Family Court Division. If a Master or Judge determines that a particular case meets the criteria, the Supervising Judge will assign a volunteer attorney to the case. In situations where clients have already approached a legal services agency first and the organization cannot accommodate the request for representation, the organization could contact the Supervising Judge, who would then assign a volunteer attorney from the list.

The Group recommends the following criteria for a case to be eligible for inclusion in the pilot program: the custody dispute must involve allegations of physical and/or mental abuse, drug addiction or other factors that would hinder a parent's ability to nurture a child, as well as cases where there are serious concerns for the safety of the child.

While this model would address the most difficult factual and legal circumstances, and thus may discourage some *pro bono* volunteers, the Group anticipates that a

number of well-qualified attorneys will accept them because a judge of the First Judicial District is requesting the assistance.

In addition to the case criteria outlined above, participation by *pro bono* attorneys would be qualified as well: The list would be limited to seasoned attorneys with at least five (5) years of experience handling child custody cases and who are members of the Philadelphia Bar Association's Family Law Section or other similar professional organization that meets regularly to discuss family law issues. The selectivity of the list would in turn attract more high-quality attorneys to these *pro bono* cases.

While this pilot project appears to be relatively simple from an administrative perspective because it can be implemented by the Supervising Judge and his or her staff alone, a system or procedure nonetheless would need to be created to provide oversight and appropriate follow-up to ensure that the program is proceeding efficiently and effectively. A successful pilot project of this type also will require ongoing recruiting efforts; the program will only be as successful as the efforts and commitment of its participants to devote the resources necessary for it to function.

3. *Develop an attorney rotation "wheel" project.*

The Group also recommends that the Bar Association and the First Judicial District adopt and implement a "wheel" project that parallels the court appointed counsel system used in Dependency Court in the Juvenile Branch of Family Court. In this model, a client would go to court to file, where court personnel would identify them as being eligible for a court appointed attorney and assign the next available attorney to that client. The identification could be done through the use of a checklist or other rubric that could be submitted with the client's IFP forms and would be part of a newly instituted general uniform screening process that would be used by family court and legal services agencies.

Attorneys who want a place on the wheel must have completed a Philadelphia VIP training or an equivalent program through a public service agency, and have either three years of experience with family court cases or have handled a VIP referral to completion. The attorney would also be required to maintain membership in the Philadelphia Bar Association's Family Law Section or other similar professional organization that meets regularly to discuss family law issues.

An oversight component should be developed through which clients could file grievances through the same unit or program of the Court that places lawyers on the "wheel" and who evaluates clients for eligibility. Based on experience in other projects, the Group recommends that one or more sources of funding be developed to ensure that lawyers in this project are paid a minimum of $50 per hour, which should increase proportionally with the fees paid to attorneys on the dependency court wheel. Further research would be necessary to determine whether the Domestic Relations Branch of Family Court has the resources to undertake, administer and fund such a program.

Additional Recommendations and Future Steps:

- *Training and Mentoring*: Many attorneys with experience in pilot programs elsewhere have cited frustration with poorly trained volunteer attorneys. Training programs would need to be developed for the above models. It has been observed that many volunteer attorneys do not stay committed because they are intimidated or feel unsupported. A mentoring or "coaching" program for volunteer attorneys should be considered for the above models.

- *Scope:* The scope of the custody pilot project must be further clarified and the priorities of custody cases to be included in any pilot project should be delineated. Other jurisdictions have approached the issue incrementally, such as first assisting people for whom English is not their first language, victims of domestic violence, cases where only one side has representation, people with disabilities, etc. Clarification is also needed on when the right to counsel attaches in the legal proceeding. The Group recommends that it should attach at least at the Master's level, but ideally at the time of filing, as parties often run into serious problems during the conference stage.

- *Funding:* Possible sources of funding for the wheel model need to be identified by the Fundraising Working Group. Funding may be available in particular issue areas, such as domestic violence, disability or health, and may be available from the city, federal or private sources. The Family Working Group suggests that consideration be given to accessing funding from private sources through use of a "formula" that would determine the "cost" of a custody case by multiplying the $50/hour proposed fee by the average number of hours needed to see a case through to completion. Data from legal services agencies could be used to help determine this average. This strategy would help to quantify the need by identifying it in monetary terms. This approach is used by many non-profit organizations, essentially outlining the value of a donation in a certain dollar amount in terms of the number of persons in need of legal services who will be represented in child custody cases as a result of the financial support provide.

VI. OUTREACH TO BENCH, BAR AND COMMUNITY AND COMMUNICATIONS WORKING GROUP PRELIMINARY REPORT AND RECOMMENDATIONS

Objective:

The Communications Working Group was charged with leading the efforts to develop an education plan, which would include a communications plan and outreach strategy to educate the public at large, judiciary, legislature, private bar, and other key stakeholders about the case for Civil Gideon. These tasks include both interim and long-term strategies, and will incorporate the findings and recommendations from the other Task Force Working Groups as approved by the Board of Governors.

While it is anticipated that this Group's principal efforts will begin after adoption of this preliminary report and recommendations by the Board of Governors, this Group recently accomplished an important initial step in introducing Civil Gideon to the wider community.

On October 23, 2009, a member of the Working Group, on behalf of the Task Force, made a presentation concerning the need for Civil Gideon and the activities of the Task Force at the October Quarterly Meeting of the Philadelphia Bar Association at the Bench Bar and Annual Conference in Atlantic City. That meeting was attended by over 400 members of the bench and bar, and was also attended by four members of the City Council of Philadelphia. This provided an early opportunity to tee-up the initiatives to a wider bench, bar and community audience. The message was well received.

Recommendations for Future Strategies:

Following the presentation of the Task Force Report to the Board of Governors, and if the Report is adopted, the Working Group will develop, in conjunction with other Task Force working groups, a comprehensive education plan that can be used to make the case for Civil Gideon with the state legislature, the public at large, the judiciary, City Council, the private bar and larger legal community and other key constituencies. The education plan will incorporate the recommendations made by the Legislative Working Group in Section III, p.17 of this Report, as well as the following specific components:

1. The development of educational materials, including "case statements" to present to various stakeholders, which will highlight aspects of the unmet need, the benefits of representation and other qualitative issues, as well as case studies and results involving real people and their issues to foster the most persuasive arguments in support of funding and general support.

2. The development of a communications plan, which may include a series of articles and op-ed pieces promoting the Task Force initiatives and the case for Civil Gideon to be submitted to various publications, such as the *Philadelphia Inquirer* and The *Legal Intelligencer*.

3. The development of strategies to promote awareness of Civil Gideon to a wider audience through public service announcements and appearances on various local television and radio shows, and ultimately expanding the Civil Gideon discussion to all

forms of media in which members of the community regularly address issues of public importance.

4. Identification of other venues and forums in which to present focused outreach to specific stakeholders through communications that address the specific concerns and goals of those stakeholders and build momentum for Civil Gideon initiatives.

The Philadelphia Bar Association will be instrumental in assisting in the dissemination of the educational materials and providing ongoing support for the execution of the education plan and communications and outreach strategies developed by the Task Force.

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2006 EDWARD V. SPARER SYMPOSIUM: CIVIL GIDEON: CREATING A CONSTITUTIONAL RIGHT TO COUNSEL IN THE CIVIL CONTEXT: A RIGHT TO COUNSEL IN CIVIL CASES: LESSONS FROM GIDEON V. WAINWRIGHT

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SUMMARY:
... These numbers are stunning, but they do not convey the depth of the desperation low-income people suffer when they cannot find legal representation. ... In some places, indigent defendants routinely spend long periods of time in jail before counsel is appointed, and when counsel is appointed, the attorney sometimes lacks the training, experience, resources, or independence to adequately represent the client. ... Twenty-five years have passed since the Court's Lassiter ruling - even more than the twenty-one years that elapsed between Betts and Gideon - leading a number of commentators to predict that the Supreme Court will now see fit to overrule Lassiter by requiring the appointment of counsel in at least some categories of civil cases. ... Funding and Enforcing Gideon Over the Past 40 Years - The Current Indigent Defense Reform Movement ... Moreover, in recent years indigent defense reform advocates have had some notable successes, which may show the way for similar efforts on the civil side. ... It may be that the indigent defense reform cases will have a similar spill-over effect for civil right to counsel efforts, by making courts and legislatures more aware of the problems for individuals and society when counsel are absent or lack the resources to provide competent representation during court proceedings. ...

TEXT:
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More than three decades after riots in urban centers across the United States helped prompt Congress and President Nixon to create the federal Legal Services Corporation (LSC), the vast majority of low-income people remain unable to exercise their right to a meaningful day in court. While there is one lawyer for every 525 people in the general population, there is only one lawyer for every 6,861 low-income people. n1 As a result, studies on both the national and state levels consistently show that more than eighty percent of the legal needs of low-income people go unmet. n2 These numbers are stunning, but they do not convey the depth of the desperation low-income people suffer when they cannot find legal representation. Many of the legal problems confronting low-income people concern the most important as-

pects of their lives: custody of their children, the ability to remain in their long-term housing, compensation for work they have performed, and government benefits enabling them to put food on the table and obtain health care. n3

The high level of unmet need for legal assistance stems in part from chronic under-funding of LSC. LSC's funding has never been nearly adequate to meet the need for legal services for low-income people, and the funding gap has increased over time. When the current federal appropriation for LSC is adjusted for inflation, it constitutes only forty-nine percent of the amount Congress appropriated for LSC in 1981, even though the number of people eligible for legal services increased by fourteen percent during this period. n4 The emergence of Interest on Lawyer Trust Account (IOLTA) funding for civil legal aid, of state and local funding for civil [*528] legal aid, and of high-level Access to Justice commissions in many states, have been welcome developments in the past two decades. n5 Even those new strategies, however, have not brought in nearly enough funding to meet the need. As Justice Earl Johnson Jr. has demonstrated, other industrialized democracies spend far more per capita, far more of their gross national products, and far more of their judicial budgets, on access to legal assistance. n6

Frustration with the chronic nature of the problem has led to a renewed search for ways to address the problem. Most states have a statutory or constitutional right to counsel in termination of parental rights cases. n7 Some extend the right to other family matters as well, including abuse and neglect proceedings, paternity matters, and child custody. n8 A number of states guarantee counsel in other types of proceedings, including civil commitments, waiver of parental notification for minors seeking an abortion, and quarantine. n9

Bar leaders, academics and others are exploring the potential for expanding the scope of the right to counsel to other types of cases. In August 2006, the American Bar Association issued a resolution calling on state governments and the federal government to guarantee a right to counsel for low-income people "in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody ... ." n10 State bar associations are beginning to follow suit. n11

Over the past few decades, federal and state courts have also grappled with the extent to which federal and state constitutions guarantee a right to counsel in civil cases. n12 In recent years, a number of courts have issued important decisions [*529] expanding the right to counsel. n13 In 2002, a federal district court in New York held that the Federal Constitution and state statutes guaranteed the right to counsel to the class of women whose children the state sought to remove because the women were victims of domestic violence. n14 In 2005, another federal district court in Georgia ruled that the Georgia Constitution and a state statute guarantee foster children a right to counsel in dependency proceedings in which their parents have been charged with abuse or neglect. n15

Also, in 2003, three judges on Maryland's high court issued a concurring opinion calling for recognition of the right to counsel under the state constitution for a woman involved in a contested child custody dispute, proclaiming that the right "goes to the very center of the American constitutional, and extra-constitutional promises - equality under the law." n16 Although the other four judges on the court decided to avoid the issue in that case, the passion of the three-judge concurring opinion testified to the importance of the issue. n17

The need to explore the expansion of the right to counsel in civil cases is based in substantial part on the fact that people facing criminal charges and the possibility of prison time have had a right to counsel since 1963. n18 This has been one of the fundamental tenets of the criminal courts. n19 It has meant that criminal defendants are never forced to represent themselves, and are always entitled to rely on the advice of an attorney as they navigate their procedurally difficult criminal cases. n20 The attorneys are required to inform the defendants of their possible defenses, to engage in testing the prosecution's version of the facts, and to make the most persuasive legal arguments available on the defendant's behalf. n21 Judges hearing criminal cases are accustomed to having defense attorneys present, and as a result are more aware of defendants' rights. n22 The result is that the rights of a criminal defendant are protected in criminal proceedings to an extent largely unheard of in the civil context. n23 Given the general recognition of the importance [*530] of the right to counsel in criminal cases to the fairness of the proceedings, it is inevitable that participants in civil proceedings will question to what extent a similar right exists on the civil side.

At the same time, enthusiasm for the civil right to counsel notion inevitably runs up against the reality that implementation of the right to counsel in criminal proceedings has been piecemeal. As this article discusses below, more than forty years after the Supreme Court declared in Gideon v. Wainwright n24 that there exists a constitutional right to counsel in criminal cases, there continue to exist serious difficulties securing that right in some parts of the country. n25 In some places, indigent defendants routinely spend long periods of time in jail before counsel is appointed, and when counsel is appointed, the attorney sometimes lacks the training, experience, resources, or independence to adequately represent the client. It is imperative that any exploration of the scope of a civil right to counsel be based on an under-

standing of the experience with the criminal right to counsel. This article attempts to draw some useful lessons from that experience.

I. Securing the right: Lessons from the litigation of Gideon v. Wainwright

In 1963, the Supreme Court issued its landmark decision in Gideon v. Wainwright, holding that the Sixth Amendment to the Federal Constitution guarantees all individuals facing felony charges a right to counsel. n26 Notwithstanding the obvious differences between the criminal and civil realms, that opinion contains many lessons for those considering a Civil Gideon.

A. The Supreme Court recognized the categorical right to counsel in criminal cases twenty-one years after refusing to recognize such a right.

Twenty-one years before Gideon, the Supreme Court rejected the notion that there was a categorical right to counsel in criminal cases. In 1942, in Betts v. Brady, n27 the Court ruled that although the Sixth Amendment may guarantee counsel in some criminal cases, whether it does so depends entirely on the facts of each individual case. n28 The Court held that if special circumstances are present that threaten to rob the proceeding of fundamental fairness, then appointment of counsel is required. n29

In reaching its decision in Betts, the Court relied on the fact that, at the time, a majority of the states did not provide a right to counsel for all criminal defendants. n30 The Court also noted that, were it accepted, the logic of Betts' [*531] argument would require the appointment of counsel not only in criminal cases, but in civil cases too. n31

Given the firmness with which the Betts Court rejected a categorical approach, it seemed unlikely that the Court would reverse itself and propound a categorical right. However, over the next few decades, the Court began to reverse itself, finding that counsel was required in a variety of different situations. n32 Finally, 21 years after its ruling in Betts, the Court issued its opinion in Gideon v. Wainwright, explicitly overruling Betts. n33 This time, the Court stated that the Sixth Amendment's guarantee of counsel is binding on the states, and that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." n34

The factors that led the Court to reverse its Betts ruling are of particular interest in the context of claims for a Civil Gideon, because Betts has a parallel on the civil side. n35 In 1981, in Lassiter v. Department of Social Services, n36 the Court refused to rule that the Federal Constitution guarantees appointment of counsel for all parents facing the termination of parental rights. n37 Rather, the Court ruled that courts faced with applications for counsel in civil cases must, on a case by case basis, weigh "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions," and then "set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." n38

Twenty-five years have passed since the Court's Lassiter ruling - even more than the twenty-one years that elapsed between Betts and Gideon - leading a number of commentators to predict that the Supreme Court will now see fit to overrule Lassiter by requiring the appointment of counsel in at least some categories of civil cases. n39

Some of the conditions that contributed to the reversal of Betts are already in place on the civil side. First, widespread academic condemnation for the Court's ruling in Betts may have been among the factors leading to that decision's demise. n40 Many highly respected academics and judges have likewise roundly condemned Lassiter. n41 Some have characterized the opinion as undermining "the legitimacy of [*532] the justice system" by failing to ensure legal representation in cases "where crucial interests are at issue, legal standards are imprecise and subjective, proceedings are formal and adversarial, and resources between the parties are grossly imbalanced." n42 Others have criticized the opinion for incorrectly balancing the three factors the Court said should govern whether due process has been denied: n43 "(1) the private interest at stake, (2) the government interest, and (3) the risk that the procedures used will lead to erroneous decisions." One critic has noted that the third factor dictates appointment of counsel "whenever in forma pauperis status exists." n44 "As every trial judge knows, the task of determining the correct legal outcome is rendered almost impossible without effective counsel." n45 Still others have noted that the United States is anomalous in failing to guarantee a right to counsel in important civil cases. n46

Second, the Court appears to have concluded that case-by-case determinations are simply unworkable in the criminal context. n47 For one thing, they create a heavy burden on the trial courts by forcing them adjudicate whether the right to counsel attaches in each case. n48 For another, it is time-consuming for the appellate courts - including the Su-

preme Court - to hear the many appeals resulting from the denial of counsel. n49 Moreover, although the imposition of a right to counsel on the states would seem to reduce state sovereignty, Gideon's attorney argued that appeals from right to counsel denials intrude more deeply, because they require the appellate courts to review the facts of each case and leave the states uncertain about what standards to apply. n50 At oral argument, Justice Black seemed intrigued by this theory, asking Florida's counsel, "Why isn't [Betts] as much interference with the states as an absolute rule? One of my reactions to Betts was the uncertainty in [*533] which it leaves the states." n51 Finally, it is expensive for the states to have to retry each case in which counsel was improperly denied, and often the retrials end in acquittals because witnesses' memories become cloudy and evidence is lost in the interim. n52

Similar problems certainly exist on the civil side. The case-by-case determination called for by the Lassiter Court, and appellate review of denial of counsel claims, are just as unwieldy and inaccurate as the case-by-case determination and appellate review necessitated by Betts. n53 Indeed, it is for this reason that the Alaska Supreme Court rejected Lassiter's case-by-case approach in favor of a bright-line rule requiring the appointment of counsel in all termination of parental rights cases. n54 The court warned: "The case-by-case approach adopted by the majority does not lend itself practically to judicial review ... . A case-by-case approach is also time consuming and burdensome on the trial court." n55 One commentator has observed that family courts in most states simply do not hold Lassiter hearings. n56 As a result, appellate courts faced with denial of counsel claims lack an adequate record on which to base their decisions. The result is either a time-consuming remand for a Lassiter hearing or an appellate ruling based on speculation or an improper legal standard. n57 Further exploration of the effects of the Lassiter case-by-case standard would no doubt be informative.

