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The Appointment of Civil Counsel for the Indigent: an Examination of the Practice through the Lenses of History, Current Policy, and International Comparison

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I. Introducing the Civil Counsel Problem

Imagine an indigent litigant in a civil trial, faced with the potential termination of his or her parental rights and pitted against the immense legal and investigative resources of the state. Now, take into account the indigent parent's bewilderment at the complexity of legal proceedings, especially in light of the common correlation between a person's poverty and his or her level of education. Ultimately, the indigent litigant in a parental rights case is overwhelmingly disadvantaged. With the constitutional guarantee of due process in mind—a concept that courts in general have intentionally left flexible—the appointment of an attorney for an indigent parent might seem appropriate and requisite for the adequate protection of a person's right to a fair trial, regardless of financial ability. In fact, the Supreme Court reached this decision for criminal trials in *Gideon v. Wainwright*[1] in 1963. Yet, in 1981, the Supreme Court's ruling in *Lassiter vs. Dept. of Social Services of North Carolina*[2] rejected the idea of a general federal due process right to counsel, not only for

[1] *Gideon v. Wainwright, 372 U.S. 335 (1963).*
[2] *Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981).*

indigent defendants faced with parental rights termination, but also for any indigent litigant in a civil trial.

Yet, in its decision, the Court not only broke with the trends in state courts, constitutions, and statutes, as well as counterpart examples within the criminal realm, but it also signified a watershed in an evolving, centuries-long history of differing practices and perspectives regarding the provision of appointed counsel for the indigent in civil trials.

Furthermore, the *Lassiter* Court seems to have broken with the established domestic policy examples of the United States' international peers, as well as several principles and agreements within the international legal realm. Differing from countries of similar political, social, and economic disposition, the United States denies a practice that its neighbors and supranational organizations consider integral to the preservation of civil rights. In doing so, the United States has set a uniquely exclusive precedent with regard to counsel provision.

Thus, this research intends to examine the *Lassiter* decision—as well as the results of its implementation—within the context of Anglo-American legal history, contemporary legal practices in the United States, and trends in the global community, all focusing on the status of the provision of counsel to the indigent in civil trials. Focusing frequently on parental rights termination

proceedings as a critical, controversial arena for discussing the provision or denial of civil counsel—the primary issue of the *Lassiter* case—the research broadens its scope to encompass the idea of providing civil counsel on a larger scale in a variety of cases. In doing so, the research illuminates a set of evolving, interrelated perspectives regarding the provision of counsel, ranging in designation from "right," to "legal dispensation," to "moral obligation," to "charitable gift," depending on the circumstances under which the concept has been at issue.

This evolution in perspectives begins in 15th century Britain, where a statute required the provision of counsel to indigents in civil trials, even when courts denied criminal defendants the right to paid counsel. From there, the research examines legal documents and recorded cases from history, tracing the practice of providing civil counsel from the American colonial environment, through the Civil War era, through the early 20th century, to modern-day society.

Examining modern day practices involving the provision of civil counsel, *Gideon* and *Lassiter* are compared. In turn, in addition to the reactions to the *Lassiter* decision, the research provides examples of where historical trends have led through the analysis of recent relevant cases, as well as where future trends' trajectories may lie.

Finally, the research examines the provision of civil counsel from an international perspective. Briefly analyzing both international agreements to which the United States is party, as well as the domestic laws of other countries, the research provides informative examples for policymakers in the United States.

After uncovering historical, current policy-related, and international examples of providing or denying civil counsel, the research advances an analysis markedly different from the reasoning and methodology of the *Lassiter* Court. The multi-faceted body of evidence compiled infra implies conclusions about the necessity, constitutionality, and practicality of providing appointed civil counsel for the poor, not only in parental rights proceedings but also in other categories of "critically important" or "serious" cases, which the analysis will define. Aside from the more complicated, subjective, and semantic debates about the status of providing civil counsel as a right, the practice's role as a conduit or facilitator for securing universally accepted basic rights in the courtroom is apparent.

Accordingly, there is a need both to examine the body of evidence in support of expanding the provision of civil counsel and, in turn, to glean a consistently applicable standard in order to determine which categories of cases qualify for the provision of counsel under certain criteria. In addition to

providing an historical and current informational base to develop a reliable standard to delineate the civil cases in which courts provide counsel, the research will investigate the standards and methods of implementation of the systems of other countries that provide the right to civil counsel—uniting historical evidence, current legal thought, and foreign comparative perspectives with American constitutional values. In turn, the research offers ideas for reform and implementation of a workable system to provide counsel to indigent civil litigants through, inter alia, the use of a reconfigured balancing test.[3]

Ultimately, with an awareness of the historical, domestic, and international evidence in favor of expanding the provision of civil counsel—as well as the practical benefits of its expansion in a country with significant limitations on access to justice for the indigent—the modern United States should be aware of the consequences of its increasingly complex legal system as well as its growing number of impoverished citizens. In turn, the current treatment of the provision of civil counsel as a measure applied only in particularly exceptional circumstances should be reexamined and recalibrated in light of the demands of due process, today. In other words, the shortcomings of *Lassiter* need to be remedied through a redirection in policy, which treats the provision of counsel in civil trials much like the provision in criminal trials—as a

[3] A test unlike in the *Lassiter* decision, which relied upon the *Mathews* test and a presumption against providing counsel in cases not involving physical liberty, discussed infra.

right. Indeed, the central issue of the provision of counsel debate ought not center on the nature of the case as criminal or civil; rather, the debate should focus on the nature of the fundamental rights in jeopardy.