A third factor in the reversal of Betts is the fact that, by the time the Court heard Gideon, in all but five states criminal defendants in federal court were entitled to the appointment of counsel pursuant to the state constitution, a state statute, or court rulings and practice. n58 Unfortunately, a similar state of affairs on [*534] the civil side led to an entirely different result in Lassiter. n59 There, the Supreme Court recognized that:

Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well ... . Most significantly, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases. n60

Nonetheless, the Lassiter Court held that whether the appointment of counsel was constitutionally required must be decided on a case-by-case basis. n61

Finally, twenty-three states submitted amicus briefs urging the Court to reverse its Betts ruling. n62 This astonishing development appears to have stemmed from the fact that the vast majority of states already provided counsel for defendants in criminal cases - most of them as a matter of right. n63 Moreover, Walter Mondale used his position as Attorney General of Minnesota to persuade his colleagues in other states to join him as an amicus. n64

Although it is difficult to imagine a majority of states arguing today for the recognition of a new constitutional right that would increase their constitutional obligations, it is not entirely out of the question. n65 There is growing concern among state judges and legislators about the widespread inability of low-income people to obtain counsel in civil cases. n66 A number of states now have statewide Access to Justice commissions, n67 many of which include legislators and high-level members [*535] of the judiciary as participants. n68 Through their involvement in the commission process, the participants gain an understanding of both the importance of civil legal representation and the extreme paucity of resources for lawyers for the poor. n69

In another example of the degree to which the states have begun to identify civil legal aid as essential to the state's self-interest, the state of Oregon is challenging the constitutionality of federal restrictions on Oregon's civil legal services funding that goes to programs receiving any funding from the federal Legal Services Corporation. n70 One of the state's claims is that the ability of states to fund civil legal services is essential to the ability of the state to run its justice system. n71 Involving the states in efforts to expand access to legal services thus plays an important role in educating key decision makers about the widespread inability of low-income people to obtain legal representation in civil cases and about the widespread effects that inability has on all facets of society.

B. The practical difficulties created by recognition of the right to counsel must be addressed but need not preclude recognition of the right.

A frequent response to calls for expansion of the right to counsel in civil cases is that the practical obstacles are simply too great. n72 Critics may argue that the Supreme Court issued its Gideon opinion in a more innocent time, when courts and legislatures were unfamiliar with the expense and practical difficulties that would turn out to accompany the right to counsel in criminal cases.

In fact, however, the Gideon Court was aware of many of the obstacles that opponents now claim will make the right infeasible, and dismissed them as insufficient to prevent recognition of the right to counsel. n73 One or more parties before the Court warned that granting a right to counsel in felony cases would: (a) require the Court to determine next whether a right to counsel existed in misdemeanor and civil cases; n74 (b) require courts to start adjudicating whether [*536] adequate counsel had been provided; n75 (c) lead to holdings that states must cover other vital expenses such as bail, travel, witnesses, experts, and investigators; n76 (d) impose an enormous financial burden on the states; n77 and (e) be unworkable because there would not be enough attorneys available to meet the system's need. n78

The Gideon opinion itself does not indicate why the Court decided to recognize the right to counsel despite these issues. n79 Nonetheless, the fact that the Gideon Court was undaunted by those difficulties demonstrates that awareness of similar obstacles in the civil context need not doom a litigation initiative to establish a right to counsel in civil cases. However, the Gideon example suggests that courts will find it easier to evaluate the claim for a Civil Gideon if they are provided with solutions to these practical issues.

Notably, the Supreme Court has continued to expand the scope of the right to counsel in criminal cases, notwithstanding the Court's clear recognition of the difficulties states have encountered in implementing Gideon. In Argersinger v. Hamlin, n80 for example, the Supreme Court extended the right to counsel to defendants charged with misdemeanors and facing incarceration. n81 Concurring opinions discussed the high volume of cases that would be affected, noted that the states were already having difficulty providing competent counsel for all felony defendants, and predicted that the states would find implementing Argersinger even more difficult. n82 Nevertheless, the Court did not shy away from its duty to correctly interpret the Constitution in the face of these difficulties. Just four years ago, in Alabama v. Shelton, n83 the Court again extended the right to counsel, holding that a suspended sentence that may result in incarceration may not be imposed unless the defendant was represented by counsel. n84

It is evident from the Gideon decision that the courts can decide a matter like Gideon without fully articulating the entire scope of the right. In Gideon itself, an amicus brief submitted by twenty-three states proposed that the Court's decision be [*537] a narrow one. n85 The brief noted that "the question of the right to obtain counsel in misdemeanor cases might be foreseen as the troublesome next step," but emphasized that such cases might never reach the Court, and that "as of this time, ... the experience of the states justifies the restriction of the right to serious charges." n86 The Gideon Court responded by recognizing the right to counsel in felony cases, without specifying whether the right would extend to misdemeanors and civil cases, or whether the right would require states to pay for experts, investigators and other aspects of a defense. n87 Likewise, in Argersinger, the Court stated that it "need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, ... for here petitioner was in fact sentenced to jail." n88

Courts considering cases seeking to expand the right to counsel in civil cases can, and very likely would, take the same narrow approach: deciding whether there is a right to counsel in the type of case before them, without determining whether other types of civil cases or other types of litigants would be entitled to counsel too. Those questions may be left for another day.

C. Litigants are not better off without counsel.

Civil Gideon critics sometimes warn that litigants are likely to fare better without legal representation. n89 Judges are more lenient with unrepresented litigants, the argument goes, and the litigants are more likely to be acquitted or sentenced leniently in the absence of counsel. n90 Although these arguments were presented to the Court in Gideon, several justices made clear that they were not persuasive. n91 For example, both Justice Stewart and Justice Goldberg stated during oral argument that a judge cannot be both judge and counsel. n92 Likewise, Justice Stewart made clear that "Gideon would not be allowed to represent others in court," and so could not be considered an adequate representative of himself. n93 In the opinion itself, the Court stated:

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 [*538] obvious truth ... . "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' n94

These statements refute the argument that litigants are better off without representation, as do the many studies conducted since Gideon demonstrating that attorneys make an enormous difference in the outcome of civil proceedings. n95

II. Implementing the Right: Lessons from the post-Gideon experience

A. There have been successes and failures in implementing Gideon.

Over the past four decades, Gideon has transformed the way criminal prosecutions proceed. It has generated a significant amount of funding for indigent defense nationally. n96 Although nationwide data does not appear to exist, we do know that as of 1999, the 100 most populous counties in the nation spent a combined $ 1.2 billion on indigent defense. n97 This figure, which does not account for all national spending on indigent defense, far exceeds what the nation spends on civil legal services for the poor. n98

Gideon eventually resulted in the provision of counsel for all criminal defendants facing incarceration, as well as the representation of most criminal defendants by publicly financed counsel. n99 As of 1997, seventy-five percent of defendants facing criminal charges in state court, and sixty percent of those facing criminal charges in federal court, had a publicly financed attorney. n100

Some of the publicly financed counsel systems provide extremely high quality representation to their clients. One example is the Public Defender Service for the District of Columbia, which requires its attorneys to undergo rigorous training before they can represent clients, and to continue their training throughout the [*539] course of their employment. n101 The Bronx Defenders and the Neighborhood Defender Service of Harlem, pioneers in providing holistic representation to their clients, are others. n102 The quality of defense lawyering overall has improved in the past forty years, no doubt in part because of Gideon. n103

Among the roles that defense counsel play in a particular case are:

(1) to ensure that the government meets its burden of proof for each case; (2) to exonerate the innocent; (3) to ensure that those who are erroneously charged with more serious misconduct (i.e., over-charged) are held accountable only to the extent of their actual culpability; and (4) to secure just and effective sentencing results. n104

Public defenders also help clients make decisions regarding pleas and other important aspects of their cases, n105 advocate for diverting clients with serious mental illness or substance abuse issues out of the criminal justice system and into treatment that can address their core problems, n106 help clients find solutions to ongoing problems that have led to involvement with the criminal justice system, n107 and help clients and their families deal with the consequences of the client's criminal sentence. n108

In addition to benefiting individual clients, the universal right to counsel in criminal cases has had a positive influence on the way courts and other parts of the criminal justice system operate. The mere fact that lawyers are always present means that criminal courts must operate with more attention to due process and to defendants' other constitutional rights than many civil courts do. n109 Public defenders also act as a check on rogue police, causing police departments, prosecutors, and the judiciary to become increasingly alert to the possibility of police misconduct. n110 Finally, public defenders play an important role in informing [*540] legislators and other policy makers about the reality of their clients' lives, and in identifying policy reforms that will help prevent crime and reduce unintended and unfair effects of criminal justice policy on clients, their families, and their communities. n111 For example, public defenders have played an important role in informing the judiciary and policymakers about the racially disparate impact of imposing harsher sentences on people associated with crack cocaine than on people involved with other drugs. n112

Nevertheless, too many defendants have received representation that falls far below widely accepted standards. n113 Just ten years after the decision in Gideon was issued, Judge David Bazelon wrote that defendants are commonly represented only by ""walking violations of the sixth amendment.'" n114 Thirty years later, Stephen Bright warned, "No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel." n115

Empirical data demonstrate that the flaws in indigent defense representation are widespread. A 2000 report from the Federal Bureau of Justice Statistics found that, nationally, clients represented by private attorneys spoke to their attorneys more quickly after arrest, and more often throughout the representation, than clients represented by publicly financed counsel. n116 The procedures used by private attorneys and publicly financed attorneys also differed. Defendants represented by publicly financed attorneys were more likely to plead guilty, and less likely to go to trial or to be tried by a jury. n117

The catalogue of the ways in which states have failed to implement Gideon is long. n118 In the worst case scenario, no counsel is appointed at all. n119 More often, counsel is appointed too late in the process - after a defendant has been incarcerated for longer than his potential sentence, for example. n120 Counsel have [*541] been appointed with no training or experience in criminal law. n121 Indeed, one attorney in Georgia who practices real estate out of his home was forced to sue the court system to prevent it from appointing him to any more criminal cases. n122 Some attorneys who have been appointed have lacked basic competence in any field of law - as Stephen Bright notes, "One-third of the lawyers who represented people sentenced to death in Illinois have been disbarred or suspended." n123 The financial pressures on some counsel are so overwhelming that the attorneys fail to perform tasks that all agree are essential to an adequate defense, such as investigation, legal research, motion practice, and oral argument. n124 All too often, publicly financed counsel have time only for a "meet and plead" with their clients: they meet them for the first time in the courtroom prior to the preliminary hearing, and then, without conducting any independent factual investigation or legal research, counsel advises them to plead guilty. n125 There have even been instances of attorneys who have fallen asleep, or been drunk, during their clients' trials. n126

B. We now know the conditions in a state that result in adequate representation.

More than forty years of experience in attempting to implement Gideon has shed light on the conditions that result in the provision of constitutionally adequate representation to indigent criminal defendants. Many of these same factors are likely to affect the extent to which an expansion of the right to counsel in civil cases in a given jurisdiction results in the provision of competent counsel.

1. Adequate funding

The most important factor is clearly the existence of adequate funding for counsel. n127 Without adequate funding, even the brightest, most hardworking defense attorney cannot provide adequate representation. Inadequate funding results in caseloads that are too high, and in the inability of defense counsel to pay for essential tasks such as investigation and legal research. n128 The existence of [*542] adequate funding often depends on the state's fiscal health. n129 It also depends, however, on the inclinations of its legislature, governor, attorney general and judiciary. n130

Although it is extraordinarily difficult to raise funding to finance civil legal aid, the challenge may be less difficult in some respects than raising adequate funding for indigent criminal defense. For several decades - and with increasing vigor since federal LSC funding was cut in 1996 - civil access to justice advocates have been educating state legislatures, judiciaries, and executive branch personnel about how society benefits when low-income people are able to obtain representation in civil cases. n131 Even in the absence of a right to counsel mandate, an increasing number of states provide funding for civil legal services. n132 This education process has pushed states to be open to identifying ways to finance counsel in civil cases. n133 Moreover, the relative attractiveness of civil litigants, as contrasted with people charged with crimes, should also help make courts and legislatures more amenable to claims for financing a civil right to counsel. Indeed, a number of commentators have noted the gross disparities that result from the deprivation of counsel for civil litigants facing serious consequences such as being subjected to domestic violence or the loss of their housing, while counsel is provided for criminal defendants facing nominal prison time. n134

2. Manner of providing counsel

The manner of providing counsel has an enormous impact on the quality of representation provided. n135 States arrange to provide representation in criminal cases through institutional providers, private attorneys appointed for individual [*543] cases, private attorneys with a contract to handle all cases for a jurisdiction, or a combination of these methods. n136

Contracts between a county and a provider who agrees to take on all of a jurisdiction's cases are an increasing problem. n137 Such a contract provides defenders with an incentive to keep costs down in each case - by spending as little time as possible, and by avoiding travel and legal research costs - in order to maintain their profit margin. n138 When

the contract comes with little compensation, and when it permits defenders to maintain a private caseload, defenders have every incentive to maintain a private practice, which takes additional time away from their indigent clients. n139 One recent study found that, in comparison with full-time defenders, part-time defenders in Mississippi have less contact with their clients, engage in less investigation, and file fewer motions. n140 Clients of the part-time defenders spent far more time in jail prior to sentencing than did clients of full-time defenders. n141 Compounding the problems, some jurisdictions give the contract to the attorney submitting the lowest bid, with no quality control whatsoever. n142 This saves the jurisdiction money, but at a clear cost to the quality of service provided.

A few examples suffice to show the dangers of such an approach. According to Stephen Bright:

A family of lawyers who contracted with four counties in Georgia to provide representation for the past 20 years handled felony cases at an average cost of less than $ 50 per case. In another county, a contract lawyer came to court with responsibility for 94 people set for trial on the same day. Most cases were resolved with hastily arranged plea deals; none were tried. n143

Although the American Bar Association recommends that full-time attorneys handle no more than 150 felony cases each year, one contract attorney in Mississippi handled 700 felony cases for indigent defendants in one year and [*544] maintained a private practice on the side to make ends meet. n144 He had no time to conduct investigations or engage in motion practice on behalf of his clients. n145

In jurisdictions where attorneys are appointed on an hourly basis, the hourly fees are often far too low to allow the attorneys to recoup their costs. The problems are particularly bad where fees are capped at a low level, making it difficult for attorneys to afford to engage in vigorous representation in time-consuming cases. n146 The result can be that attorneys earn less than the minimum wage for such cases. n147

Many commentators agree that if funding is adequate, an institutional provider will almost always result in a more consistent and better level of representation than attorneys in private practice. n148 An institutional provider can offer centralized training and continuing education, shield individual attorneys from pressure by judges and legislators, and take advantage of economies of scale to pay for libraries, investigators, and other resources essential to competent representation. n149

The criminal side experience teaches that the identity and manner of appointment of counsel can have a significant impact on the success or failure of any civil right to counsel regime. Institutional legal services providers funded by the LSC and other sources already provide the vast majority of civil legal services for low-income people who lack a right to counsel. Some civil right-to-counsel schemes currently provide counsel through private attorneys appointed by a court; others do so by contracting with public defenders or civil legal services lawyers. n150 At the very least, any expansion of the right to counsel in civil cases will increase the importance of careful consideration regarding which scheme can best provide the mandated level of representation.

An expansion of the right to counsel in civil cases will create new pressures on all of these schemes. For example, taking on new contracts to provide legal representation to people who are entitled to that representation may require significant changes in the way that civil legal services offices operate. n151 The current reality, that there does not exist sufficient resources for the representation of all low-income people seeking representation in civil cases, requires such offices to select only those cases that they believe can make a significant difference for the [*545] individual or the community. n152 If a legal services program is under contract to represent everyone entitled to counsel, however, it will have to represent clients regardless of the strength and significance of the cases. n153 This will necessitate a change in the culture and practice of legal services programs. n154 They may need, for example, to adopt a strategy such as Anders briefs, in which attorneys appointed to represent criminal defendants in appeals that they believe are groundless inform the court of "anything in the record that might arguably support the appeal," and then seek to withdraw. n155 Or they may find other techniques to deal with such situations, but the point is that they will need to be open to new ways of running their offices and litigating cases.

3. Manner of appointing counsel

Who does the appointing is just as important as who is appointed. Attorneys will inevitably feel pressure to please whoever appoints them. n156 This can cause serious problems if the appointer is the presiding judge. n157 For example, a study conducted by the NAACP Legal Defense and Educational Fund found that "in one Mississippi county, the pub-

lic defenders' independence is thoroughly undermined by a circuit judge who not only decides which attorneys receive contracts to defend the county's poor, but also determines when they receive raises, and how much they receive." n158

Additionally, it is important to ensure that whoever makes the appointments is not subject to the pressures placed on elected judges, executive agency personnel, and legislatures. A study of homicide cases in Philadelphia found that many of the city's judges appointed attorneys based on political connections, with the result that a number of attorneys were ward bosses, judges' relatives, and party leaders. n159 Consequently, the best practice is to have an independent agency or board appoint counsel. n160 At the very least, if the judiciary is involved, it should be court personnel or a judge other than the one presiding over the defendant's case.

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4. Judicial culture

The judicial and legal culture in a county or state has an enormous impact on the quality of representation provided to indigent criminal defendants. n161 In many parts of the country, "poor representation resulting from lack of funding and structure has become a part of the culture of the courts, and it has been accepted as the best that can be done with the limited resources available." n162 According to Stephen Bright, "even when choosing from among those who seek criminal appointments, judges often appoint less capable lawyers to defend the most important cases." n163

Whether tolerance of inadequate representation results from malice, a desire for fast-moving dockets, or a chronic shortage of funds, it is clear that, in at least some parts of the country, judges turn a blind eye to inadequate representation. n164 For example, judges in Houston, Texas continued to appoint an attorney in death penalty cases even after he slept through parts of one of his death penalty trials. n165 Judges in one county in Mississippi routinely failed to appoint counsel for as long as a year after a defendant was first charged. n166

At the same time, a litigation and public education campaign waged by the National Legal Aid and Defender Association, the American Bar Association, the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, the Brennan Center for Justice, and others is increasingly educating judges about the extent to which the Constitution requires not just the appointment of counsel, but the appointment of constitutionally adequate counsel. n167 This campaign is changing the prevailing judicial culture in many places, and it may well lead to an increased awareness among judges of the need for competent counsel in important civil cases, as well as in criminal cases. n168

5. Acceptance and enforcement of minimum standards for counsel

Acceptance and enforcement of minimum standards for defense counsel has proven to be one of the most important factors in providing substance to Gideon's promise. Without standards, the funding entity has no way to know how much funding to allocate, and the appointing entity has no guidance as to whom it should retain to provide representation, the proper level of compensation, and the activities [*547] it should expect the attorney to perform. n169 Standards provide an essential counterweight to the competing financial pressures facing state or county legislatures, and to the desire of the judiciary to move their dockets along. n170 Standards also help trial judges determine whether an attorney is providing adequate representation, and they help appellate courts determine after the fact whether the representation provided was adequate. n171 This is particularly important in jurisdictions where the judiciary has become accustomed to a very low level of representation. n172 Finally, standards can be relied upon in institutional reform litigation to compel a state or county to bring its indigent defense system in line with the Constitution. n173

The American Bar Association, the National Legal Aid and Defender Association and others have developed standards for criminal cases setting minimum training and experience requirements for lawyers (sometimes called eligibility standards), standards establishing what tasks an attorney must perform (sometimes called performance standards), and standards governing how institutional providers should be administered (sometimes called administration standards). n174 The national guidelines are quite specific in some areas, such as maximum caseload. n175 To the extent that they are specific, the guidelines have proven extremely valuable to courts attempting to determine what constitutes constitutionally adequate representation. n176 However, a number of observers have [*548] noted that some of the existing guidelines are extremely vague. n177 This may be because of the difficulty of prescribing standards for all kinds of criminal cases, and for all jurisdictions in the country. n178 Thus, the onus falls on the states to prescribe minimum standards for their jurisdictions, and while a few have done so, many have not. n179

Of course, in addition to setting standards there must be an entity with responsibility for enforcing them. Surprisingly, in many jurisdictions there is [*549] none. n180 Instead, contracts or appointments are made without ever in-

quiring into the attorneys' training and experience, and no one ever evaluates caseloads, plea rates, whether attorneys conduct investigations or engage in motion practice, or any other indicia of competent representation. n181

Given the experience on the criminal side, it is predictable that the establishment and enforcement of standards can play an extremely useful role in helping to secure the right to counsel in civil cases. Whoever is responsible for appointing the new attorneys can use standards to ensure that the lawyers have adequate training and experience, and that they fulfill their duties. n182 The new lawyers, who may be appearing in courts accustomed to handling cases in which most litigants appear pro se, can rely on the standards to explain why they are filing motions or engaging in other types of vigorous advocacy. n183 There are a number of existing civil-side standards, developed by the American Bar Association, the National Legal Aid and Defender Association and other standard-setting bodies, that can serve as a useful guide to states in this task. n184 However, there are no national standards for some types of civil cases in which counsel are currently appointed. For example, there are no national standards for the appointment of counsel for parents in termination of parental rights and other types of abuse and neglect cases. Any expansion of the right to counsel in civil cases should be accompanied by the development of standards for counsel in that kind of case.

6. Uniform system of representation throughout the state

Another important factor in ensuring the provision of constitutionally adequate representation is a uniform system for providing defense services throughout a given state. In some states, counties have the primary or sole responsibility for [*550] funding indigent defense services. n185 This leads to a disastrous situation in the poorest counties, which often have the highest crime rate but which lack the tax base to fund adequate representation. n186 Counties are also more vulnerable to economic downturns and to sharp increases in caseload. n187

Moreover, it is inefficient for each county to develop its own standards and quality oversight system. Those functions will be performed better and more efficiently if they are centralized in a single statewide entity. n188 Finally, the judicial and legal communities in many counties are so small that defense attorneys in a county-run system often end up feeling enormous pressure to accommodate the wishes of the local judges or legislatures, even if that means advocating less vigorously for their clients. n189

III. Funding and Enforcing Gideon Over the Past 40 Years - The Current Indigent Defense Reform Movement

In the years since the Gideon decision, both individual defendants and their advocates have used litigation, legislative advocacy and public education to compel states and counties to implement the decision. n190 It is worthwhile for people interested in the possibility of expanding the right to counsel in civil cases to become familiar with those efforts for several reasons. For one thing, the willingness of judges and legislators to expand the right to counsel in civil cases may well depend on their experience with indigent defense reform. Moreover, in recent years indigent defense reform advocates have had some notable successes, which may show the way for similar efforts on the civil side. n191

Over the course of the past decade, Connecticut, Georgia, Massachusetts, Montana, New York, and Allegheny County, Pennsylvania have all embarked on significant indigent defense reform efforts after being sued by indigent defendants and their advocates. n192 The reforms have included more state funding and/or staff for public defender programs, n193 increased fees for appointed counsel, n194 creation of [*551] a statewide public defender program or of new public defender offices, n195 adoption of statewide practice standards, n196 establishment of an entity responsible for oversight, n197 and implementation of training programs for attorneys and other staff. n198 In many, if not all, of these jurisdictions it remains to be seen how well these reforms are implemented, and there is more that could be done. It is indisputable, however, that these reform efforts are the most significant development in indigent defense reform in the past several decades.

The successful reform efforts have, by and large, shared a number of characteristics. First, they resulted from a creative combination of litigation, legislative efforts, and public education. Impact cases in Connecticut, Montana and New York settled after important state actors - Connecticut's governor, Montana's attorney general, and New York's chief judge - lobbied for, and obtained, funding and other significant reforms. n199 In Georgia and Massachusetts, the reforms resulted from a series of smaller lawsuits. n200 In Georgia, civil rights groups, bar organizations, a blue ribbon panel appointed by the judiciary, the legislative black caucus and others worked together to mobilize support for the reforms. n201 Newspaper articles documenting the government's failure to provide [*552] competent counsel for many defendants played an important role in the reforms in Connecticut, Georgia and New York. n202

These campaigns demonstrate that even though courts are often reluctant to order legislatures to spend more money, a strategic combination of litigation, lobbying, and public education can result in the allocation of funding for

indigent defense. n203 Also, the lobbying and public education are of continuing use, because for reform to be real and lasting, it needs continued legislative and public support each year, as the legislature considers the budget. n204 It is clear from the criminal-side example that legislative advocacy and public education efforts can play a similarly important role in any civil right to counsel campaign.

A second characteristic of the successful reform efforts is that many have found and publicized evidence of harm to individuals as a result of the shortcomings of the indigent defense system. n205 A corollary to this is that a number of earlier efforts focusing on systemic problems but not containing evidence of harm to individual defendants were not successful. n206 There are many reasons for this. In the criminal context, many judges may be accustomed to the Strickland standard (which requires a showing of actual prejudice), n207 even though there are good reasons why this standard should not apply in the context of affirmative litigation. n208 Moreover, evidence of actual harm to individuals makes clear to the courts that what is at stake is far more important than the interests of the underpaid lawyers, for whom the court may not feel much sympathy. n209 Finally, the cooperation of the legislature is generally essential, and evidence of harm to individual constituents is very persuasive to legislators. n210

[*553] It is worth noting that evidence of harm to individuals is particularly difficult to identify in the criminal context, because doing so often requires defenders to admit that their clients are suffering as a result of their lack of resources or other problems. n211 This generally is not an obstacle to demonstrating that a lack of counsel in civil cases is harming low-income people.

The type of harm to individuals that has perhaps been the most significant in prompting indigent defense reform has been the increasing evidence of wrongful convictions. n212 Even in jurisdictions in which exonerations have not occurred, information about the high rate of exonerations over the past five years or so undoubtedly has influenced the way judges and legislatures view claims about the shortcomings of the indigent defense system. n213 Adele Bernhard credits exonerations with relaxing the stringent Strickland v. Washington n214 standard for post-conviction assistance of counsel claims and making courts more receptive to affirmative indigent defense reform litigation. n215 Exonerations have also played an important role in persuading the federal government to pass the Innocence Protection Act of 2004, which, among other things, provides grants to the states to improve the quality of representation for capital counsel, and requires the states to adopt standards for the performance of capital counsel. n216

Although there is no precise analogue to exonerations on the civil side, there are serious consequences of the lack of counsel on the civil side, including parents losing custody of their children, families losing their homes, and so forth. Exonerations demonstrate that the justice system is producing inaccurate results, which certainly is true in many pro se civil cases.

In addition to pointing to harm to individuals, indigent defense reform advocates have begun calculating the cost to the government of providing counsel that is unable to provide competent representation. For example, the NAACP Legal Defense and Educational Fund has issued a report calculating the costs Mississippi has incurred because of the unavailability or inadequacy of appointed counsel. n217 The report found that if adequate representation were provided, defendants would spend less time in jail awaiting trial. n218 As a result, they conclude, counties spend as much as $ 16.5 million annually unnecessarily housing inmates, defendants lose income (and government consequently loses tax revenue), and defendants' families lose child support payments. n219

Similar studies have been performed regarding the wasteful results of the inaccuracy in many civil proceedings caused by the absence of counsel for the [*554] parties. n220 In fact, Arkansas recently strengthened its law providing a right to counsel for indigent custodial parents in abuse and neglect proceedings, in part because of concern over the high number of foster care placements in cases involving pro se parents. n221 There is a need for more research in this area, however.

The successful indigent defense reform campaigns seem to be having a cascading effect. When North Dakota passed an indigent defense reform bill in 2004, it was reported that "the litigation over the indigent defense system in Montana motivated legislators. They were acutely aware of the potential liability created by a failing indigent defense system." n222

It may be that the indigent defense reform cases will have a similar spill-over effect for civil right to counsel efforts, by making courts and legislatures more aware of the problems for individuals and society when counsel are absent or lack the resources to provide competent representation during court proceedings. Indeed, the reform cases in Montana and New York concerned not only the provision of counsel in criminal proceedings, but also the provision of counsel in civil proceedings in which a right to counsel exists. In both instances, the settlements will benefit clients in both

types of cases. n223 On the other hand, there is always the possibility that courts and legislatures familiar with the indigent defense reform movement will be more reluctant than ever to support expansion of the right to counsel on the civil side, because they realize that implementing a meaningful right to counsel is not cheap and requires constant oversight.

At a minimum, it is essential that people working for indigent defense reform and people exploring the right to counsel on the civil side talk to each other. Each group needs to know what the other is doing, so that both sides can coordinate their efforts. They may find that they have interests in common. For example, a lack of adequate representation in criminal cases can adversely affect an individual's chance of success in a separate immigration or family proceeding. Through discussion and coordination, the two sides may also be able to avoid the risk that a legislature will find funding for criminal counsel by taking it away from civil counsel, or vice versa. n224

[*555]

Conclusion

Some clear lessons can be drawn from the experience with right to counsel in criminal cases. Nothing is impossible. Lassiter need not be the last word - the Supreme Court does change its mind. n225 State legislation and court rulings can both be important indications to the federal courts that a right to counsel is generally accepted in the states. n226 Support from attorney generals, the judiciary and other state actors can also be helpful. n227 Analysis and documentation of the burdens imposed on courts, states and litigants by the Lassiter case-by-case analysis are needed.

A constitutional right to counsel can leverage enormous amounts of money to provide representation for many litigants. The presence of counsel in all cases before a court can also dramatically improve both the court's operations and the court's observance of litigants' constitutional rights. n228

At the same time, winning a right to counsel is a beginning, not an end. In many parts of the country, many people facing criminal charges languish in jail for long periods of time before getting counsel appointed. All too often, the attorney who is eventually appointed lacks the time and resources to provide a competent defense. n229 Moreover, too many appointed attorneys are beholden to judges for their appointments and are thus unable to provide truly independent representation. n230

Affirmative litigation can result in courts enforcing the right to counsel. Cases are most likely to succeed when they have support from a variety of stakeholders, are combined with legislative efforts, can demonstrate harm to individuals, and can demonstrate the shocking results from the denial of counsel. n231 Due to widely publicized exonerations, path-breaking litigation, and diligent legislative work, substantial indigent defense reform has occurred in a number of jurisdictions in the past few years. n232 This may spill over to help civil right to counsel efforts, or it may harm those efforts. At the very least, people interested in expanding the right to counsel in civil cases need to be aware of the criminal side experience, as they consider their own strategy for reform.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselAppointmentsCriminal Law & ProcedureCounselRight to CounselGeneral OverviewPublic Health & Welfare LawSocial ServicesLegal Aid

FOOTNOTES:

n1. Legal Services Corporation, Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans 15 (Sept. 2005), http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf.

n2. Id. at 18.

n3. See id. at 7 (displaying statistics that show the categories of cases most indigent people need help with include family, housing, employment, and health).

n4. Id. at 2, 18.

n5. Id. at 2.

n6. Justice Earl Johnson Jr., Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies, 24 Fordham Int'l L.J. S83, S94-S98 (2000).

n7. Bruce A. Boyer, Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham, *36 Loy. U. Chi. L.J. 363, 367-68 (2005),* reprinted in *15 Temp. Pol. & Civ. Rts. L. Rev. 635 (2006).*

n8. *State ex rel. Lemaster v. Oakley, 203 S.E.2d 140, 145 (W. Va. 1974)* (finding a constitutional right to counsel for indigent parents facing child neglect charges); *Kan. Stat. Ann. §§38-1125* (1985) (establishing a right to counsel for indigent parties to paternity actions); *N.Y. Fam. Ct. Act §262* (McKinney 1975) (providing a right to counsel in termination of parental rights proceedings, and certain custody proceedings).

n9. See, e.g., *Del. Code Ann. tit. 20, §3136* (West 2006) (providing right to counsel in quarantine proceedings); *Fla. Stat. Ann. 390.01114* (West 2005) (granting a right to counsel in waiver of parental notification requirements for minors seeking abortion); *405 Ill. Comp. Stat. Ann. §5/3-805* (West 2006) (guaranteeing counsel in involuntary commitment proceedings).

n10. ABA, Resolution 112A (Aug. 7, 2006), reprinted in *15 Temp. Pol. & Civ. Rts. L. Rev. 507 (2006).*

n11. For example, the Conference of Delegates of California Bar Associations has passed a resolution calling for the provision of counsel for those who cannot afford it "when needed to protect their rights to basic human needs, including sustenance, shelter, safety, health, child custody, and other categories the Legislature may identify ... ." See Conference of Delegates of California Bar Associations, Resolution 01-06-2006.

n12. See, e.g., *Lassiter v. Department of Social Services, 452 U.S. 18 (1981)* (holding that the due process clause of the federal Constitution may guarantee a right to counsel in termination of parental rights and other civil cases, but whether it does so depends on an analysis of the characteristics of the case); *In re K.L.J., 813 P.2d 276 (Alaska 1991)* (finding a right to counsel under Alaska Constitution in all termination of parental rights cases); *In re Jay, 197 Cal. Rptr. 672 (Cal. App. 1983)* (finding a right to counsel under California Constitution in contested adoption proceedings).

n13. See, e.g., *Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D. N.Y. 2002)* (expanding right to battered women in domestic violence cases); *Kenny A. v. Perdue, 356 F. Supp. 2d 1353 (N.D. Ga. 2005)* (extending right to foster children in deprivation and TPR proceedings). One federal judge has also spoken outside of the courtroom about the need for an expanded right to counsel in civil cases. See Hon. Robert W. Sweet, Civil Gideon and Confidence in a Just Society, *17 Yale L. & Pol'y Rev. 503, 506 (1998)* ("The time has come to reverse Lassiter and provide counsel in civil litigation just as the Supreme Court in Gideon in 1963 reversed its holding in Betts v. Brady twenty-one years earlier and found for a right to counsel in all criminal proceedings.").

n14. *Nicholson, 203 F. Supp. 2d at 238-40, 253-56.*

n15. *Kenny A., 356 F. Supp. 2d 1353.*

n16. *Frase v. Barnhart, 379 Md. 100, 129 (2003)* (Cathell, J., concurring).

n17. *Id. at 127-28.*

n18. *Gideon v. Wainwright, 372 U.S. 335 (1963).*

n19. See *id. at 343-45* (explaining the fundamental need for appointed counsel in criminal proceedings).

n20. Id.

n21. Id.

n22. See Sweet, supra note 13, at 505 (explaining that it is almost impossible for a judge to come to an effective outcome without counsel on both sides and that judges cannot play the role of a litigant).

n23. See id. (saying that although counsel in civil cases is just as important in criminal cases, only criminal defendants have the right to counsel).

n24. *372 U.S. 335.*

n25. See American Bar Association, Gideon's Broken Promise: America's Continuing Quest for Equal Justice IV-VI (Dec. 2004), http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf (describing a widespread failure by states to provide constitutionally adequate counsel in criminal proceedings).

n26. *Gideon, 372 U.S 335.*

n27. *316 U.S. 455 (1942).*

n28. *Id. at 471-73.*

n29. Id.

n30. *Id. at 472.*

n31. *Id. at 473.*

n32. Anthony Lewis, Gideon's Trumpet 120-22 (1964).

n33. *Gideon, 372 U.S. 335.*

n34. *Id. at 344.*

n35. See *Lassiter, 452 U.S. 18.*

n36. Id.

n37. Id.

n38. *Id. at 27.*

n39. See, e.g., Boyer, supra note 7, at 380-81 ("By this reckoning, reassessment of Lassiter's treatment of parents' fundamental liberty interest in their relationships with their children is now at least two years overdue."); Joan Grace Ritchey, Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation, *79 Wash. U. L.Q. 317, 341 (2001).*

n40. See Lewis, supra note 32, at 114 (suggesting that scholarly criticism of Betts influenced the Gideon Court).

n41. See Boyer, supra note 7, at 380 n.83 (citing articles criticizing Lassiter).

n42. Deborah L. Rhode, Access to Justice, *69 Fordham L. Rev. 1785, 1799 (2001).*

n43. Sweet, supra note 13, at 505.

n44. Id.

n45. Id. The commentator, Judge Robert W. Sweet, speaks from his experience as a United States District Judge for the Southern District of New York.

n46. Paul Marvy & Debra Gardner, A Civil Right to Counsel for the Poor, 32 Hum. Rts. 8 (Summer 2005).

n47. Early in the Gideon opinion, the Court rejected Betts' focus on the ""totality of facts in a given case."' *Gideon, 372 U.S. at 339-40* (quoting *Betts, 316 U.S. at 462).* Instead, the Court adopted a bright-line rule covering all defendants facing felony charges. Id. at 344; see also Stacey L. Read, A Look Back at Gideon v. Wainwright After Forty Years: An Examination of the Illusory Sixth Amendment Right to Counsel, *52 Drake L. Rev. 47, 51 (2003)* (stating that the Gideon Court adopted a uniform rule to avoid requiring "the states to apply a meaningless, confusing test on a case-by-case basis").

n48. See *Brief for the State Government Amici Curiae at 17-18, Gideon, 372 U.S. 335 (No. 155), 1962 WL 75209* (describing the difficulties trial courts faced when attempting to apply the Betts case-by-case analysis).

n49. In Gideon, the Court complained, "Since 1942, when *Betts v. Brady, 316 U.S. 455,* was decided by a divided Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts." *372 U.S. at 337-38.* According to Abe Krash, who helped write Gideon's Supreme Court brief, "The Court had become frustrated by the endless stream of cases presenting special circumstances issues ... ." Yale Kamisar et al., Gideon at 40: Facing the Crisis, Fulfilling the Promise, 41 Am. Crim. L. Rev.135, 137 (Winter 2004). See also William N. Eskridge, Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, *100 Mich. L. Rev. 2062, 2210 (2002)* (arguing that "this ongoing review process gave rise to restiveness within the Court").

n50. Lewis, supra note 32, at 134-36.

n51. Id. at 176.