Despite the arguable benefits of constitutionally guaranteed civil counsel for indigents, costs and obstacles to reform loom large. These are also addressed within the research, citing examples in which efficiently providing counsel has proven difficult.

In sum, the research concludes a serious need for reform with regard to providing counsel to poor civil litigants in the United States. While obstacles exist, changing the system to allow equal access to the court system for the protection of basic rights is an endeavor worth undertaking—an endeavor on behalf of those who seek the guarantees of fundamental fairness from the Constitution.

II. Appointed Civil Counsel in History: Forgotten Truths and Change Over Time

The *Lassiter* decision, which is discussed infra, exemplifies the halt of the transformation and development of the practice of appointing counsel in critical

civil trials. In other words, *Lassiter* is a definitive roadblock against expanding the notion of providing civil counsel to indigents. This notion is a product of changing legal thought throughout history. Appointment of counsel was originally considered as a necessary legislative provision in Britain, obscured during the American colonial period, and reconfigured during the 19th century. During the 20th century, with *Lassiter* serving as a culmination, appointment of civil counsel has been construed as a charitable act or ethical obligation for lawyers, rather than a right guaranteed under due process. Even though historical data show that the status of the appointment of civil counsel has been unclear, insofar as how it was considered, the analysis of the unique parallels between historical and modern legal environments as well as the reasoning regarding this issue provide instructive examples for the United States in policy development.

The Right to Counsel in Medieval Britain-

Great Britain has at least a five-century tradition of not only instructing courts to provide counsel in civil proceedings but also of frequently appointing lawyers free of charge for indigent litigants. There is evidence that some English courts provided free counsel in civil cases for the poor even in the 13th and 14th centuries—when litigants expressed their poverty and publicly asked for

assistance. For example, after 1217, when the ability to sue *in forma pauperis*[4] was made available to the poor in common law courts, allowing them to sue free of charge, more steps were taken to protect the rights of the poor in the courts when the appointment of counsel became regularized. This came about because of the ubiquitous increase in the use of counsel in courts.[5] This, in turn, was a result of the increasing complexity of the "complicated maze of writs and procedures" that composed the developing British legal system and confused poor litigants.[6] In all, this practice was a result of a heightened focus and importance on "due process" in Common Law for both the rich and poor.

The practice of providing counsel to the poor in civil cases was first codified in a 1495 Statute of Henry VII, which stated:

> "…And after the said Writ or Writs be returned, if it be afore the King in his Bench, the Justices there 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 likewise the Justices shall appoint Attorney and Attornies for the same poor Person or 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…." [7]

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[4] In the form of a pauper: when a person incapable of affording court costs and other expenses brings a case and seeks government relief.
[5] See Note, The Right to Counsel in Civil Cases, 1325-7.
[6] See Note, The Right to Counsel in Civil Cases, 1325.
[7] Statute of Henry the Seventh, 1495, 11 Hen. 7, c. 12.

Under this statute, the chancellor had to determine whether a party was indigent, confirming whether the litigant would swear himself to be worth less than five pounds.[8]

Notably, this portion of British judicial history demonstrates again that there was a serious concern for the legal needs of the poor as well as conscious efforts by courts to meet those needs.[9] Indeed, the ideas that culminated in the 1495 statute flowed directly from the Magna Carta, which states in its 40th chapter: "To no one will we sell, to no one will we refuse or delay, right or justice." Blackstone commented on this idea as a means to access the courts: "[c]ourts of justice must at all times be open…[10]" According to some scholars, this statute was intended to have "established a *right* to appointed counsel for indigent civil plaintiffs with meritorious causes of action.[11]" In fact, the 1495 statute was intended "to ensure that those indigent civil litigants, who would have been unable to navigate the baroque writ system without assistance, had access to the King's courts.[12]" In other words, it appears that the provision of counsel maintained an important status in Britain for well over a century. While its status as a right, obligation of government, or royal dispensation remains

[8] See Sachs 17 and 3 Blackstone 400.
[9] See Note, The Right to Counsel in Civil Cases, 1327.
[10] See Sachs 17.
[11] See Sachs 17. Emphasis added.
[12] See Sachs 17.

somewhat unclear, the notion was related to the fundamental rights of Englishmen, established in the early legal documents of Common Law.