n52. Gideon made this argument in his brief. Id. at 136. Likewise, the State of Oregon submitted an amicus brief arguing that, based on Oregon's experience, "it would provide greater protection of constitutional rights, and would be less expensive, to insist upon counsel in each original criminal proceeding; than to attempt by a post-conviction proceeding to recover justice, lost by defects at the trial." *Brief for the State of Oregon as Amicus Curiae at 6, Gideon, 372 U.S. 335 (No. 155), 1962 WL 75207.*

n53. See *Lassiter, 452 U.S. 18* (holding trial judges must determine whether the Constitution requires the appointment of counsel for indigent parents facing termination of their parental rights by weighing the interests at stake in each case); *Betts, 316 U.S. at 1262 (1942)* (requiring trial judges to consider whether each criminal case involves special circumstances warranting the appointment of counsel), overruled by *Gideon, 372 U.S. 335.*

n54. *In re K.L.J., 813 P.2d at 282 n.6* (rejecting the case-by-case approach set out by the Supreme Court in Lassiter and instead favoring a bright-line rule).

n55. Id. (quoting Kevin W. Shaughnessy, Note, Lassiter v. Department of Social Services: A New Interest Balancing Test for Indigent Civil Litigants, *32 Cath. U. L. Rev. 261, 282-83 (1982)).*

n56. William Wesley Patton, Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases, *27 Loy. U. Chi. L.J. 195, 201-202 (1996)* (observing that because most states grant judges the discretion to appoint counsel in dependency and termination proceedings, Lassiter hearings rarely occur).

n57. *Id. at 202-203* (arguing that without a record, the appellate courts either remand the case or are forced to make a decision based on speculation or an improper legal standard).

n58. Kamisar et al., supra note 49, at 138-139 (observing that in 45 states the right to counsel had been established through state constitutions, state statutes or state judicial decisions and practice, but in five southern states the right did not exist).

n59. *Lassiter, 452 U.S. at 18* (holding that the Constitution does not require the appointment of counsel for every case).

n60. *Id. at 33-34.*

n61. *Id. at 27* (holding that there is no fundamental constitutional right to counsel in every case).

n62. *Brief for the State Government Amici Curiae, Gideon, 372 U.S. 335 (No. 155), 1962 WL 75209; Brief for State of Oregon as Amicus Curiae, Gideon, 372 U.S. 335 (No. 155), 1962 WL 75207.*

n63. See *Brief for the Petitioner at 30, Gideon, 372 U.S. 335 (No. 155), 1962 WL 75206* (describing state practices regarding the provision of counsel for indigent defendants); Yale Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused, *30 U. Chi. L. Rev. 1, 17, 67-74 (1962)* (stating that at the time Gideon was argued, thirty-seven states required the provision of counsel to indigent felony defendants upon request, and explaining the practices of the remaining states).

n64. Lewis, supra note 32, at 145-47.

n65. See Robert Echols, The Rapid Expansion of "State Access to Justice" Commissions, Mgmt. Info. Exch. J., 41 (Summer 2005), http://www.nlada.org/DMS/Documents/1125688879.69/MIE%20Journal%20summer%2005-ATJ%20article.pdf (reporting the rapid expansion in the number of state commissions aimed at assessing and addressing the civil legal needs of low-income residents).

n66. See Helaine M. Barnett, An Innovative Approach to Permanent State Funding of Civil Legal Services: One State's Experience-So Far, *17 Yale L. & Pol'y Rev. 469, 469-70 (1998)* (detailing the involvement of the Chief Judge of the State of New York and the New York State Assembly's attempt to provide permanent state funding for civil legal services for poor state residents).

n67. See Echols, supra note 65, at 41 (reporting on the number of current and proposed Access to Justice commissions).

n68. See, e.g., Arkansas Access to Justice Commission, http://www.arkansasjustice.org/about.html (last visited Nov. 4, 2006) (listing commission members).

n69. Echols, supra note 65, at 41-42.

n70. See Oregon v. Legal Services Corp., No. CV 05-1443-PK at 2 (D. Or. July 10, 2006), available at http://www.nlada.org/DMS/Documents/1154636453.26/Magistrate%20Decision%20on%20Motion%20to%20Dismiss%207-10-06%20%282%29.pdf (findings and recommendation by magistrate, setting forth Oregon's allegation that the restrictions violate the Tenth Amendment and the Spending Clause).

n71. See Brennan Center for Justice, Oregon Joins With Legal Services Programs, Lawyers and Clients to Challenge Restrictions on Private Funding Received by LSC Grantees, Legal Services E-lert (Sept. 23, 2005), http://www.brennancenter.org/programs/lse/pages/index.php (search with keywords "Oregon Joins").

n72. See, e.g., Teri J. Dobbins, The Hidden Cost of Contracting: Barriers to Justice in the Law of Contracts, 7 J. of Law in Soc'y 116, 133 (2005).

n73. See Lewis, supra note 32, at 178.

n74. Both Florida, in its brief opposing *Gideon, Brief for the Respondent at 47, 50, Gideon, 372 U.S. 335 (No. 155), 1963 WL 66427,* and the states' amicus brief supporting him warned that misdemeanor cases would be next. *Brief for the State Government Amici Curiae, supra* note 62, at 21. Florida also quoted the Betts Court's warning that recognizing a categorical right to counsel in criminal cases could require recognition of a similar right in civil cases. See Brief for the Respondent, supra 74, at 47-48, 50.

n75. *Brief for the Respondent, supra* note 74, at 50; *Brief for the State Government Amici Curiae, supra* note 62, at 21.

n76. *Brief for the Respondent, supra* note 74, at 53; *Brief for the State Government Amici Curiae, supra* note 62, at 21.

n77. Lewis, supra note 32, at 153 (describing arguments in amicus brief in support of Florida filed by two states).

n78. Id. at 153-54.

n79. See *Gideon, 372 U.S. at 344-45* (explaining the Court's rationale for finding the right to counsel fundamental to a criminal defendant's constitutional right to a fair trial without addressing the practical problems raised).

n80. *407 U.S. 25 (1972).*

n81. *Id. at 40*.

n82. *Id. at 44* (Burger, J., concurring) ("The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it."); *id. at 55* (Powell, J., concurring) ("It is doubtful that the States possess the necessary resources to meet this sudden expansion of the right to counsel."). See also *id. at 37 n.7* (noting "Justice Powell's doubt that the Nation's legal resources are sufficient to implement the rule we announce today," but predicting that there would indeed be enough lawyers).

n83. *535 U.S. 654 (2002).*

n84. *Id. at 674*. The Court dismissed concerns voiced by the dissenting Justices that its ruling would "encumber [the states] with a "large, new burden,'" noting that many states already provided counsel for people in Shelton's situation. *Id. at 668-69* (quoting *id. at 679-80* (Scalia, J., dissenting)).

n85. See *Brief for the State Government Amici Curiae, supra* note 62, at 21 ("We ... are limiting our claim to the constitutional right to representation for felonies.").

n86. Id.

n87. See *Gideon, 372 U.S. at 344-45* (explaining the Court's rationale for holding that the right to counsel is fundamental to a criminal defendant's constitutional right to a fair, trial without addressing the practical problems raised).

n88. *Argersinger, 407 U.S. at 37.*

n89. Cf. *Piper v. Popp, 482 N.W.2d 353, 357 (Wis. 1992)* (affirming the lower court's holding that a civil defendant in a tort action was not entitled to appointed counsel, in part because ""he was able to make arguments that the lawyer couldn't with his situation, and maybe elicited some sympathy he could never have done if he had a lawyer ... representing him,'" and thus had a meaningful opportunity to defend himself pro se) (internal citations omitted).

n90. See Lewis, supra note 32, at 179-80 (illustrating the argument).

n91. Id.

n92. Id. at 179.

n93. Id. at 177, 175.

n94. *Gideon, 372 U.S. at 344-45* (quoting *Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).*

n95. See, e.g., Steven Gunn, Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?, *13 Yale L. & Pol'y Rev. 385 (1995);* Carroll Seron et al., The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment, *35 Law & Soc'y Rev. 419 (2001).*

n96. Cf. Carol J. DeFrances, U.S. Dep't of Justice, State-Funded Indigent Defense Services 1999 (2001), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf (detailing state funding programs for indigent criminal defense).

n97. Press Release, Bureau of Justice Statistics, Two of Three Felony Defendants Represented by Publicly-Financed Counsel (Nov. 29, 2000), available at http://www.ojp.usdoj.gov/bjs/pub/press/iddcpr.htm. In 1999, twenty-one states spent a total of $ 662 million on indigent defense. DeFrances, supra note 96, at 2.

n98. As of 2005, LSC-funded legal services programs received $ 330.8 million from LSC and $ 352.3 million from other sources. Legal Servs. Corp., Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans 18 & n.22 (2005), available at http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf.

n99. See Caroline Wolf Harlow, U.S. Dep't of Justice, Defense Counsel in Criminal Cases 1 (2000), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf.

n100. Id. at 7.

n101. Charles J. Ogletree, Jr., An Essay on the New Public Defender for the 21st Century, 58 Law & Contemp. Probs. 81, 90-93 (Winter 1995).

n102. Malia Brink, Indigent Defense - Establishing the Fundamentals of a Working Indigent Defense System in New York State, Champion, May 2005, at 30, 33 [hereinafter Brink, New York State].

n103. Malia Brink, Indigent Defense - Interview With Professor Norman Lefstein - 2005 Champion of Indigent Defense Award Winner, Champion, Jan.-Feb. 2006, at 38, 38-39 [hereinafter Brink, Interview With Norman Lefstein].

n104. Mark H. Moore et al., The Best Defense Is No Offense: Preventing Crime Through Effective Public Defense, *29 N.Y.U. Rev. L. & Soc. Change 57, 57 n.2 (2004).*

n105. *Id. at 73.*

n106. Cait Clarke, Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor, *14 Geo. J. Legal Ethics 401, 406-07 (2001).*

n107. *Id. at 429-30.*

n108. *Id. at 430;* Moore et al., supra note 104, at 73.

n109. For example, in the Chicago's eviction courts, only five percent of tenants facing eviction have lawyers, hearings typically last less than two minutes, and judges frequently fail to observe important procedural protections such as swearing in witnesses, asking the tenant if he or she has a defense, and examining the landlord's eviction notice. Lawyers' Comm. for Better Hous., No Time for Justice: A Study of Chicago's Eviction Court 4 (2003), available at http://www.lcbh.org/pdf/full_report.pdf.

n110. See Moore et al., supra note 104, at 70-71 (discussing the role of the Los Angeles County Public Defenders in responding to the Los Angeles Police Department's Rampart scandal).

n111. Clarke, supra note 106, at 439-41.

n112. Ogletree, supra note 101, at 83-84.

n113. E.g., ABA Standing Comm. on Legal Aid and Indigent Defendants, ABA, Gideon's Broken Promise: America's Continuing Quest for Equal Justice 38-39 (2004), available at http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf (cataloging many of the fundamental flaws in the indigent defense delivery system).

n114. David L. Bazelon, The Defective Assistance of Counsel, *42 U. Cin. L. Rev. 1, 2 (1973)* (recollecting the comments of a "very able trial judge").

n115. Stephen B. Bright, Turning Celebrated Principles Into Reality, Champion, Jan.-Feb. 2003, at6 [hereinafter Bright, Turning Celebrated Principles Into Reality].

n116. Harlow, supra note 99, at 8.

n117. Id.

n118. See ABA, supra note 113, at 7-28 (describing the lack of adequate funding, inadequate legal representation, and structural defects in indigent defense systems).

n119. See id. at 22-23. There is evidence that many states are in violation of their obligation under *Alabama v. Shelton, 535 U.S. 654 (2002),* to appoint counsel for defendants in misdemeanor cases facing a suspended sentence. See, e.g., Norman Lefstein, In Search of Gideon's Promise: Lessons From England and the Need for Federal Help, *55 Hastings L.J. 835, 843 n.35 (2004)* (addressing Georgia's widespread failure to comply with Shelton's mandate); Gerald Lippert, Affiliate News - NMCDLA's IDC Report, Champion, Aug. 2004, at 26, 27 (discussing New Mexico's lack of compliance with Shelton).

n120. Sarah Geraghty & Miriam Gohara, NAACP Legal Def. & Educ. Fund, Inc., Assembly Line Justice: Mississippi's Indigent Defense Crisis 3, 6 (2003), available at http://naacpldf.org/content/pdf/ms_indigent/Assembly_Line_Justice.pdf; see also Barbara E. Bergman, Verbatim, Champion, Sept.-Oct. 2005, at 41, 42 ("Defendants in Calcasieu Parish in Louisiana often languish in jail for six to ten months before a lawyer does anything on their case.") (quoting Helen Ginger Berrigan, Federal distict judge of the Eastern District of Louisiana).

n121. Bright, Turning Celebrated Principles Into Reality, supra note 115, at 8.

n122. Id.

n123. Id.

n124. Kate Jones, Indigent Defense, Champion, Aug. 2001, at 35, 40 (stating that in Venango County, Pa., the public defenders consistently interview clients for the first time in court "just minutes before their preliminary hearings," and conduct also little or no investigation); Geraghty & Gohara, supra note 120, at 10-12.

n125. ABA, supra note 113, at 16.

n126. Stephen B. Bright, Death in Texas: By Denying Competent Lawyers and Suspending Due Process, the Texas Court of Criminal Appeals Runs the Fastest Assembly Line to the Death Chamber in the Country, Champion, July 1999, at 16, 18 [hereinafter Bright, Death in Texas] (noting that the Texas Court of Criminal Appeals has confirmed three death sentences in cases in which defense attorneys slept during portions of the trial).

n127. See Stephen B. Bright, Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake, *1997 Ann. Surv. Am. L. 783, 816 (1997)* [hereinafter Bright, Neither Equal Nor Just].

n128. See ABA, supra note 113, at 10, 17.

n129. For example, Orange County, California slashed funding for indigent defense services when it declared bankruptcy in the mid-1990's, resulting in a system with severe ethical and constitutional problems. See Richard Klein, The Constitutionalization of Ineffective Assistance of Counsel, Paper Presented at the 2001 Annual Meeting of the Association of American Law Schools 6-10 (Jan. 6, 2001), available at http://www.aals.org/am2001/art_klein.pdf [hereinafter Klein, Constitutionalization]. See also Richard Klein, The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, *13 Hastings Const. L.Q. 625, 660 (1986)* [hereinafter Klein, The Emperor Gideon Has No Clothes] (describing how localities facing budget pressures cut indigent defense representation budgets, or increased defenders' caseloads).

n130. Even in relatively flush times, legislatures cut funding for indigent defense representation. See Klein, Constitutionalization, supra note 129, at 10.

n131. Brennan Center for Justice, Struggling to Meet the Need: Communities Confront Gaps in Federal Legal Aid 7 (2003), http://www.brennancenter.org/resources/atj/atj8.pdf.

n132. Id.

n133. Id. at 12.

n134. See, e.g., Rhode, supra note 42, at 1799 ("It is a cruel irony that, in domestic violence cases, defendants who face little risk of significant sanctions are entitled to counsel, while victims whose lives are at risk are expected to seek legal protection without legal assistance."); Minutes of the ABA Task Force on Access to Civil Justice Meeting, Nov. 20, 2005 (Participant Mary Ryan noted that "people are aghast that they can be law abiding but still be evicted without any legal help, while someone who is perceived as having committed a crime gets free legal help.").

n135. See Geraghty & Gohara, supra note 120, at 22 (recommending institutional changes to state indigent services to remedy systemic weaknesses).

n136. DeFrances, supra note 96, at 3.

n137. According to Richard Klein, "Contract systems were developed in 1970's as a response to budget pressures faced by states & counties post-Gideon." *Klein, The Emperor Gideon Has No Clothes, supra* note 129, at 679. In Mississippi, the contracts have become particularly common since the Mississippi Supreme Court ruled in 1990 that counsel retained on an hourly basis must be compensated for overhead. Geraghty & Gohara, supra note 120, at 16.

n138. Id.

n139. Id.

n140. Carl Brooking & Blakely Fox, NAACP Legal Defense & Educational Fund, Economic Losses and the Public System of Indigent Defense: Empirical Evidence on Pre-Sentencing Behavior From Mississippi 4 (2003), available at http://www.naacpldf.org/content/pdf/indigent/Mississippi_Economic_Study.pdf.

n141. Id.

n142. Bright, Turning Celebrated Principles Into Reality, supra note 115, at 8. See also Bright, Neither Equal Nor Just, supra note 127, at 788.

n143. Bright, Turning Celebrated Principles Into Reality, supra note 115, at 8.

n144. Geraghty & Gohara, supra note 120, at 17.

n145. Id.

n146. Bright, Neither Equal Nor Just, supra note 127, at 818.

n147. Id.

n148. Id. at 828; Adele Bernhard, Take Courage: What the Courts Can Do To Improve the Delivery of Criminal Defense Services, *63 U. Pitt. L. Rev. 293, 304-08 (2002);* Robert Spangenberg & Marea Beeman, Indigent Defense Systems in the United States, 58 Law & Contemp. Probs. 31, 41-44, 48 (1995); *Nicholson v. Williams, 203 F. Supp. 2d 153, 238-40, 260 (E.D. N.Y. 2002)* (noting that the best way to provide competent representation for indigent parents charged with abuse or neglect may be through an institutional provider).

n149. Bernhard, supra note 148, at 310 (stating that improved training, monitoring, and evaluation of defense systems would make a difference in providing sufficient counsel).

n150. For example, in New York City, representation for children mandated by the New York Family Court Act is provided by contracts with institutional providers, while representation for adults mandated by the N.Y. Family Court Act is provided by private attorneys selected from a panel. *Nicholson, 203 F. Supp. 2d at 223.*

n151. Debra Gardner, Pursuing a Right to Counsel in Civil Cases: Introduction and Overview, Clearinghouse Rev., July-Aug. 2006, at 169 (asking how, under a civil right to counsel regime, can "legal aid programs remain free to set local priorities and remain client-centered").

n152. Scott L. Cummings, After Public Interest Law, *100 Nw. U.L. Rev. 1251, 1281 (2006)* ("Rationing legal services is a necessity in a world of scarce resources.").

n153. Id.

n154. Gardener, supra note 151, at 169.

n155. Sweet, supra note 13, at 506 (quoting *Anders v. California, 386 U.S. 738, 744 (1966)).*

n156. Bernhard, supra note 148, at 306 (stating that an appointed attorney has an inherent desire to "please the court to which he or she returns each day").

n157. See Kim Taylor-Thompson, Tuning Up Gideon's Trumpet, *71 Fordham L. Rev. 1461, 1484 (2003)* (describing "the system of patronage in which appointments of defense attorneys become dangerously linked to pleasing the appointing judge") (citing Richard Klein & Robert Spangenberg, The Indigent Defense Crisis (ABA Section of Criminal Justice, 1993)); Bright, Turning Celebrated Principles Into Reality, supra note 115, at 8 (A "survey of Texas judges found that almost half admitted that an attorney's reputation for moving cases quickly, regardless of the quality of the defense, was a factor that entered into their appointment decisions.").

n158. Geraghty & Gohara, supra note 120, at 18.

n159. Bright, Neither Equal Nor Just, supra note 127, at 825 (1997). See also *Brink, New York State, supra* note 102, at 31 (discussing politically motivated appointments in New York).

n160. See ABA, supra note 25, at 20 (National standards require that "counsel should be subject to judicial supervision only in the same manner and to the same extent as are attorneys in private practice and should be assigned to specific cases by administrators of indigent defense programs, not by judges or elected officials."); Bright, Neither Equal Nor Just, supra note 127, at 828; Bernhard, supra note 148, at 304-05.

n161. See generally Bright, Turning Celebrated Principles Into Reality, supra note 115, at 7 (noting that on many governmental levels there has been resistance to the implementation of Gideon, including prosecutors, judges, legislators, governors, lawyers, and even lay people).

n162. Id. at 9.

n163. Id.

n164. Bruce A. Green, Criminal Neglect: Indigent Defense From A Legal Ethics Perspective, *52 Emory L. J. 1169, 1193-94 (2003).*

n165. Bright, Turning Celebrated Principles Into Reality, supra note 115, at 9.

n166. Geraghty & Gohara, supra note 120, at 10.

n167. See discussion at Part III, infra; Bernhard, supra note 148, at 323-333.

n168. See also Bernhard, supra note 148, at 306 (predicting and calling for policy reform initiatives largely through judicial activism but also through defense community imposing eligibility standards).

n169. See id. at 303 (arguing that development of standards for the delivery of defense services should spur reform).

n170. See David Carroll, Primer on Indigent Defense Workload Standards & Case Weighting 1 (2006) (unpublished manuscript, on file with author) ("The strong pressures of favoritism, partisanship, and/or profits on public officials underscore the need for standards to assure the fundamental quality in all facets of government.").

n171. See Bernhard, supra note 148, at 335 ("Lacking standards that establish the number of cases a defender can reasonably be expected to handle, for example, courts cannot assess complaints of excessive caseloads and will rely on their own subjective sense of what is appropriate."); *Klein, The Emperor Gideon Has No Clothes, supra* note 137, at 655 ("The lack of specific standards makes it more difficult to evaluate the competency of the representation provided. This in turn diminishes the likelihood of obtaining appellate relief for a defendant who had ineffective counsel at trial.").

n172. See generally Geraghty & Gohara, supra note 120 (documenting numerous shortcomings of the representation provided by the Mississippi indigent defense system that have come to be accepted as the norm).

n173. Bernhard, supra note 148, at 303 ("Standards make challenges to defense delivery systems more justiciable.").

n174. This taxonomy is taken from Bernhard, supra note 148, at 303, 335. The national standards, and also existing state standards, have been compiled by the Institute for Law and Justice. See Institute for Law and Justice, Compendium of Standards For Indigent Defense Systems: A Resource Guide for Practitioners and Policymakers (2000), available at http://www.ojp.usdoj.gov/indigentdefense/compendium/welcome.html.

n175. See Institute for Law and Justice, supra note 174, vol. I p. 8 (noting that the ABA's Ten Commandments of Public Defense Delivery Systems adopts the recommendation of the National Advisory Commission on Criminal Justice Standards and Goals that limits caseloads to 150 felonies per year).

n176. *Strickland v. Washington, 466 U.S. 668, 688-689 (1984).* In this seminal opinion laying out the standard for assessing when the assistance of criminal defense counsel has been constitutionally inadequate, the Supreme Court rejected the notion that violation of the ABA standards and other standards could constitute per se ineffective assistance. The Court stated:

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude

counsel must have in making tactical decisions. See *United States v. Decoster, 199 U.S. App. D.C. at 371, 624 F.2d at 208.* Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.

Id. at 688-89.

Nonetheless, in the years since Strickland was issued, the Supreme Court, lower federal courts and state courts have found the existing standards to be extremely useful guidelines in assessing counsel's performance. See, e.g., *Wiggins v. Smith, 539 U.S. 510, 522 (2003)* (noting that the Court has long referred to the ABA standards for Criminal Justice as "guides to determining what is reasonable," and relying on those standards in finding counsel's performance constitutionally ineffective); *Williams v. Taylor, 529 U.S. 362, 396-397 (2000)* (citing ABA standards as support for proposition that "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); *United States v. Gipson, 985 F.2d 212, 215-16 (5th Cir. 1993)* (determining that a client who was not informed of the time limit for filing an appeal was denied the effective assistance of counsel under the ABA Standards Relating to the Administration of Criminal Justice); *State v. Peart, 621 So. 2d 780, 788-789 (La. 1993)* (when a system of indigent defense departs from the ABA's Criminal Justice Standards for the Defense Function, there is a rebuttable presumption that it provides ineffective assistance); *State v. Smith, 681 P.2d 1374, 1380-82 (Ariz. 1984)* (also recognizing a rebuttable presumption of ineffective assistance in the case of non-conformity to the ABA standards).

n177. See, e.g., Bernhard, supra note 148, at 336 ("However useful these performance standards may be for training purposes, or to inspire defense attorneys, they sometimes set unrealistic goals for handling routine minor criminal cases and can be too vague to be helpful in a serious investigation into the adequacy of defense services.").

n178. The ABA Criminal Justice Standards say explicitly that they:

are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

ABA, Standards for Criminal Justice Prosecution Function and Defense Function (3d ed. 1993), Standard 4-1.1. See also Carroll, supra note 170 ("In applying the workload standards, jurisdictions need to take into account local factors: travel needed in rural areas, prosecutorial and judicial processing practices, trial rates etc., level of technological sophistication.").

n179. Norman Lefstein, In Search of Gideon's Promise: Lessons From England and the Need for Federal Help, *55 Hastings L.J. 835, 907-08 (2004).* Of the few jurisdictions that have adopted binding standards, Massachusetts and Indiana have mandatory standards covering topics such as workload, *id. at 908,* and Texas and Georgia have statutes requiring counsel to meet with clients as soon as possible after they are appointed. Geraghty & Gohara, supra note 120, at 8.

n180. For example, the NAACP Legal Defense and Educational Fund has reported: "In Mississippi, there is no supervision or evaluation of indigent defense services, nor are there uniform standards insuring that county-funded defenders are providing a basic, constitutionally adequate defense." Geraghty & Gohara, supra note 120, at 17. See also Bernhard, supra note 148, at 304-305; DeFrances, supra note 96, at 8 (identifying Missouri and Maine as states where all attorneys are considered eligible to accept appointments, regardless of training and qualifications).

n181. Geraghty & Gohara, supra note 120, at 17-18; Bernhard, supra note 148, at 304-05.

n182. See Bernhard, supra note 148, at 305 (noting that "in organized plans administered by an independent manager ... attorneys generally must meet specific skill and knowledge criteria to be assigned to certain types of cases").

n183. See generally ABA Section of Family Law, Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996), http://www.abanet.org/family/reports/standards_abuseneglect.pdf (instructing appointed lawyers to file appropriate motions and engage in other advocacy for their appointed clients) [hereinafter "Standards for Abuse and Neglect Cases"].

n184. See, e.g., ABA Section of Family Law, Standards of Practice for Lawyers Representing Children in Custody Cases (2003), http://www.abanet.org/family/reports/standards_childcustody.pdf; ABA Section of Family Law, Standards for Abuse and Neglect Cases, supra note 195; Nat'l Ctr. for State Courts, Guidelines for Involuntary Civil Commitment (1986), http://www.ncsconline.org/WC/Publications/KIS_MenHeaGuideInvolCCtmt.pdf.

n185. Bright, Turning Celebrated Principles Into Reality, supra note 121, at 7; Kate Jones, Delaware County, PA, Board of Judges Accepts Improved Assigned Counsel Plan, Champion, July 2003, at 45, 45.

n186. *Klein, The Emperor Gideon Has No Clothes, supra* note 137, at 661.

n187. *Brink, New York State, supra* note 102, at 30.

n188. See Geraghty & Gohara, supra note 120, at 17-18 (noting that in Mississippi there is no statewide system of regulation of indigent defense but rather, such regulation is left to the counties).

n189. See Geraghty & Gohara, supra note 120, at 18 (noting that in some counties in Mississippi, "lawyers for the poor cannot be vigorous advocates for their clients when their continued employment depends upon staying in a judge's good graces").

n190. Bernhard, supra note 148, at 323-33.

n191. See, e.g., id. at 327-28 (discussing Connecticut reforms).

n192. Texas also enacted an indigent defense reform bill in 2003 without being sued. Rodney Ellis, Gideon's Promise: The Texas Story, Champion, Apr. 2003, at 61.

n193. Bernhard, supra note 148, at 327-28 (discussing Connecticut reforms); Malia Brink, Indigent Defense: News Briefs: Massachusetts Adopts Significant Reform, Champion, Oct. 2005, at 56, 56 [hereinafter Brink, Massachusetts Reforms] (discussing 2005 reforms in Massachusetts); Jones, supra note 199, at 45 (discussing doubled staff size for public defender office as result of 1996 settlement in Allegheny County, Pa.).

n194. See Bernhard, supra note 148, at 327-28 (Connecticut); Brink, Massachusetts Reforms, supra note 193, at 56 (Massachusetts legislature raised hourly rate from $ 30-$ 40/hour to $ 50-100/hour in 2005); Lawrence C. Marshall, Gideon's Paradox, *73 Fordham L. Rev. 955, 963 (2004)* (New York legislature raised hourly rate from $ 25-$ 40/hour to $ 60-$ 75/hour in 2003).

n195. Malia Brink, Indigent Defense: News Briefs: Montana Reform Signed Into Law, Champion, Aug. 2005 at 34 [hereinafter Brink, Montana Reforms] (describing 2005 legislation creating statewide public defender

program in Montana); Adele Bernhard, Exonerations Change Judicial Views on Ineffective Assistance of Counsel, *18 Crim. Just. 37, 41 (Fall 2003)* (discussing 2003 bill creating new public defender office in each county in Georgia) [hereinafter Bernhard, Exonerations].

n196. Bernhard, supra note 148, at 327-28 (discussing Connecticut); Brink, supra note 194, at 34 (discussing 2005 Montana legislation).

n197. Brink, Montana Reforms, supra note 195, at 34 (describing 2005 legislation establishing a new supervisory "indigent defense commission" in Montana). See also Bernhard, supra note 148, at 327-28 (pursuant to the Connecticut settlement the public defender will oversee conflict counsel).

n198. Brink, Montana Reforms, supra note 195, at 34 (describing 2005 legislation establishing new training in Montana); Jones, supra note 185, at 45 (discussing implementation of training for public defenders as result of 1996 settlement in Allegheny County, Pa.).

n199. Bernhard, supra note 148, at 327-28 (discussing lobbying by the governor as part of the settlement agreement in Connecticut); Brink, Montana Reforms, supra note 194, at 34 (describing lobbying by the attorney general as part of the settlement agreement in Montana); John Caher, Assigned-Counsel Rate Hike Is in Sight, N.Y. L.J., Mar. 1, 2003, at 1.

n200. In Georgia, the Southern Center for Human Rights filed six different lawsuits. Bernhard, Exonerations, supra note 195, at 41. In Massachusetts, there were at least three separate developments leading to the 2005 reforms. First, attorneys began refusing to take new cases because the compensation they received was too low. Second, after the ACLU filed suit on behalf of defendants in a particular county who had been unable to obtain counsel, the Massachusetts high court ordered the release of pretrial detainees held for more than seven days without access to counsel. The court also ordered that charges pending for more than 45 days be dropped against any defendant who had not had access to counsel. Finally, Holland & Knight filed a class action on behalf of all indigent defendants in the state, seeking an increase in compensation for counsel. The legislature acted to raise rates for court-appointed counsel after Massachusetts' high court scheduled oral argument in that case. Brink, Massachusetts Reforms, supra note 193, at 56.

n201. Stephen Bright, Indigent Defense, Champion, Dec. 2003, at 50, 55; Marion Chertoff, Indigent Defense - The Georgia Indigent Defense Act of 2003, Champion Aug. 2003, 61 at 62-63.

n202. Bernhard, supra note 148, at 332 (discussing Connecticut and New York); Steven D. Benjamin, The Press Is Finally Getting It, Champion Apr. 2004, at 36, 36 (discussing Georgia).

n203. Prior to settlement, some of the courts hearing indigent defense reform cases have made statements indicating their willingness to step in if the legislature refused to act. See, e.g., *N.Y. County Lawyers' Ass'n v. State, 742 N.Y.S.2d 16, 18-20 (App. Div. 2002)* (indicating a willingness to raise compensation rates, if necessary). These statements may demonstrate a similar receptiveness to arguments that it is the role of courts - and not only of the legislature - to ensure that low-income people have access to counsel in civil cases.

n204. See generally, Geraghty & Gohara, supra note 120 (arguing that continued attention and financial support are necessary to improve indigent defense and, impliedly, to sustain those improvements).

n205. Bernhard, supra note 148, at 325, 327, 330.

n206. Id. at 325-26. See also *Quitman County v. State, 910 So. 2d 1032, 1037 (Miss. 2005)* (rejecting affirmative challenge to Mississippi's indigent defense system, and noting that the plaintiffs had not presented any evidence of harm to individuals).

n207. See, e.g., *Quitman County, 910 So. 2d at 1036-38* (discussing applicability of the Strickland standard to affirmative indigent reform case).

n208. See *Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988)* (holding that the Strickland standard is inappropriate for a civil suit seeking prospective relief).

n209. See *Wayne County Criminal Defense Bar Ass'n v. Chief Judges of Wayne Circuit Court, 468 Mich 1244, 1244 (2003)* (Corrigan, J., concurring) (holding that attorneys representing criminal defendants did not demonstrate that the fees they were paid were unreasonably low).

n210. See Gaylene Schellenberg, Access to Justice in Canada: Canadian Bar Association Strategies to Make it Happen, Clearinghouse Rev., July-Aug. 2006, at 284 (describing Legal Aid watch project in which Canadian Bar Association reports to legislators regarding constituents unable to obtain legal representation).

n211. Bernhard, supra note 157, at 327.

n212. Deborah Rhode, Access to Justice: Again, Still, *73 Fordham L. Rev. 1013, 1022-23 (2004);* Bernhard, Exonerations, supra note 195, at 37-38; Lefstein, supra note 108, at 40.

n213. See, e.g., Bernhard, Exonerations, supra note 195, at 42 (stating exonerations of innocent prisoners have taught courts to be more diligent when evaluating the work of prosecutors and police).

n214. *466 U.S. 668 (1984).*

n215. Bernhard, supra note 148, at 37.

n216. Marshall, supra note 212, at 966-67. Likewise, the many exonerations in Illinois led the state to adopt new standards for capital counsel. Id.

n217. Brooking & Fox, supra note 149.

n218. Id. at 4.

n219. Id.

n220. See, e.g., Community Training and Resource Center and City-Wide Task Force on Housing Court, Inc., Housing Court, Eviction and Homelessness: The Costs and Benefits of Establishing a Right to Counsel iv (June 1993) (providing attorneys to all tenants facing eviction in New York City could prevent 4,873 families and 3,567 individuals from needing emergency shelter each year, and could save almost $ 160 million annually in emergency shelter costs).

n221. *Ark. Code Ann. §9-27-401* (West 2006); Telephone Conversation with Jean Carter, Executive Director of the Center for Arkansas Legal Services (Jan. 31, 2006).

n222. Brink, Indigent Defense: *News Briefs, supra* note 195, at 34.

n223. In Montana, the statewide public defender office that was created as a result of the lawsuit will provide representation in civil cases in which there is a right to counsel. See *Mont. Code Ann. §41-3-425(3)* (2005). In New York, the hourly rates were raised for appointed counsel for parties entitled to counsel in Family Court proceedings as a result of the lawsuit. Caher, supra note 199, at 1 (col. 3).

n224. For one of just many instances in which civil legal services programs and public defenders have been pitted against each other, see *Klein, The Emperor Gideon Has No Clothes, supra* note 129, at 688-92 (arguing that Interest on Lawyer Trust Account programs (IOLTA), which were set up to supplement the dwindling federal contribution to civil legal services funding, should be used to support indigent criminal defense programs).

n225. See discussion Part I, supra.

n226. See discussion accompanying notes 61-70, supra.

n227. See id.

n228. See discussion Part II.A., supra.

n229. See id.

n230. See id.

n231. See discussion Part II.B., supra.

n232. See id.

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2006 EDWARD V. SPARER SYMPOSIUM: CIVIL GIDEON: CREATING A CONSTITUTIONAL RIGHT TO COUNSEL IN THE CIVIL CONTEXT: CIVIL GIDEON AS A HUMAN RIGHT: IS THE U.S. GOING TO JOIN STEP WITH THE REST OF THE DEVELOPED WORLD

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SUMMARY:
... As he said after the vote, "This is historic, in the realm of an extraordinarily meaningful action by the ABA, expressing the principle that every poor American, like every wealthy American, should have access to a lawyer to protect the fundamental needs of human existence. ... The scope of the legal services is quite comprehensive with respect to representation of individuals in most areas of substantive civil law. ... One of the rights the colonists brought with them was the guarantee of free civil counsel for indigent parties expressed in the Tudor statute 11 Hen. and its common law equivalents. ... The European Court of Human Rights (hereinafter "ECtHR") is the body which interprets the European Convention. ... The court interpreted effective access to mean representation by an attorney, or a proceeding simple enough that a lay person could handle it without a lawyer. ... International law is comprised of treaties and customary international law. ... Customary international law, in addition to treaties, makes up the majority of international law rules. ... Modern scholars are divided as to the status of customary international law in federal courts. Some argue that customary international law has the status of federal common law. ... Without definitive rulings by international bodies responsible for treaty interpretation and without near universal adoption of a right to free civil counsel under customary international law, United States courts will probably find that the right is not required by international law. ...