In contrast, early British courts treated the provision of counsel in criminal cases very differently than the provision of civil counsel, revealing the accepted—yet anomalous—legal consensus of the period. Primarily, the provision of free counsel in criminal proceedings was unheard of in Great Britain. For serious offenses, including felonies and treason, there originally existed no right even to be represented by paid counsel.[13] While in some cases counsel could argue procedural issues or doubtful points of law on behalf of the defendant, permission to argue facts concerning the claim of "not guilty" was strictly limited to the defendant himself.

Enigmatically, however, for lesser misdemeanors, lawyers could conduct the defense of the accused without restriction.[14] The reasoning behind the courts' denial of the right to representation in major criminal trials involved the belief that a genuine, artless defense conducted by the person attempting to preserve his very life would be the best defense; nevertheless, judges abused this policy and rendered many arbitrary and cruel judgments against innocent men.[15] It was not until 1836 that British courts allowed defendants

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[13] See Chapman 342.
[14] See Carson 626.
[15] See Carson 627-30.

representation by counsel in all criminal cases. The significance of this policy lies within the fact that British courts enacted a system virtually opposite of that of the early United States that developed later, considering the provision of free counsel in civil trials more important than the right to representation in criminal proceedings.[16]

Ultimately, the fact remains that Britain made an active effort to provide free appointed civil counsel to indigents as something at least approaching the importance of a "right." This importance, at least in theory, transferred to the American colonies.[17]

The American Colonial Tradition-

Although the American colonies, and subsequently the United States, inherited the practices of British Common Law, the two legal traditions have treated the provision of counsel—both civil and criminal—very differently. The explanation for this discrepancy in how Great Britain and the United States have viewed the right to counsel lies within the unique evolution of the American colonial judicial system.

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[16] See Note, The Right to Counsel in Civil Cases, 1327-8.
[17] Notably, in *Frase v. Barnhart, 379 Md. 1000 (2003, Ct. App.)*, the appellant's brief documents that the Statute of Henry VII was colonial law imported into the common law of the state of Maryland upon independence from Britain. (Appellant's Brief at 33–42).

American colonial courts, which were keenly aware of works clarifying English law, such as Blackstone's Commentaries, adopted English law as a starting point,[18] changeable by statute. However, they often strayed from the Common Law template with the development of their constitutional documents and judicial systems.[19] Firstly, after the establishment of the colonies, the creation of an efficiently regulated judicial system was not a pressing issue. Because of this, executive power and judicial power were combined in colonial governors, often for the purpose of resolving disputes on an ad hoc basis.[20] Furthermore, even with later developments of judicial bodies, court proceedings were routinely informal, lax, slow, unstructured, and irregular. Because of the simplicity and informality of the legal process of early colonial courts, most people—both rich and poor—were capable of conducting their own cases without any need of counsel.[21]

Another major factor contributing to the absence of any notion of the right to counsel in the colonial judicial system was the lack of legally trained colonists; the supply of and demand for them was simply too small. Unlike in Britain, there were few lawyers with which to begin in the colonies, while most judges were not learned in the law, either, resulting in "community"

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[18] See 3 Blackstone 400.
[19] See Surrency 257, 266.
[20] See Surrency 258.
[21] See Note, The Right to Counsel in Civil Cases, 1328-9.

deliberations on justice. Instead of basing decisions on legal tradition and precedents, American colonists preferred principles of equity and natural reasoning to dispense justice, in turn blurring the distinctive line between civil and criminal trials.[22] For example, by the 18th century, many American courts combined the powers and jurisdictions of the different British courts, namely the King's Bench, the Court of Common Pleas, and Exchequer.[23]

Accordingly, the right to counsel—whether the right to representation by counsel or to be provided free counsel, in either criminal or civil trials—was not often considered or given much substance as a result of the characteristics of the American colonial environment. Although the colonial judicial system increasingly adhered to the British Common Law tradition over time, many deviations from the British system remained beyond the Revolutionary War, engendering the absence of the appointment of civil counsel.[24] Furthermore, the relative absence of providing civil counsel has potential roots in the relatively low levels of social inequality among citizens of the period who were capable of participating in the political process, consequently resulting in fewer indigents and a lower demand to pursue lawsuits *in forma pauperis*.

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[22] See Note, The Right to Counsel in Civil Cases, 1328.
[23] See Surrency 261.
[24] See Note, The Right to Counsel in Civil Cases, 1329.