TEXT:
[*769]

Introduction

On August 7, 2006 the American Bar Association House of Delegate at their annual convention voted unanimously in favor of a Civil Gideon. The resolution reads:

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. n1

ABA President Michael Greco made this the hallmark of his administration and succeeded in one year. n2 As he said after the vote, "This is historic, in the realm of an extraordinarily meaningful action by the ABA, expressing the principle that every poor American, like every wealthy American, should have access to a lawyer to protect the fundamental needs of human existence." n3

This vote affirms the aspirations of many lawyers that the promise of Gideon v. Wainwright n4 would apply in the civil courts as well. It particularly affirms the ceaseless efforts of Justice Earl Johnson n5 to establish a right to a publicly provided [*770] attorney in civil matters; a right which has an ancient lineage within the English legal system and is accepted in over fifty countries in the world. n6

In 1963, the U. S. Supreme Court declared that indigent criminal defendants had the right to free counsel. n7 This right, grounded in the 6th Amendment and applied to the states via the 14th Amendment, was required by notions of fundamental fairness, and to guarantee a fair trial. n8 Many legal advocates for the poor hoped that parallel insights into and concerns about fundamental fairness for low-income civil litigants would lead to an extension of Gideon v. Wainwright. n9

However, in 1981 the U.S. Supreme Court in Lassiter v. Department of Social Services of Durham County, N.C. left unfulfilled aspirations that it would declare a federal constitutional right to counsel in civil matters. n10 A divided court, employing a pinched reading of due process analysis and prior precedents, determined there was a presumption against the right to counsel unless the loss of physical liberty was at stake. n11 The case involved the termination of parental rights, a situation hardly less serious than a one-day jail stint, and one considered to be a fundamental liberty interest. n12

The 40th anniversary of Gideon has been a catalyst for a resurgence of interest in a Civil Gideon. Numerous articles have been published. n13 At least five recent [*771] state cases have raised the issue explicitly. n14 And now the ABA has gone on the record in support of a civil right to counsel where basic needs are at stake.

This article will discuss the scope of services and rationale for such a right currently provided in the 49 European member countries in the Council of Europe (COE), Australia, Canada, India, New Zealand, Hong Kong, Japan, Zambia, South Africa, and Brazil. n15 Frequent reference will be made to a chart in the appendix, which condenses extensive information about programs in each of these countries.

Our general conclusion regarding the foreign programs is that the right to a free lawyer in civil matters is a robust concept. Multiple rationales, such as, rule of law, preservation of other human rights, due process, foundational for democracy, peaceful dispute resolution, access to justice, equal protection, confidence in the judicial process, and social policy goals of poverty eradication, all lead to a similar result, publicly provided lawyers for indigents in civil matters.

[*772] The scope of the legal services is quite comprehensive with respect to representation of individuals in most areas of substantive civil law. Lawyers are provided for litigation at the trial and appellate level. A sizeable majority extend coverage to representation at administrative hearings. n16 It appears that law reform activities such as advocacy for changes in statutes and rules, representation of low-income community groups, class actions, and community development are not part of many programs.

With respect to the cases, the statutes almost all provide some type of merits test, varying from merely stating a claim to likelihood of success. There is also often mention of a cost/benefit type of analysis. With respect to client eligibility most countries have some kind of sliding needs scale, making the services more widely available and lessening the burden on the middle class. n17

In the COE, there is extensive protection of foreigners. n18 It is unremarkable that a low-income Italian would have rights to legal assistance in Sweden for a landlord-tenant lawsuit. n19 But it is not only lawful residents within and from other COE member countries who have access to a free lawyer; immigrants from outside of Europe also have access to free lawyers when dealing with immigration issues, particularly asylum. n20

Twenty-three countries from the former Soviet Union have been admitted to the COE since 1990. n21 All but four have some type of program for free lawyers, but do not yet afford the full range of civil representation provided by the other members. n22 In the COE countries with older programs, as well as Canada, Australia, and New Zealand, public funding, however it is calculated, (budgeted amount per poor person, per capita, or as a percentage of gross national product, etc.) far exceeds the spending in the U.S. n23

The article will briefly explore the kinds of arguments which can be raised in domestic courts regarding foreign and international law. On the whole, such authority is merely persuasive. However, informing the court of the extent of such a right to free civil representation for indigents may encourage judges and legislatures to be more receptive.

It is appropriate that after twenty-five years, Lassiter be reexamined. In 1981, 33 states provided a right to counsel in termination of parental rights cases, and [*773] since then the number has increased to 40. n24 State courts and legislatures may provide the best opportunity to put the ABA resolution into practice. But there are some signs that the U.S. Supreme Court is itself aware of the status of certain important rights under International and foreign law. Between 2002 and 2005, the Supreme Court reversed at least three cases decided in the 1980s after Lassiter. Each reversal has favored more expansive individual rights. For example in 2006 in Roper v. Simmons, the Supreme Court prohibited the death penalty for minors. n25 In Lawrence v. Texas, the Court decriminalized private consensual homosexual sex. n26 In Adkins v. Virgina, the Supreme Court barred the execution of mentally ill defendants. n27

I. The Right To A Civil Attorney In International And Foreign Law

A. At Least 49 Countries In Europe Are Required To Provide Free Civil Lawyers To Indigents

1. Reclaiming our own history: England has had a statute providing a right to a free civil lawyer for indigents for more than 500 years

England has a more than five-century tradition of providing free lawyers for indigent people in at least some civil matters. The statute provided, in pertinent part:

The Justices ... shall assign to the same poor person or persons, Counsel learned by their discretions which shall give their Counsels nothing taking for the same, and in likewise the same Justices shall appoint attorney and attorneys for the same poor person and persons and all other officers requisite and necessary to be had for the speed of the said suits to be had and made which shall do their duties without any rewards for their Counsels, help and business in the same. n28

[*774] One rationale for the original statute was to inspire confidence in the King's courts and to encourage people to use them. n29 The passage of the statute was, essentially, the move away from the religious courts to a development of a secular judicial branch of government.

Since then the right has been expanded to include civil defendants, non-litigation transactions, and advice. n30 The statutory system has been modified over the years, but the English legal aid system has continuously provided indigent parties with a right to counsel in civil cases. n31

The history is not widely known. Many US states at their formation adopted constitutional or statutory provisions preserving their residents' rights under English Common Law. n32 Three of seven Maryland Supreme Court justices found that history was determinative in concluding that a Maryland petitioner was entitled to free civil counsel in a family law matter. n33 The appellant advanced a right to court-appointed civil counsel founded in part on the incorporation of English rights into Maryland law at statehood. n34 Article 5 of the Maryland Declaration of Rights guarantees to Maryland's inhabitants the rights provided by the body of English statutory and common law as it existed on July 4, 1776. n35 One of the rights the colonists brought with them was the guarantee of free civil counsel for indigent parties expressed in the Tudor statute 11 Hen. and its common law equivalents. n36

2. Since 1979, all members of the Council of Europe must provide free civil lawyers as a human right

The year 1979 was a watershed. The European Court of Human Rights declared that ensuring a fair hearing in civil matters member states could be required to provide publicly paid counsel for low-income litigants. n37 All members [*775] of the COE were required to provide free civil lawyers in some circumstances as a matter of international human rights law. n38

One of the primary purposes of the COE, founded in 1949, is the defense of human rights, parliamentary democracy and the rule of law. n39 Forty-nine countries are members of the COE. n40 As such, they are signatories to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). n41 Article 6 para. 1 (Art. 6(1)) of the European Convention reads, in part, as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." n42

The European Court of Human Rights (hereinafter "ECtHR") is the body which interprets the European Convention. n43 In 1979, in Airey v. Ireland, the ECtHR determined that the right to a fair hearing, under Art 6(1), required effective access to the court. n44 The court interpreted effective access to mean representation by an attorney, or a proceeding simple enough that a lay person could handle it without a lawyer. n45 The court stated:

The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective ... . This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. n46

[*776] Each country was still free to choose the means of achieving the right to a fair hearing. n47 For example, it might simplify the judicial procedures. n48 It was only when the assistance of a lawyer was indispensable for effective access to the courts that the government was under a legal obligation to guarantee this right of counsel. n49

This article will discuss salient ECtHR post-Airey cases in Section III, infra. In general, the cases have set broad parameters protecting the right of access to the courts in a meaningful manner for low-income and vulnerable individuals. n50 For example, the court in Airey did not create any test for which kinds of cases would require free counsel; there was no list of factors such as loss of liberty, parental rights to children, life necessities, etc. n51

The post-Airey jurisprudence of the ECtHR on Article 6(1) has been reasonably sparse. One hypothesis is that the court was reflecting the views of many of its member countries. In 1979, two-thirds of the member countries at that time already had requirements, some dating back centuries, to provide the poor with free civil lawyers: Austria-1781; Belgium-1994; Denmark-1969; England-1495; France-1851; Germany-1877; Iceland-1976; Italy-1865; Norway-1915 (perhaps as early as the 1600's); Portugal-1899; Spain-1835; Sweden-1919; Switzerland-1937; The Netherlands-1957. n52 States which were not members at the time, but which had a right prior to 1979 include Monaco-1932; Poland-1964; Slovak Republic-1963; Russia-1917; Ukraine-1978. In most of the countries the right is provided by statute. Italy, Spain, Portugal and the Netherlands had constitutional provisions explicitly providing a right to free civil counsel for the poor. n53

Very few appellate judicial opinions explicated the basis for the right. In 1937, Switzerland's Supreme Court grounded such a right in an "equal protection" [*777] analysis. n54 It stated: "All citizens whether poor or rich should have access to the court." n55 In 1973, the German Constitutional Court based such a right on an access to justice rationale. n56

II. Scope Of The Right To Publicly Provided Civil Counsel: Patterns That Arise Regarding The Standards

A. Initial Observations On Comparing Legal Systems

The COE member states n57 include 3 major legal traditions - common law, [*778] civil code law, and Soviet law. n58 They each have lawyers, judges, and courts. However, these commonly used terms, while capturing certain similarities, also obscure significant differences. n59 The unitary role of lawyer in the United States is divided into solicitor and barrister in the British system and into lawyer and notary in the civil code tradition. The constitutional role of the judiciary as the final arbiter of what is the law is much more circumscribed in the civil code tradition. Case law itself is only one source of authority, and civil code courts themselves look as often to scholarly works as to judicial opinions. n60

One consequence of this is that in the civil law systems, the courts are not viewed as a primary venue for law reform. They provide a forum to resolve individual disputes. Public interest litigation challenging government practices is less common. Class actions are rare, although there are procedural options for some collective parties. The Chart in Appendix A includes only comments on class actions when they are specifically mentioned. n61 A corollary to a more circumscribed role of the courts is that law reform advocacy primarily occurs before the legislative and executive rule-making bodies. These are not contested hearings requiring lawyers. The Chart notes explicit provisions for such advocacy. n62

This article does not address a comparison of the overall costs of the programs. There are clearly countries in the chart, which have a right that is scarcely applied. n63 The former Soviet states comprise the vast majority of these countries. n64 The first to join COE was Hungary in November 1990. n65 Four of [*779] them, Albania, Bosnia/Herzegovina, Georgia, and Moldova, do not appear at this point to have any program for civil legal assistance. n66

However, those who have looked at the costs of the existing programs indicate that many spend substantially more than the US. n67

B. Expansive Coverage of Substantive Areas of Law

In approximately two-thirds of the COE countries, the right to counsel covers a wide spectrum of civil matters. These include family law, housing, consumer and debt cases, personal injury claims, public benefits, employment and labor law. n68 Where countries indicate social security coverage, this term often refers to a variety of social programs from welfare to pensions. n69

Approximately fifteen countries use language suggesting coverage of all civil disputes. Some limit the scope by identifying specific exclusions, rather than listing extensive inclusions. Typical exclusions are "assigned claims" and "small claims." These are so common that they are not included in the chart. Other frequently mentioned exclusions are matters involving the running of a business or profession and defamation. n70

As pointed out above, the ECtHR has not spelled out the substantive scope of Article 6(1). n71 In general, it has held the convention "does not in itself guarantee any particular content for the "rights and obligations' in the substantive law of the Contracting States." n72 However, the ECtHR has not always been able to disentangle procedural barriers from lack of a domestic substantive right, nor private law rights from public law rights. n73 For example, various countries have doctrines of sovereign immunity. n74 But in 2000, the ECtHR held that immunity for certain police functions is a violation of access to the courts, n75 thereby permitting a person to sue whom the police had not protected.

[*780] In 1993, the COE adopted a recommendation to facilitate effective access to the courts for the very poor, encouraging member states to extend "legal aid or any other form of assistance to all judicial instances (civil, criminal, commercial, administrative, social, etc.) and to all proceedings, contentious or non-contentious, irrespective of the capacity in which the persons concerned act." n76 The language does not require specific substantive coverage, but it implies coverage for all fact-finding hearings regardless of the label as administrative, civil, or commercial.

With respect to exclusions, defamation is nearly universal. The ECtHR had sustained that domestic policy of exclusion, concluding that injury to reputation is not so fundamental as to require human rights protection. n77 However, in 2005 the European Court found in favor of right to counsel for defamation defendants who were engaged in the longest legal trial in English history, Steel and Morris v. United Kingdom. n78 The case has come to be known as "McLibel," because the plaintiff, McDonald Corporation, brought suit against two individuals. n79 Here the court looked beyond the label of defamation to the fairness of the underlying procedure. n80 The court determined that the case was factually, legally, and procedurally complex, and that lack of a lawyer familiar with the case throughout made the procedure unfair. The court stated:

Finally, the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonalds (see paragraph 16 above) was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness, despite the best efforts of the judges at first instance and on appeal. n81

The impact of this opinion has yet to be felt. It may provide the basis for free civil counsel when the opposing party is represented to reduce unfairness where there is inequality of arms.

C. Types of Legal Services

Litigation and advice are universally available. However, only fifteen countries include mediation in their available services. n82 This may be due to mediation recently being adopted in some countries, and in others, it may not be a procedure typically involving lawyers. n83 A largely overlapping group of fifteen countries provides lawyers for transactional matters. n84 This may reflect the fact [*781] that most of the European countries are based on the civil code systems. In those systems, notary publics play a much wider role than they do in the United States. As such, they are often the professionals consulted with respect to transactions. n85

Enforcement of judgments is widely provided. It may be considered as a necessary adjunct to litigation.

Free legal advice is included in the programs of every country. By and large, the advice can cover substantive law areas not included for litigation. n86 Many programs support paralegals in the advice stage. Some countries make free legal advice available to all without regard to financial eligibility. n87

D. The Fora

In all countries with the right, lawyers are provided for the original fact-finding hearings in the courts. Almost all provide free counsel for appeals. However, eligibility usually must be re-determined at each stage. Two-thirds of the countries extend coverage to hearings in the administrative tribunals. n88

E. Merits Tests

Most of the countries discussed here have some standard for determining if the case has merit. This test does not involve a mini-hearing on the merits; rather it is a determination made by the body that will appoint the free counsel. n89 A common standard is similar to a prima facie showing and does not involve the weighing of evidence regarding each claim. n90 However, an equal number of states have some requirement in which the applicant must demonstrate that they are likely to succeed. n91

The continuing viability of the "likelihood of success" test may be in question. In Aerts v. Belgium, the ECtHR reversed a determination by Belgium that the claim was not "well-founded." n92 The court held:

In civil cases Belgian law requires representation by counsel before the Court of Cassation. It was not for the Legal Aid Board to assess the proposed appeal's prospects of success; it was for the Court of Cassation to determine the issue. By refusing the application on the ground that the appeal did not at that time appear to be well-founded, the Legal Aid Board impaired the [*782] very essence of Mr. Aerts's right to a tribunal. There has accordingly been a breach of Article 6 §1. n93

F. Need

In all instances where it exists, the right to a free lawyer arose in response to the financial needs of the applicants. Most countries provide the services completely for free if the person has very modest income and resources. n94 It is also not uncommon to have a sliding scale or a tiered system. n95 If their income exceeds the limit for a free lawyer, the applicants must contribute something toward the fees of counsel or the costs of the case. Very rarely, there is a minimum contribution. In general, however, this has been rejected as a barrier to the poorest. Generally it is individuals who are eligible for free legal services. n96 Yet, six countries also cover non-profit and charitable organizations if they are low-income. n97 (In the chart these are indicated by NGO.) Also, at least two countries include private corporations/companies. n98

Costs of litigation such as for court filings, witnesses, expert expenses, service of process, and discovery are often treated differently from lawyer fees. n99 Not all countries waive costs for those entitled to free lawyers. Most systems have some mechanism to ameliorate these expenses for low-income applicants. n100

A more significant barrier for many litigants, low-income or otherwise, is that about half of the countries have what is called "loser pay." n101 That means that prevailing parties will be awarded judgment on the substance and all of their lawyer fees and other costs. Not all "loser pay" countries impose the full burden on low-income losers. Some provide that if the litigant is publicly funded then the winner's cost will also be paid publicly. Others leave it up to the discretion of the court. n102

Two other factors affecting fees and costs are worth noting. Contingency fee arrangements are uncommon in Europe and are only now being tried out in some countries. n103 In a very few countries, such as Germany, litigation expense insurance (LEI) is widely available. n104 This is taken into consideration when services are sought. n105

[*783] Financial need may not be the sole determinant for a right to a free lawyer. For example, in France, Finland, Greece, Poland, and Belgium, the aged, disabled, veterans and people on social security are automatically eligible for free counsel. n106 Aliens seeking asylum are often provided free attorneys. n107 In some countries such as France, Denmark, and Iceland, financial eligibility is waived if the issue is of significant public interest. n108

III. Raising Issues Of International And Foreign Law In State and Federal Courts in the United States

International law is comprised of treaties and customary international law. Over one hundred years ago, the United States Supreme Court acknowledged that it had a duty to enforce established rules of international law. n109 In his ma-

jority opinion, Justice Grey wrote: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." n110 The Supremacy Clause of the US Constitution states that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the contrary notwithstanding. n111

Thus both federal and state courts have a responsibility to interpret and follow treaties. n112

The United States is not bound by the Airey decision since it is not a signatory to the European Convention. The United States is a signatory to the International Covenant on Civil and Political Rights (ICCPR) n113 and The Universal Declaration on Human Rights (UDHR). n114 Both have provisions very similar to Article 6(1) of [*784] the European Convention. n115 However, the United Nations Human Rights Committee which interprets each of these treaties has not required the provision of free civil counsel to indigents. n116

The U.S. is a member of the Organization of American States (OAS) the Charter of which contains an explicit to free civil counsel:

The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms ... . Adequate provision for all persons to have due legal aid in order to secure their rights. n117

Likewise, the appropriate bodies to interpret the Charter, The InterAmerican Commission of Human Rights and the InterAmerican Court of Human Rights have not extended the right to counsel to most civil cases. n118 But in an advisory opinion the InterAmerican Court did require civil counsel for migrant workers to be able to assert workplace rights. n119

In Paquette, Justice Gray also wrote:

For this purpose, where there is no treaty, and no controlling executive or legislative act or juridical decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. n120

[*785] Customary international law, in addition to treaties, makes up the majority of international law rules. n121 There are two components to customary international law: 1) it results from a general and consistent practice of states, and 2) it is followed by them from a sense of legal obligation:

The requirement of international consensus is of paramount importance, for it is that consensus which evinces the willingness of nations to be bound by the particular legal principle ... . Violations of current customary international law, are characterized by universal consensus in the international community as to their binding status and their content. That is, they are universal, definable, and obligatory international norms. n122

Modern scholars are divided as to the status of customary international law in federal courts. Some argue that customary international law has the status of federal common law. n123 Other commentators argue that customary international law is not federal common law because it "is not a rule of decision for any courts without statutory authorization but that it can be part of the common law of the states to the extent that individual states choose to incorporate it." n124

The debate regarding customary international law and the existence of federal common law was given new life in the recent case of Sosa v. Machain. n125 That case dealt with the Alien Torts Statute (ATS). n126 The court determined that "the ATS was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations." n127 But required "any claim based on the present-day law of nations to rest on a norm of international character accepted by the [*786] civilized world and defined with the specificity comparable to the features of the 18th century paradigms we have recognized." n128

It is unlikely that arguments made to domestic courts will succeed under international law. Without definitive rulings by international bodies responsible for treaty interpretation and without near universal adoption of a right to free civil counsel under customary international law, United States courts will probably find that the right is not required by international law.

Still, foreign law, whether it drives from international instruments, or from independent adoption by particular countries can have persuasive power. n129 Our federal law is full of instances where courts have overruled past decisions based on an "evolution of fundamental principles." n130 One such example is Gideon itself. It is a long-standing principle of our Supreme Court to interpret fundamental rights based on contemporary standards of the time. n131 For example, recently the United States Supreme Court revisited the issue of whether the execution of a mentally retarded criminal was prohibited by the Eighth Amendment of the Federal Constitution, despite having already decided the issue in a previous case. n132 In its analysis, the Court looked at the number of states that recently prohibited the execution of retarded persons. n133 It held that in light of "evolving standards of decency," the Constitution placed a "substantive restriction on the State's power to take the life of a retarded person." n134

What constitutes contemporary community standards and norms can also be ascertained from international and comparative law. This point has been amply demonstrated by three very recent Supreme Court decisions: Roper v. Simmons n135 (holding that the death penalty for offenders under the age of eighteen violated the Eighth Amendment), Lawrence v. Texas n136 (holding that a statute which made criminal certain sexual conduct by homosexuals violates the Due Process Clause), and Grutter v. Bollinger n137 (holding that the law school's consideration of race and ethnicity in its admissions decisions was lawful because law school had a compelling interest in attaining a diverse student body and admissions program was narrowly tailored and thus did not violate the Equal Protection Clause).

[*787] In Roper, the majority spent considerable time addressing the state of the law throughout the world regarding execution of juveniles. n138 Although the court was clear that even near unanimous rejection of execution of juveniles elsewhere is not controlling on the court's interpretation of the Eighth Amendment, it took note that its opinions on this issue had "referred to the laws of other countries and to international authorities as instructive." n139 Justice O'Connor wrote a separate dissent primarily to reject Justice Scalia's dissent in which he argued that foreign and international law had no place in U.S. jurisprudence. n140 Thus, six justices of the court opened the door to arguments bolstered by comparative and international law.

In Lawrence, the court based its decision to overrule the relatively recently decided case of Bowers v. Hardwick, n141 which had held that there is no fundamental right to engage in sodomy by homosexuals, by concluding that the real fundamental right involved is one of privacy. n142 In its opinion, the Supreme Court cites decisions by the European Court of Human Rights n143 and the law of other nations, n144 all of which protect the right of homosexual adults to engage in intimate consensual conduct, in order to demonstrate the widespread adoption of such a right.

In Grutter, Justice Ginsburg's concurring opinion noted that the Court's observations that race-conscious programs must end once their goal is achieved, "accords with the international understanding of the office of affirmative action." n145 Justice Ginsburg, along with Justice Breyer, thought it was important that our law was in accord with international law. n146

Conclusion

Elsewhere in the world countries have developed, as a matter of their own domestic law, a right to a free civil lawyer for low-income persons. Council of Europe members are bound by decisions of the European Court on Human Rights, which the European Convention requires them to develop as a matter of [*788] international human rights law. In the United States, policy makers, advocates, legislators and judges need to become educated about this progress. Not only have these countries put in place the right, but they have also fully articulated standards with respect to the range of the substantive cases, types of legal services, the various fora, and standards of indigence.

Recent United States Supreme Court jurisprudence has looked to foreign and international law in cases in which the Court has extended constitutional protections. In this global age ideas as well as goods and people cross borders. This country, founded on the rule of law and the centrality of resolution of disputes through the courts, has much to learn from the old world.

[*789]

Appendix A:

Country Specific Information On The Scope Of The Right to Free Lawyers for Low-Income People In Civil Matters
All of the dates referenced can be found in Johnson, International Perspective, supra note 1, or in the text of supra note 57.

Key

Country

LP - Loser Pay

Basis of Right

C - Constitution

J - Judicial Opinion

O - Executive order

S - Statute

Lawyer Services

A - Advice

L - Litigation

M -Mediation

T - Transactions

Scope of right

All - All civil and Administrative

All Civil - All civil, no Administrative

Broad - Most civil with listed exclusions, see Fora if administrative matters are included.

Types of Fora

TC - Trial Court

AH - Administrative Hearings

App - Appeals

Merits Tests

C/B - Cost/benefits, often phrased as a reasonable person with resources would pay a lawyer to pursue

Reasonable Basis - Reasonable grounds for taking, defending, continuing

Need

Yes - Means there is an income standard for eligibility

SS - Sliding Scale

NGO - Non-Governmental Organizations: includes non-profits, charitable organizations.

No Need

Advice - Advice free to all

Public Interest - If matter of public interest

Prin. - Principle

Ess. - Essential to Applicant [*790]

[SEE TABLE IN ORIGINAL]

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCounselRight to CounselGeneral OverviewInternational LawDispute ResolutionGeneral OverviewPublic Health & Welfare LawSocial ServicesLegal Aid

FOOTNOTES:

n1. 2006 Report to House of Delegates 1, available at http://abanet.org/leadership/2006/annual/onehundredtwelvea.doc (last visited Dec. 11, 2006).

n2. Micheal S. Greco, then President-Elect, American Bar Association, Speech at Fellows of the Alabama law Foundation Annual Dinner, Montgomery Alabama (Jan. 28, 2005) ("I believe that the time has come for us to recognize, finally, that a poor person whether facing either a serious criminal or civil matter, must have access to counsel if that person is to receive justice.").

n3. See James Podgers, A Civil Law Gideon, August 8, 2006, available at http://www.abanet.org/journal/daily/am8house.html.

n4. *372 U.S. 335 (1963)* (requiring publicly paid lawyers for low income criminal defendants).

n5. Justice Earl Johnson, Associate Justice of the California Court of Appeals, is one of the few who has passionately supported his arguments for a Civil Gideon by exploring the status of the right to free civil counsel for indigents under other legal systems. Earl Johnson et al., Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies (1975) [hereinafter Toward Equal Justice]; Earl Johnson, Thrown to the Lions: A Plea for a Constitutional Right to Counsel for Low-Income Civil Litigants, Bar Leader (Sept./Oct. 1976) [hereinafter A Plea]; Earl Johnson and Elizabeth Schwartz, Beyond Payne: The Case for a Constitutional Right to Representation in Civil Cases for Indigent California Litigants, *11 Loyola L.A. L. Rev. 249 (1978)* [hereafter Beyond Payne]; Earl Johnson, The Right to Counsel in Civil Cases: An International Perspective, *19 Loy. L.A. L. Rev. 341 (1985)* [hereinafter International Perspective]; Earl Johnson, Toward Equal Justice: Where the United States Stands Two Decades Later, 5 Maryland Journal of Contemporary Legal Issues 199 (1994) [hereinafter Two Decades Later]; Earl Johnson, Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrialized Democracies, 24 Fordham Int'l L.J. S83 (2000) [hereinafter Comparing]; Earl Johnson, Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and its Implications for a Right to Equal Justice in Civil Cases, 2 Seattle J. for Soc. Just. 201 (2003). See also Hon. Robert W. Sweet, Civil Gideon and Confidence in a Just Society, *17 Yale L. & Pol'y Rev. 503 (1998).*

n6. See the chart at end of this article distilling the scope of the right to civil counsel in 49 European states, Canada, and 8 other countries.

n7. *Gideon, 372 U.S. at 344* ("Any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

n8. *Id. at 339-40.*

n9. Johnson, Toward Equal Justice, supra note 1; A Plea, supra note 1; Beyond Payne, supra note 1; Luther M. Swygert, Should Indigent Civil Litigants in the Federal Courts Have a Right to Appointed Counsel, *39 Wash. & Lee L. Rev. 1267 (1982)* (The author was Senior Judge at the United States Court of Appeals for the Seventh Circuit. This was probably one of the last articles written before Lassiter was decided.).

n10. See *Lassiter v. Dep't of Soc. Serv. of Durham County, N.C., 452 U.S. 18 (1981)* (holding that "the Constitution does not require the appointment of counsel for indigent parents in every parental status termination proceedings" and "the decision whether due process calls for the appointment of counsel is to be answered in the first instance by the trial court, subject to appellate review").

n11. *Id. at 25.*

n12. *Id. at 20-21.*

n13. Laura K. Abel & Risa E. Kaufman, Preserving Aliens' and Migrant Workers' Access to Civil Legal Services: Constitutional and Policy Considerations, *5 U. Pa. J. Const. L. 491 (2003);* Simran Bindra & Pedram Ben-Cohen, Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants, 10 Geo. J. on Poverty L. & Pol'y 1 (2003); Lisa Brodoff et al., The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon, 2 Seattle J. for Soc. Just. 609 (2004); James A. Bamberger, Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State, 4 Seattle J. for Soc. Just. 383 (2005); Robert B. Kershaw, Access to Justice in Maryland - A Visionary's Model, 37 Md. Bar J. 50 (2004); Rachel Kleinman, Comment, Housing Gideon: The Right to Counsel in Eviction Cases, *31 Fordham Urb. L.J. 1507 (2004);* Deborah Perluss, Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest, 2 Seattle J. for Soc. Just. 571 (2004); Joan Grace Ritchey, Note, Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation, *79 Wash. U. L.Q. 317 (2001);* Richard Zorza, Some Reflections on Long-Term Lessons and Implications of the Access to Justice Technology Bill of Rights Process, *79 Wash. L. Rev. 389 (2004);* John Nethercut, "This Issue Will Not Go Away": Continuing to Seek the Right to Counsel in Civil Cases, *38 Clearinghouse Rev. 381 (2004).* See other articles in this volume 2006 Sparer Symposium, 2006 Edward V. Sparer Symposium, Civil Gideon: Making the Case, and in Clearinghouse Review. 40 Clearinghouse Review 3-4, 2006, A Right to A Lawyer? Momentum Grows: Debra Gardner, Pursuing a Right to Counsel in Civil Cases: Introduction and Overview, 167; Paul Marvy, Thinking About a Civil Right to Counsel Since 1923, 170; Clare Pastore, The California Model Statute Task Force, 176 [hereinafter Model Statute]; Paul Marvy, "To Promote Jurisprudencial Understanding of the Law": A Right to Counsel in Washington State, 180 [hereinafter Washington State]; Clare Pastore, Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions, 186; Russell Engler, Toward a Context-Based Civil Right to Counsel Through "Access to Justice' Initiatives, 196; Wade Henderson and Jonathan M. Smith, The Right to Counsel and Civil Rights: An Opportunity to Broaden the Debate, 210; Steven D. Schwinn, Sidestepping Lassiter on the Path to Civil Gideon: Civil Douglas, 217; John F. Ebbott, To Gideon via Griffith: The Experience in Wisconsin, 223, [hereinafter Wisconsin]; Marcia Palof, How to Start Advocating a right to Counsel in Civil Cases in Your State: A Look at Ohio, 231; John Nethercut, Maryland's Strategy for Securing a Right to Counsel in Civil Cases: Frase v. Barnhart and Beyond, 238 [hereinafter Maryland's Strategy]; Laura Abel and Max Rettig, State Statutes Providing for a Right to Counsel in Civil Cases, 245; Laura Abel, A right to counsel in Civil Cases: Lessons from Gideon v. Wainwright, 271; Gaylene Schellenberg, Access to Justice in Canada: Canadian Bar Association Strategies to Make it Happen, 281; Raven Lidman, Civil Gideon: A Human Right Elsewhere in the World, 288.

n14. *Frase v. Barnhart, 840 A.2d 114 (Md. 2003)* (see Marvy, Washington State, supra note 13); *In re Custody of Halls, 126 Wash. App. 599 (Wash. Ct. App. 2005)* (see Marvy, Washington State, supra note 13); King v. King, No. 57831-6-1 (Wash. Ct. App. oral argument in Spring 2007). See Wisconsin cases cited in Ebbott, Wisconsin, supra note 13. Each case raised claims under their respective constitutions.

n15. Much of the information on the foreign law systems was compiled by my research assistants, Manal Boulos and Denise Fowley. Additionally, about 70 partners, associates, paralegals and interns at 11 law firms provided pro bono assistance by collecting information for a survey on approximately 80 countries. The data from the survey, including, scope, delivery systems and financing are on file with the author.

n16. Johnson, International Perspective, supra note 1; Infra the chart at the end of this article.

n17. Id.

n18. Human Rights Commissioner - presentation of reports on Italy and Iceland, Dec. 14, 2005, http://www.coe.int/T/E/Com/Press/News/2005/20051214_commissioner.asp (last visited Oct. 24, 2006); Walter Schwimmer, Human Rights Safeguard Apply Equally to Immigrants, Sept. 15, 2003, http://www.coe.int/NewsSearch/Default.asp?p=nwz&id=3021&lmLangue=1 (last visited Oct. 24, 2006).

n19. On the Council of Europe and European Union websites there are pages devoted to accessing counsel abroad and in cross border disputes. See http://www.coe.int/DefaultEN.asp (last visited Oct. 24, 2006); http://europa.eu (last visited Oct. 24, 2006).

n20. http://www.coe.int/T/E/Com/Files/PA-Sessions/Sept-2003/20030930_news_migrant.asp#TopOfPage (last visited Oct. 24, 2006).

n21. See http://europa.eu/abc/history/index_en.htm (last visited Oct. 24, 2006).

n22. Symposium, Constitutional "Refolution" In The Ex-Communist World: The Rule of Law, *12 Am. U. J. Int'l L. & Pol'y 45 (1997).*

n23. See Council of Europe, infra note 56 (providing replies to questionnaire on legal aid - how to benefit from it). It is beyond the scope of this article to explore the costs or structures of the programs.

n24. See Bruce A. Boyer, Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham, *36 Loy. U. Chi. L.J. 363, 367 (2005);* Pastore, Life After Lassiter, supra note 13.

n25. *Roper v. Simmons, 543 U.S. 551, 574 (2005),* overruling *Stanford v. Ky., 492 U.S. 361 (1989).*

n26. *Lawrence v. Texas, 539 U.S. 558, 578 (2003),* overturning *Bowers v. Hardwick, 478 U.S. 186 (1986).*

n27. *Adkins v. Virginia, 536 U.S. 304, 318 (2002),* overruling *Penry v. Lynaugh, 492 U.S. 302 (1989).*

n28. An Act to Admit Such Persons as Are Poor to Sue in *Forma Paupis, 11 Hen. 7,* c. 12 (1494), reprinted in 2 Statutes of the Realm 578 (1993) (spelling modernized) (emphasis added). There are indications from the Ninth Century onward that the English courts provided free publicly paid counsel on a sporadic basis. See Swygert, supra note 5, at 1270; John MacArthur Maguire, Poverty and Civil Litigation, *36 Harv. L. Rev. 361, 365-66 (1923)* (finding to "accept the maxim under Henry III (1216-1272) that the poor need not pay for their writs" and that "common law court had inherent power to entertain gratuitously the plains of the needy").

n29. J.H. Baker, An Introduction To English Legal History 134 (2d ed. 1979); Swygert, supra note 5, at 1271; Maguire, supra note 3.

n30. See, e.g., *Wait v. Farthing, 84 Eng. Rep. 237,* (K.B. 1668); 1 George William Sanders, Orders of the High Court of Chancery 122, 243, 296 (London, A. Maxwell & Son 1845).

n31. The statute was repealed by the Statute Law Revision and Civil Procedure Act, 46 & 47 Vict. c. 49 (1883). The act replaced *11 Hen. 7,* c. 12 with a system of legal aid, administered by the rules of court, which provided for the appointment of counsel. See Seton Pollock, Legal Aid - The First 25 Years 12 (1975). A new system of legal assistance was created by statute in 1929. Joan Mahoney, Symposium: Legal Services: Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States, *17 St. Louis U. Pub. L. Rev. 223, 226 (1998).*

n32. See, e.g., James W. Ely, Jr., The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process, *16 Const. Comment. 315, 322 (Summer 1999)* ("The colonists in the seventeenth century looked to Magna Carta as a protection of their liberties.").

n33. *Frase, 379 Md. at 102, 840 A.2d 114* (The appellant prevailed on the underlying claim. The majority did not reach the Civil Gideon issue).

n34. Id.

n35. "That the colonists carried with them the rights of Englishmen, when they crossed the Atlantic, is one of the axioms of our constitutional history." Bernard C. Steiner, The Adoption of English Law in Maryland, *8 Yale L.J. 353, 353 (1899).* See also Maryland v. Buchanan, *5 H. & J. 317, 355 (1821)* (stating "that our ancestors did bring with them the laws of the mother country, so far at least as they were applicable to their situation, and the condition of an infant colony, cannot be seriously questioned").

n36. Id.

n37. Airey v. Ireland, 2 Eur.H.R.Rep. 305 (1979-1980).

n38. Id.

n39. Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter I. Statute of the Council of Europe (ETS 1) Chapter II, Article 3, 1949. See also COE home page, http://www.coe.int/T/e/Com/about_coe/ (last visited Oct. 20, 2006).

n40. Council of Europe, http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp (last visited Oct. 20, 2006) (lists 46 member states with dates of ratification). The United Kingdom comprised of four countries, England, North Ireland, Scotland, and Wales, is considered one member; hence the difference between 46 member states and 49 countries in the COE.

n41. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, P 1, Nov. 4, 1950, 213 U.N.T.S. 222, 228.

n42. Id. (emphasis added). It is to be noted that there is an explicit language in art. *6 P 3*(c), requiring free lawyers in criminal cases.

n43. Convention for the Protection of Human Rights and Fundamental Freedoms, Sec. 2, art. 19, Nov. 4, 1950, 213 U.N.T.S. 222, 228. (The Court was established to "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights ... . It shall function on a permanent basis.").