Since the right to free civil counsel was often lost in translation from English law to American colonial law, the newly formed American Constitution and Bill of Rights of the post-war era failed to make explicit mention of civil counsel, yet the founding fathers perceived the right to counsel in criminal cases as sufficiently important to be included. The unjust rulings that British courts frequently rendered against innocent men gave rise to an increased awareness in the American colonies that an accused person without counsel for his defense was at an unfair disadvantage; this awareness was especially prominent with the ever-growing bar.[25]

It would at first appear that the provision of civil counsel[26] had been overlooked.[27] Nevertheless, there are indications that there was little conscious distinction between the importance of providing counsel in criminal and civil trials in the minds of the colonists. Firstly, representation by lawyers was equally common in criminal as well as civil trials[28] in the courts of the early states.[29] Secondly, while providing free civil counsel to indigents had been obscured in the early United States on a universal level, several states affirmed

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[25] See Beaney 24-25. After the Revolution, while largely incorporating British Common Law into their own systems, most states included clauses respecting the right to counsel in their constitutions as a reaction against the British practice of denying counsel in serious criminal trials, which ultimately resulted in the ratification of the 6th Amendment in the Bill of Rights.
[26] In this instance, the right to be represented by counsel in civil trials, whether appointed or retained, was neglected on the federal level.
[27] See Note, The Right to Counsel in Civil Cases, 1327-1329.
[28] No distinction between appointed or retained.
[29] See Note, The Right to Counsel in Civil Cases, 1329.

the its importance by explicitly acknowledging it as an inheritance from English law. For example, Article V of the Maryland Declaration of Rights[30] guarantees Maryland's inhabitants the rights provided in the body of English statutory and common law as it existed on July 4th, 1776, which included the provision of civil counsel to indigents expressed in the 1495 Tudor statute. Furthermore, the statute has never been repealed or rejected, implying its relevance in today's world.[31] As another example, New York indicated in its constitution that criminal defendants were entitled to counsel "as in civil actions."[32]

Essentially, unless changed by statute or judicial review, English law served as the universal starting point for the infant United States, and included the provision of counsel for indigents in civil trials. Explicitly recognized well into even the 19th century, the 1495 Tudor act was acknowledged by the Supreme Court of Judicature of New Jersey in 1836 as "in principle the same as" the state's statute,[33] adding that "the practice of the courts at Westminster, under their act, must regulate ours, until a new course shall be prescribed by the

[30] Article V states: "That the Inhabitants of Maryland are entitled to the Common Law of England . . . and to the benefit of such of the English statutes as existed on the Fourth day of July, [1776]; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity . . . subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State."
[31] See Sachs 18.
[32] See Note, The Right to Counsel in Civil Cases, 1329.
[33] Rev. Laws, 393. Entitled "an act to assist poor persons in the prosecution of their suits."

legislature, or until this court shall feel itself authorized to lay down new rules upon the subject."[34]

The 19th and Early 20th Centuries-

During the 19th and early 20th centuries, the practice of providing of appointed civil counsel was already obscured because of its treatment in the unique environment of the American colonies. Nonetheless, the American judicial system grew more complex and society more unequal because of westward expansion and industrialization. Legal attitudes shifted, recognizing the need for the provision of counsel for indigent civil litigants—yet not without ambiguity insofar as whether the practice was considered rightful, dutiful, or charitable.

Nonetheless, demonstrating an insightful pattern, the provision of civil counsel often applied in cases involving litigants whom courts considered inherently and exceptionally disadvantaged members of society.[35] Also, the cases in question suggest disagreement among the courts about the conceptual

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[34] *Sears v. Tindall 15 N.J.L. 399 (1836, N.J. Sup. Ct. Jud.)* "Our statute (Rev. Laws, 393) entitled 'an act to assist poor persons in the prosecution of their suits,' is in principle the same as that of II Henry, 7, c. 12, and the practice of the courts at Westminster, under their act, must regulate ours, until a new course shall be prescribed by the legislature, or until this court shall feel itself authorized to lay down new rules upon the subject."

[35] Most state cases of any nature during this era were not officially recorded. The ones discussed here are all appeals.

status of the appointment of civil counsel.[36] Notably, the research has revealed a few recorded decisions that pertain to the provision of civil counsel between the colonial era and the early 20th century. The case record sheds a glimmer of light on the prevalence and importance of appointing counsel to particular indigents in civil trials, while also giving insight into this period's shifting—and often conflicting—legal attitudes regarding the nature of free civil counsel.

As slavery was becoming a lucrative business during the early 19th century, later forming the prime economic institution of the South, a significant number of cases involving civil counsel were brought before Virginia courts. They dealt with petitions and appeals from slaves or former slaves suing as paupers for their emancipation.[37] In many of these cases, the slave owner had agreed to emancipate the said slave, either through a last will and testament or by other means, and it later occurred that the slave was denied his freedom after

[36] The record consists of an intriguingly large proportion of state cases in which minorities and/or the disadvantaged of 19th century society were appointed counsel by courts, thus demonstrating a line of judicial reasoning rudimentarily connected with later modern notions of civil rights and equal access to justice. It should be additionally noted, however, that the practice's relative uncommonness in the courts of the period likely resulted in its future obscurity.

[37] *Dempsey v. Lawrence, Gilmer 333 (1821, Va. Sup. Ct. App.); Sam v. Blakemore, 4 Rand. 466 (1826, Va. Sup. Ct. App.); Nicholas v. Burruss, 4 Leigh 289 (1833, Va. Sup. Ct. App.); Williams v. Manuel 40 Va. 639 (1843, App. Ct.)* Furthermore, these cases were examined almost entirely in courts of equity, which were found only in the South, rather than in courts of law. Notably, courts of equity were by nature intended to confront issues of unfairness and natural justice that were not sufficiently addressable in common law courts.

meeting the prior agreement's requirements, often in the form of a remaining number of years of requisite labor.[38]

For slaves suing for freedom *in forma pauperis,* the assignment of counsel by the court was an acceptable, standard procedure. For example, in *Dempsey v. Lawrence*[39] in 1821, the Supreme Court of Appeals of Virginia, citing a state statute,[40] demanded that a lower court appoint counsel for a slave petitioning for his freedom. The court added that "…in suits for freedom, where *essential justice*[41] can be done, the court ought not to adhere to strict form," implying that cases of this nature, in which essential, fundamental justice was in play,

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[38] Unfortunately, it appears that the only cases of this nature that were recorded were appeals from equity courts to higher courts. Non-appellate cases could possibly be found in state court records.

[39] *Dempsey v. Lawrence, Gilmer 333 (1821, Va. Sup. Ct. App.)* Dempsey was born the slave of an owner named David Wallace and was inherited by Wallace's son William. William Wallace agreed to hire Dempsey to work for his freedom, demanding $100 immediately and $200 at a later date to emancipate Dempsey. After coming to the agreement, Wallace insisted that Dempsey find surety for his bond, and he did so eventually in one Lawrence. Lawrence agreed to pay Dempsey's bond and to emancipate him if Dempsey came with him to North Carolina. Dempsey complied and lived as a free man in North Carolina on a piece of land adjoining Lawrence's estate. After Lawrence's death, his widow claimed that Dempsey was a slave. Dempsey then sued for the fulfillment of his bill and his complete emancipation. Dempsey's claim was dismissed, and an appeal was taken. Among other instructions, the Supreme Court of Appeals of Virginia demanded that Dempsey's case be heard and that he be appointed counsel.

[40] Ch. 124. 1 Rev. Code. This statute allows for the appointment of counsel in general as well as specifically for cases involving a petition for freedom. In general: "The said court shall direct their clerk to issue the necessary process, shall assign him counsel learned in the laws, and appoint all other officers requisite and necessary to be had for the speed of the said suit to be had and made, who shall do their duties without any reward for their counsels, help and business in the same." For cases involving slave petitions: "…the petitioner shall obtain counsel, to be assigned by the said court, who, without fee or reward, shall prosecute the suit of such complainant." This text is also supported with the entire process for handling petitions from slaves. Interestingly, these provisions of the statute refer to the statute of Henry VII. It should be noted that the statute uses the words "shall obtain" and "requisite," rather than "shall be granted," "appropriate," or any other phrasing that implies the appointment of counsel's status as a privilege instead of a right.

[41] Emphasis added.

especially required additional procedures to protect sufficiently the basic rights of the petitioner.

Similarly, in *Sam v. Blakemore*[42] in 1826, a slave petitioned a Virginia county court to have leave to sue for his freedom. The court, without comment or reluctance, appointed counsel for the petitioner to conduct the case on his behalf, demonstrating marked openness toward providing civil counsel. After the county court refused his petition, the slave appealed to the Supreme Court of Appeals, which also assigned him free counsel. Interestingly, as it had done before, the court referred to cases involving pauper slaves suing for freedom as unusual and deserving of more than ordinary procedural protection:

> "If this were an ordinary case, the difficulties which have been suggested as to the right of the plaintiff to appeal from such an order, might be insurmountable…But, in *these pauper cases for freedom,*[43] this Court have not adhered strictly to rules applicable to other cases…"

Embedded within the language of this quote is the implication that "these pauper cases for freedom" indicate a type of case that occurred frequently enough to be thought of as its own category. Moreover, these cases were

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[42] *Sam v. Blakemore, 4 Rand. 466 (1826, Va. Sup. Ct. App.)* A slave known only as Sam, owned by Blakemore, was denied his claim to sue for his freedom in a lower court. Upon appeal, the Supreme Court of Appeals of Virginia remanded the case and granted Sam his claim to sue *in forma pauperis* for his freedom. He was assigned counsel by the court.

[43] Emphasis added. This phrase demonstrates a pattern of thought focusing on the slave's status as inherently disadvantaged member of society.

considered unusual, unlike an "ordinary case." Arguably, the court thought it necessary to treat the right to freedom as an exceptionally fundamental right requiring additional procedural protection, especially for an extraordinarily disadvantaged litigant.