n44. Airey v. Ireland, 2 Eur.H.R.Rep. 305, P 14 (1979-80). In Airey, the plaintiff, Mrs. Airey, was seeking a separation from her husband but was unable to do so because she could not afford an attorney. *Id. at P 24.* One of her arguments was that the government violated her right under Art. 6(1) since her right of access to the court was effectively denied and she could not get a fair hearing without an attorney. *Id. at P 13.* Ireland argued that it did not violate Art 6(1) because it did not affirmatively bar or place an obstacle in the way of the plaintiff's access to the court, and because the plaintiff could have proceeded without the assistance of lawyer. *Id. at P 24.* [Ireland had signed the treaty with an explicit reservation against providing broader free legal aid. Reservation contained in the instrument of ratification.].

n45. Id. at P P 24 -25.

n46. Id.

n47. Id.

n48. Id.

n49. Id.

n50. A more detailed description of these cases can be found in Michael J. Beloff & Murray Hunt, The Green Paper On Legal Aid And International Human Rights Law, 1996 Eur. Hum. Rts. L. Rev. 1, 5-17, and Francis G. Jacobs, The Right of Access to a Court in European Law, 10 Interights Bull. 53, 55 (1996).

n51. See Airey, at P 25. This is to be distinguished from the Lassiter test (loss of liberty), or state courts' rationales which have expanded the right to Parental Termination Proceedings (loss of parental rights). Some United States authors recognize the limits of United States jurisprudence in this area and argue for a context-based right. See Andrew Scherer, The Importance of Collaborating to Secure a Civil Right to Counsel, (unpublished paper presented at Partners in Justice: A Colloquium on Developing Collaborations Among Courts, Law School Clinical Programs and the Practicing Bar, May 9, 2005). See also Russell Engler, Towards a Context-Based Civil Gideon Through Access to Justice Initiatives, *40 Clearinghouse Rev. 3-4* (July-Aug. 2006); Kleinman, supra note 14 (Evictions); Bindra & Ben - Cohen, supra note 14 (Civil defendants); Abel & Reise, supra note 14; and Eleanor Acer, et al., No Deportation Without Representation: The Right to Appointed Counsel in the Immigration Context, Immigration Briefings, 1 (Oct. 2005) (Immigration matters).

n52. The dates signify the earliest date the right to a free civil lawyer is mentioned in the law of that country. These dates are mostly taken from Johnson, International Perspective, supra note 1, at 342-49. But also from other sources that are mentioned in, infra, note 56.

n53. Lua Kamal Yuille, No One's Perfect (Not Even Close): Reevaluating Access To Justice In United States and Western Europe, *42 Colum. J. Transnat'l L. 863 (2004).*

n54. Johnson, International Perspective, supra note 1, at 347.

n55. Francis William O'Brien, Why Not Appointed Counsel in Civil Cases? The Swiss Approach, *28 Ohio St. L.J. 1, 5* (citing judgment of October 8, Arrets du Tribunal Federal 63, 1, 209 (Swits)).

n56. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 17, 1953, 26 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 2, 336 (F.R.G.).

n57. Information on the legal systems of the COE member countries can be found in articles and books cited elsewhere in this article. The most detailed and most recent information comes from thorough questionnaires answered by each country on COE and European Union websites, and conference papers collected at the International Legal Aid Group, Open Society and Public Interest Law Initiative websites. Council of Europe, Legal Aid - How to Benefit From It, http://www.coe.int/t/e/legal_affairs/legal_cooperation/operation_of_justice/access_to_justice_and_legal_aid/List%20of%20replies.asp#TopOfPage (last visited Oct. 20, 2006) [hereinafter Council of Europe] (providing replies to questionnaire from 36 countries: Austria, Azerbaijan, Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Finland, Georgia, Germany, Greece, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Macedonia, Turkey, and the United Kingdom's England, Wales, North Ireland, and Scotland); European Union, Legal Assistance, Legal Aid, http://europa.eu.int/youreurope (last visited Oct. 20, 2006) (providing a list of all 26 member countries); European Commission, European Justice Network, Legal Aid-General Information, http://ec.europa.eu/civiljustice/legal_aid/legal_aid_gen_en.htm (last visited Oct. 20, 2006) (providing information on 26 member countries); Public Interest Law Initiative, Background materials - 2nd European Forum on Access to Justice, http://www.pili.org/2005r/2005r/index.php?option=content&task=view&id=176 (last visited Oct. 20, 2006) (presenting New Developments in Legal Aid in Central and Eastern Europe and updates since the first Forum on Access to Justice held in December 2002, compiled by Open Society Justice Initiative and Public Interest Law Initiative, Second Forum on Access to Justice, 2005); International Legal Aid Group, National Reports, http://www.ptools.com/clientside/show/ILAG/pages/nationalreports.html (herineafter International Legal Aid Group) (last visited Oct. 20, 2006) (supplying reports presented at Killarney Conference, 2005 covering Belgium, Canada, Finland, The Netherlands, New Zealand, Australia, Germany, Ireland, Hong Kong, Scotland, South Africa, USA, and Brazil); International Legal Aid Group, Conference Papers, http://www.ptools.com/clientside/show/ILAG/pages/papers.html (last visited Oct.20, 2006) (supplying papers presented at Killarney Conference, 2005, covering Germany, England, South Africa, Wales, Australia, Scotland, The Netherlands, Canada, USA, New Zealand, and Turkey); International Legal Aid Group, Conference Papers 2003, http://www.ilagnet.org/papers.htm (last visited Oct. 20, 2006) (last visited Oct.20, 2006) (supplying papers and reports presented at Harvard Conference, 2003, covering Scotland, Ontario, Ireland, Germany, Sweden, Canada, England, Wales, The Netherlands, Belgium, Finland, Norway, New Zealand, North Ireland, and South Africa). See also The Transformation of Legal Aid, Comparative and Historical Studies (Francis Regan et al. eds., 2000); http://freedomhouse.org/modules/publications/ccr/modPrintVersion.cfm?edition=7&ccrpage=31&ccrcountry=109 (last visited Oct. 14, 2006); http://www.un-az.org/UNDP/DOC/constitution.php (last visited Oct. 14, 2006); Georgiana Iorgulescu & Nicoleta Popescu, Legal Aid Developments: Country Up-date on Romania 1 (2005), http://www.pili.org/2005r/dmdocuments/RomaniaUpdate_PopescuIorgulescu.pdf.; http://www.constitution.ru/en/10003000-01.htm (last visited Oct. 13, 2006); Answer to Revised Scheme for Evaluating Judicial Systems, San Marino (2004), http://www.coe.int/t/dg1/legalcooperation/cepej/evaluation/2006/San%20Marino.PDF; Mihaela Anclin, Legal Aid Developments: Country Up-date on SLOVENIA (February 2005), http://www.pili.org/2005r/dmdocuments/SloveniaUpdate_Anclin.doc; http://www.kmu.gov.ua/control/en/publish/printable_article?art_id=235436 (last visited Oct. 14, 2006); Const. art. 39A, amended by the Constitution (Forty-second Amendment) Act, 1976; U.S. Department of State, Country Reports on Human Rights Practices 2000: Japan (February 23, 2001), available at http://www.state.gov/g/drl/rls/hrrpt/2000/eap/709.htm; U.S. Department of State, Country Reports on Human Rights Practices 2000: Brazil (February 23, 2001), available at http://www.state.gov/g/drl/rls/hrrpt/2000/wha/724.htm (last visited Oct. 20, 2006); Legal Services Society Act, Fact Sheet (June 2005), http://www.lss.bc.ca/assets/newsroom/fact_sheets/LSS_Act_amendments.pdf (last visited Oct. 20, 2006); Department of Justice Canada, A Study on Legal Aid and Official Languages In Canada 49,

(May 2002), http://www.canada-justice.ca/en/ps/rs/rep/2003/rr03lars-1/rr03lars-1.pdf (last visited Oct. 20, 2006) [hereinafter Canada Legal Aid Study].

n58. Soviet law essentially built a totalitarian superstructure on the civil law tradition. See Johnson, International Perspective, supra note 1, at 344.

n59. See Fritz Moses, International Legal Practice, *4 Fordham L. Rev. 244 (1935).*

n60. J. H. Merryman et al., The Civil Law Tradition: Europe, Latin America, East Asia passim (1994).

n61. Infra the chart at the end of this article (specifically Ireland).

n62. See infra Norway portion of the chart at the end of this article.

n63. For example, Romania appears to provide representation in Administrative Hearing, but authors indicate that in practice this is not operational. See Council of Europe, supra note 56.

n64. Infra the chart at the end of this article (distilling the former Soviet states stance on legal aid).

n65. Id.

n66. Id. (noting whether nations have programs for civil legal assistance).

n67. John Flood & Avis White, Report on Costs of Legal Aid in Other Countries, page 5 (2004) (On file with the author and can be accessed at http://johnflood.com) (comparing per capita expenditures on civil legal services in the 1990's: US-$ 2.25; Germany-$ 4.86; France-$ 4.50; Quebec-$ 7.07; Ontario-$ 7.06; British Columbia-$ 7.80; Netherlands-$ 9.70 New Zealand-$ 7.10; and England-$ 39.00); Key Features of Fifteen National Legal Aid Program, (2005) (On file with the author) (providing a summary of reports submitted to International Legal Aid Group conference.-comparing expenditure per $ 10,000 GDP: US-$ .80; Canada-$ 2.80; Finland-$ 2.35; Germany-$ 2.25; Hong Kong-$ 3.30; Ireland-$ 2.35; Netherlands-$ 6.90; New Zealand-$ 3.25; North Ireland-$ 7.00; and Scotland-$ 6.30). See also Johnson, Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrialized Democracies, supra note 1.

n68. See Johnson, International Perspective, supra note 1.

n69. Infra the chart at the end of this article.

n70. Id.

n71. Andrew le Sueur, Access to Justice Rights in the United Kingdom, 5 Eur. H.R.L.Rep, 457-75 (2000).

n72. Id. at 463.

n73. Jeremy McBride, Access to Justice under International Human Rights Treaties, 5 Parker Sch. J. E. Eur. L. 3, 6 (1998).

n74. See http://www.kmu.gov.ua/control/en/publish/printable_article?art_id=235436 (last visited Oct. 20, 2006); http://www.constitution.ru/en/10003000-01.htm (last visited Oct. 20, 2006).

n75. Osman v. United Kingdom, 29 E.C.H.R. 245 (2000). See McBride, supra note 70, at 19; le Sueur, supra note 68, at 466.

n76. Recommendation No. R (93) 1, adopted by the Committee of Ministers of the council of Europe (Jan. 8, 1993).

n77. Munro v. the United Kingdom, App. No. 10594/83, 52 Eur. Comm'n. H.R. Dec. & Rep. 158 (1987) (See especially P 54).

n78. Steel and Morris v. United Kingdom, 22 E.Ct. H.R. 403 (2005).

n79. Id.

n80. Id. at 404.

n81. Id. at 430.

n82. Infra the chart at the end of this article, which addresses which nations provide mediation.

n83. Johnson, International Perspective, supra note 1.

n84. Infra the chart at the end of this article, addressing which nations provide transactional aid.

n85. I have found very little mention of funding for notaries.

n86. Infra the chart at this end of the article.

n87. Id.

n88. Id.

n89. Id.

n90. Id.

n91. Id.

n92. Aerts v. Belgium, 29 Eur. Ct. H.R. 50 (2000). See also, Symposium, An Overview Of Civil Legal Services Delivery Models, Eleventh Annual Philip D. Reed Memorial Issue, Partnerships Across Borders: A Global Forum On Access To Justice, 24 Fordham Int'l L.J. S225 (2000) (Comments by Pascal Dorneau-Josette, Secretary of the European Court of Human Rights on potential impact of Aerts on numerous French cases which are rejected by legal aid body for lack of merit).

n93. Aerts v. Belgium, 29 Eur. Ct. H.R. at 60.

n94. Infra the chart at end of this article. In some countries such as the Netherlands the financial standard is high enough that it applies to approximately 40 percent of the population.

n95. Council of Europe, supra note 56.

n96. Id.

n97. These include Estonia, Greece, Italy, Poland, Slovenia, and Spain.

n98. Infra the chart at end of this article.

n99. Council of Europe, supra note 56.

n100. Id.

n101. Id.

n102. Id.

n103. Id.

n104. Id.; see also infra the chart at end of this article.

n105. Council of Europe, supra note 56. Sweden, the country with reputedly the most extensive program, has been looking into LEI as a cost cutting measure. And a few other countries, notably in the UK, are investigating the possibilities, although most do not have insurers willing to offer LEI.

n106. Social security is often the term applied to what we would refer to as welfare, food stamps, Medicaid or other needs-based programs.

n107. For example, see Belgium, Greece, Hungary, Ireland, Norway, and Spain, infra in the chart at the end of this article.

n108. See infra the chart at end of this article.

n109. *The Paquette Habana, 175 U.S. 677, 700 (1900).*

n110. Id.

n111. US Const. art. VI, §2.

n112. See Jordan J. Paust, International Law as Law of the United States: Trends and Prospects (Carolina Academic Press 1996) (Exploring various types of incorporations of international law into U.S. domestic legal

processes, and the trends in use and prospects, as well as means of resolving unavoidable clashes between types of international law and domestic law.).

n113. Office of the United Nations Commissioner of Human Rights, International Covenant on Civil and Political Rights (last modified Sept. 19, 2006), http://www.ohchr.org/english/countries/ratification/4.htm.

n114. United Nations, Universal Declaration of Human Rights, (visited Oct. 15, 2006), http://www.un.org/Overview/rights.html. The Declaration was adopted on December 10, 1948 by General Assembly resolution 217 A (III), United Nations, Hundred and Eighty-Third Plenary Meeting, Continuation of the discussion of the draft universal declaration of human rights. http://www.un.org/Depts/dhl/landmark/pdf/a-pv183.pdf.

n115. Id. Article 10 of the UDHR states, "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." (emphasis added). ICCPR Art. 14 (1) states: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent independent and impartial tribunal established by law." (emphasis added).

n116. Id.

n117. Organization of American States, Charter of the Organization of American States Art. 41 (Washington D.C., Nov. 1997) (emphasis added).

n118. The International Center for Criminal Law Reform and Criminal Justice Policy, The Responsibility of States to Provide Legal Aid (Mar., 1999), http://www.icclr.law.ubc.ca/Publications/Reports/beijing.pdf (argues that "this reference to legal aid in securing rights covers both civil and criminal law matters as it relates to effective recourse to ensure all human rights").

n119. InterAmerican Court of Human Rights, Advisory Opinion OC-18/03 (September 17, 2003) PP 107, 108, 121.

n120. *The Paquette Habana, 175 U.S. 677, 700 (1900).*

n121. See *Restatement (Third) of the Foreign Relations Law of the United States §§101*, 102 (1987).

n122. *Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D.Cal. 1988).*

n123. See *Restatement (Third) of the Foreign Relations Law of the United States §§111* cmt. d, 115 cmt. e (1987).

n124. Julian G Ku, Customary International Law in State Courts, *42 Va. J. Int'l L. 265, 267 (2001).* See generally Curtis A. Bradley, The Status Of Customary International Law In U.S. Courts - Before And After Erie, *26 Denv. J. Int'l L. & Pol'y 807 (1998);* Curtis Bradley and Jack L. Goldsmith, Customary International Law As Federal Common Law: A Critique Of The Modern Position, *110 Harv. L. Rev. 815 (1997);* Gordon A. Christenson, Customary International Human Rights Law In Domestic Court Decisions, *25 Ga. J. Int'l & Comp. L. 225* (1995/1996); Joan Fitzpatrick, The Relevance Of Customary International Norms To The Death Penalty In The United States, *25 Ga. J. Int'l & Comp. L. 165* (1995/1996); F. Giba-Matthews, Customary International Law Acts As Federal Common Law In U.S. Courts, *20 Fordham Int'l L. J. 1839 (1997);* Louis Henkin, International Law As Law In The United States, *82 Mich. L. Rev. 1555 (1984);* Jack L. Goldsmith and Eric A Posner, A The-

ory Of Customary International Law, *66 U. Chi. L. Rev. 1113 (1999);* Harold Hongju Koh, Review Essay: Why Do Nations Obey International Law?, *106 Yale L.J. 2599 (1997);* Harold Hongju Koh, Commentary: Is International Law Really State Law?, *111 Harv. L. Rev. 1824 (1998);* Jordan J. Paust, Customary International Law And Human Rights Treaties Are Law Of The United States, *20 Mich. J. Int'l L. 3301 (1999).*

n125. *542 U.S. 692 (2004).*

n126. *28 U.S.C.A. §1350* (West 2006).

n127. *Sosa, 542 U.S. at 721.*

n128. *Id. at 725.*

n129. Hans Linde, Comments, Symposium On International Human Rights Law In State Courts, *18 Int'l Law. 77, 78 (1984)* (explaining that "it is potentially a powerful argument to say to a court that a right which is guaranteed by an American constitutional provision, state or federal, surely does not fall short of a standard adopted by other civilized nations"). Justice Linde of the Oregon Supreme Court wrote the opinion in the case of *Sterling v. Cupp, 625 P.2d 123 (Or. 1981)* (holding that cross-gender prison searches in correctional facilities violated the Oregon Constitution. Throughout the opinion, Judge Linde makes reference to the United Nations Charter, the UDHR, the ICCPR and other international instruments. Id. at passim.).

n130. See, e.g., *Lawrence v. Texas, 539 U.S. 558, 578 (2003)* (overturning *Bowers v. Hardwick, 478 U.S. 186 (1986)).*

n131. See, e.g., *Weems v. United States, 217 U.S. 349 (1910)* (holding that what is considered cruel and unusual is to be interpreted by contemporary standards of what constitutes cruel and unusual).

n132. *Atkins v. Virginia, 536 U.S. 304 (2002).*

n133. *Id. at 314-17.*

n134. *Id. at 321.*

n135. *543 U.S. 551 (2005).*

n136. *539 U.S. 558 (2003).*

n137. *539 U.S. 306 (2003).*

n138. Roper, 543 U.S. at. 574-76.

n139. Id. at 575.

n140. Id. at 587-608.

n141. *478 U.S. 186 (1986).*

n142. *Lawrence, 539 U.S. 558.*

n143. *Id. at 576* (citing Dudgeon v. United Kingdom, 149 E.C.H.R. (1981), P.G. & J.H. v. United Kingdom, App. No. 44787/98, & P 56 (E.C.H.R., Sept. 25, 2001), Modinos v. Cyprus, 259 Eur. Ct. H.R. (1993), Norris v. Ireland, 142 Eur. Ct. H.R. (1988)).

n144. *Id. at 576-77.*

n145. *Grutter, 539 U.S. at 344* (Ginsburg, J, concurring) (citing the The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994); see also State Dept., Treaties in Force 422-423 (June 1996), for it's endorsement of "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." Annex to G.A. Res. 2106, 20 U.N. GAOR Res. Supp. (No. 14) 47, U.N. Doc. A/6014, Art. 2(2) (1965). But such measures, the Convention instructs, "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." Id.).

n146. Id.