This pattern of providing extra process for especially disadvantaged litigants in civil cases regarding personal liberty is continued in *Williams v. Manuel*[44] in 1843, in which both a county court and the Virginia Appeals Court assigned counsel to a pauper slave, known as Manuel, suing to obtain his freedom, which had been granted to him by the last will and testament of his former owner. The county court granted the slave's request that he "be allowed to sue *in forma pauperis;* that counsel be assigned him, and that he be allowed the protection and aid of the court to enable him to assert his right to freedom…" In an ensuing appeal initiated by Williams, Manuel's owner, Manuel retained the counsel appointed for him during the initial trial, indicating that the appeals court allowed the appointment of free counsel, as well. Again, in this case as in others, the right to freedom for an indigent litigant is considered worthy of

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[44] *Williams v. Manuel, 40 Va. 639 (1843, App. Ct.)* In her last will and testament, Elizabeth Magruder bequeathed her slave Manuel Dodson to her niece Elizabeth Hamilton, specifying that Manuel work for 27 years before being set free. After being sold to one Williams, a slave trader, Manuel was told that the will had been nullified by congress and that he belonged to Williams for life. Manuel prayed that the court issue an injunction against his transport or trade until his complaint against Williams could be heard. Moreover, the bill prayed that Manuel be allowed to sue *in forma pauperis* and be appointed counsel. The court granted the injunction until the complaint could be heard. Williams moved to dissolve the injunction but was denied. The court ruled in favor of Manuel, but Williams appealed. Williams' appeal was successful, with Manuel being returned to his possession for life.

garnering added protection in the form of counsel. Thus, in light of these several examples, it appears that the appointment of free counsel in civil cases survived in some places as a necessary measure intended to ensure the basic rights of especially disadvantaged petitioners.

Shifting Perspectives Regarding the Provision of Civil Counsel: A Moral and Professional Obligation-

Whereas courts appeared willing to appoint counsel to protect the disadvantaged in civil trials, with early and mid-19th century cases referencing statutory obligations and enacting "essential justice,"[45] glimpses of differing opinions among the courts in the cases of this era regarding the status of providing free civil counsel become evident.

With the abolition of slavery after the Civil War, the most common *in forma pauperis* litigants in recorded cases involving the right to assigned civil counsel shifted from slaves to women and minors—other groups perceived to be inherently disadvantaged members of 19th century society.[46] Furthermore, whereas the courts dealing with slaves prior to the Civil War appointed counsel

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[45] *Dempsey v. Lawrence, Gilmer 333 (1821, Va. Sup. Ct. App.)*
[46] *House v. Whitis, 64 Tenn. 690 (1875, Sup. Ct.); Wright v. McLarinan, 92 Ind. 103 (1883, Sup. Ct.); Hassell v. Van Houten, 39 N.J. Eq. 105 (1884); Pittsburgh, C., C. & St. L. RY. Co. v. Jacobs, 8 Ind. App. 556, 36 N.E. 301 (1894); Malkin v. Postal Typewriter, 95 A.D. 205 (1904, N.Y. Sup. Ct., App. Div., 2nd Dept.); Thompson's Estate, 23 Pa. D. 290 (1914, Pa. Orph.)*

in cases in which liberty was at stake, courts in several states were willing to assign lawyers to paupers in cases involving threats to property as well as liberty.

Following a pattern of a more liberal provision of counsel beyond cases involving physical liberty, the Supreme Court of Indiana affirmed a lower court's decision for and method for appointing counsel to an indigent litigant in *Wright v. McLarinan,*[47] which involved a female non-resident minor applying to the court to recover payment for services she rendered in the past. The high court concluded that the lower court was required by statute "to assign such person an attorney to prosecute the case," adding that "the order made permitting her to prosecute the case as a poor person relieved her from any obligation to secure the costs [of counsel]…" Notably, the appellant—who opposed the indigent minor appellee—claimed that the judicial process had been incorrectly conducted, insofar as the lower court had not appointed counsel for the appellee, which was required by statute. In other words, the appellant actually attempted

[47] *Wright v. McLarinan, 92 Ind. 103 (1883, Sup. Ct.)* The appellee, a minor, through her next friend, filed a complaint in a lower court against the estate of her deceased former employer for to be compensated for services rendered as a domestic servant. Ultimately, judgment was rendered in favor of the appellee. The judgment was appealed on the grounds that many errors were committed in reaching the judgment. One such error, the appellant claimed, was that counsel was not appropriately appointed, according to statutory requirements, thus nullifying the appellee's original claim.

to nullify the appellee's original claim by claiming that the minor litigant had not received the correct amount of procedural protection.[48]

Essentially, cases in several states during this period acknowledged the need to grant counsel for indigent civil litigants to ensure their equality before the law—a pattern of thought adeptly epitomized in *Varner v. Goldsby,*[49] an 1857 Georgia case involving a minor litigant: "The spirit of our Legislation, is that the doors of justice shall be closed against none, on account of poverty." Whether this pattern of thought was rooted more in the realm of "duty," "right," or "gift," is complex and debatable.

A pertinent example of the duty-based perception is found in *House v. Whitis,*[50] an appeal from a Tennessee court of chancery's decision in a dispute regarding a debt settlement. Notably, the case involved a minor civil defendant, prompting the court to emphasize the judicial system's sacred duty to dispense justice for the poor. In the case the court proclaimed that it had

> "…a right to command the services of counsel for persons unable to pay, in civil as well as criminal cases…[51] Where a lawyer takes his license he takes it burthened with

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[48] The court ruled that the person serving as next friend for the minor was sufficient in the role of attorney and that the lower court did not err by not appointing a credentialed lawyer on behalf of the female minor.
[49] *Varner v. Goldsby, 22 Ga. 302 (1857, Sup. Ct.)*
[50] *House v. Whitis, 64 Tenn. 690 (1875, Sup. Ct.)*
[51] The Court cited a legislative act of 1821, ch. 22, sec. 3 "…it shall be the duty of the court to appoint some counsel, able and learned in the law, to attend to, and manage such suit or suits for said poor person, without any fee or reward for the same."

> these honorary obligations. He is a sworn minister of justice, and when commanded by the court can not withhold his services in cases prosecuted *in forma pauperis*."

The court did not explicitly frame the appointment of counsel as the rightful entitlement of the indigent and instead seemed to portray providing counsel to the poor as not only required by legislation but also a professional, honor-bound obligation of the court.

In the case *Hassell v. Van Houten,*[52] which was conducted less than a decade later, a New Jersey court acknowledged the provision of civil counsel through statute, asserting that

> "…our [New Jersey's] law and practice provide for the furnishing by the court of the requisite professional assistance to poor persons having a cause of action or suit, and for the rendering by the attorney or solicitor and counsel, and of all other officers of the court, of their services in the litigations, without compensation…"

Unlike *House,* which emphasizes honor and duty in providing counsel to the poor, *Hassell* seems to view providing counsel as a legislative obligation or dispensation. Arguably, *Hassell* even appears to come close to viewing the provision of civil counsel to be a right of an indigent litigant, depending on the interpretation of the word "requisite."

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[52] *Hassell v.Van Houten, 39 N.J. Eq. 105 (1884)*. Under statutory obligation to provide free services to an indigent client, the complainant was an attorney assigned to a defendant in a suit to recover a life insurance policy from a company. The complainant then made an agreement with the defendant to receive one-half the amount recovered in compensation. What is important to focus on in this case is the fact that the attorney was originally assigned to the defendant free of charge.

Other state courts in later cases viewed the provision of free civil counsel not only as a dutiful obligation or as a legislative requirement but also as a philanthropic, charitable endeavor. In *Pittsburgh, C., C. & St. L. RY. Co. v. Jacobs* in 1894,[53] an Indiana county court cited a state statute[54] as the source of its authority to appoint counsel to an indigent filing a complaint against a railroad company. The statute reads:

> "Any poor person not having sufficient means to prosecute or defend an action, may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend as a poor person. The court, if satisfied that such person has not sufficient means to prosecute or defend the action, shall admit the applicant to prosecute or defend as a poor person, and shall assign him an attorney to defend or prosecute the cause, and all other officers requisite for the prosecution or defense, who shall do their duty therein without taking any fee or reward therefore from such poor person."

In its interpretation of this statute during the ensuing appeal from the railroad company, the court emphasized the idea that "courts are equally open to the rich and the poor." In this sense, the court hearkens to notions of due process and equality before the law. Furthermore, the court opined that an indigent person, regardless of his or her status as a defendant or plaintiff, ought

[53] *Pittsburgh, C., C. & St. L. RY. Co. v. Jacobs, 8 Ind. App. 556, 36 N.E. 301 (1894).*
[54] Section 260, Rev. St. 1881.

have counsel appointed on their behalf.[55] Nonetheless, the court took a sharp turn in outlining its stance on the issue of the status of providing counsel: the court also referred to counsel assignment for the indigent as "a clear gratuity, a charitable act." In doing so, the court steered clear of any notion that the assignment of counsel for indigence is an inherent right.

Thus, with the turn of the century, notions regarding the appointment of counsel as an ethical or charitable obligation seem to have become more commonplace. In light of the aforementioned cases, courts' opinions illustrate a trend in the legal attitudes of the period. While courts often found the need to appoint counsel for indigents in civil cases to be necessary, good, and a means to ensure fairness in trials, they also thought of the practice as something duty, honor, morality, or charity required. In other words, consensus about the status of providing counsel is difficult to glean from the record, but clearly, that indigents were inhered with the right to have representation in court seems to go beyond the scope of what courts believed during this era. In fact, it appears that the appointment of counsel for indigents came to be known as an "unusual

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[55] *Pittsburgh, C., C. & St. L. RY. Co. v. Jacobs, 8 Ind. App. 556, 36 N.E. 301 (1894).* "If a person be too poor to employ a counsel to prepare and bring his action, he may nevertheless appear in court and have counsel assigned him for that purpose; or having instituted his action, or being made a defendant, he may have counsel assigned him to further prosecute or defend." In this appeal in the Appellate Court of Indiana, a Pittsburgh railroad company brought an action to recover funds forfeited in a previous case, in which the appellee recovered personal damages from the railroad company. The company contended that the appellee, who was an indigent woman, was as a resident of Louisville, Kentucky, and that the courts of Kentucky ought to have jurisdiction over any claim. Holding that the appellee was a resident of several states and capable of choosing which jurisdiction she preferred, the court ruled against the railroad company.

course."[56] Simply put, while the provision of counsel was considered a safeguard of basic rights, it in itself appears not to have been considered a right.

This nature of the thought regarding the provision of civil counsel during this era likely had connections with the growing concern for professional and ethical responsibility among lawyers. Based upon the teachings of Judge George Sharswood, the first code of professional responsibility was adopted by the Alabama State Bar Association in 1887 and dealt with a lawyer's responsibility to his client, the state, the public, the court, and his colleagues. Quoting from Sharswood's *Essay on Professional Ethics*, the code refers to the legal profession as "the sacred ministry, in which a high-toned morality is…imperatively necessary."[57] Over the next 19 years, 10 states formed a trend by adopting similar codes also drawing from Sharswood. This trend expanded to the national level in 1908 when the American Bar Association drafted canons of professional ethics codes, and by 1920, all but thirteen states had adopted some form of these canons.[58]

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[56] *In re Thompson's Estate, 23 Pa. D. 290 (1914, Pa. Orph.)* "When this matter was called for argument, the petitioner requested us to appoint a member of the bar to prosecute his cause. In a proper case, it is possible that we might take this unusual course, following the practice of the criminal courts, but not where, as here, it does not appear that, by reason of destitute circumstances, the petitioner is unable to employ counsel." In this case, the court denied a request from a petitioner to have counsel appointed on his behalf, on the grounds that he did not sufficiently demonstrate his level of destitution."

[57] See Armstrong 1063; also compare with *Dempsey v. Lawrence, Gilmer 333 (1821, Va. Sup. Ct. App.)*

[58] See Armstrong 1063-1072.

Interestingly, the idea of professional responsibility did not originate with a dominant concern for the public but instead focused on maintaining an honorable, credible reputation among other lawyers:

> "Nothing is more certain than that the practitioner will find, in the long run, the good opinion of his professional brethren of more importance than that of what is commonly called the public. The foundations of the reputation of every truly great lawyer will be discovered to have been laid here."[59]

Lawyers as well as the judiciary seem tacitly to consent to the idea that providing free legal service in civil trials is part of a canon of "acceptable standards of conduct,"[60] rather than a litigant's fundamental right. This general assertion probably influenced ideas regarding the status of the appointment of counsel in civil trials, drawing lawyers' attention away from the idea of a "right" to civil counsel and directing it toward the maintenance of a reputation of dignity, honor, and decency in the eyes of other lawyers through, inter alia, pro bono work. In effect, this change signified the beginning of the path to *Lassiter*, since it plausibly engendered an attitude in the legal environment that relegated the idea of appointing counsel to something that morally *should be*—but not legally *must be*—implemented in some civil cases.

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[59] See Armstrong 1072; from Sharswood's Essay (1854).
[60] See Armstrong 1072.

Nevertheless, the rising systemic problems of equal access to justice within the emerging modern judicial system were not glossed over by every observer at the time. Almost a century ago, legal services advocate Reginald Heber Smith decried the plight of the indigent:

> "The administration of American justice is not impartial; the rich and the poor do not stand equally before the law; the traditional method of providing justice has operated to close the doors of the courts to the poor and has caused a gross denial of justice in all parts of the country to millions of persons."[61]

With this indictment of the system of the period, Smith foreshadowed the fast-approaching push for fair representation in criminal courts. Conversely, the same push, with a similar level of momentousness, has not happened in civil courts.

III. Current policy and practice in the United States

Gideon v. Wainwright-

During the mid-20th century, while the concept of providing counsel to indigent litigants in civil trials was moving toward obscurity, providing counsel

[61] See Boyer 635, quoting Smith in Justice and the Poor 5, Patterson Smith Publishing Co. (1972).

in criminal trials was moving to the forefront of legal controversy, with the debate culminating in the historic case of *Gideon v. Wainwright* case of 1963.[62] Although *Gideon* focused solely on criminal cases, it seemingly laid the framework for a similar decision for its civil[63] counterpart, since the Court held that the Sixth Amendment's guarantee of counsel in criminal trials is a fundamental right, essential to a fair trial, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment.

In 1963, the Supreme Court ruled in favor of providing a categorical right to counsel for indigents in criminal trials in this case. The petitioner in the case, Clarence Earl Gideon, an impoverished 51-year-old repeat offender of petty crimes, was arrested and convicted in 1961 for breaking into and entering a Panama City poolroom with the intent to commit larceny. During his trial, his request for appointed counsel on account of his poverty was denied. While in prison, Gideon studied the American Constitution and the legal system, later arguing that his 6th Amendment right to counsel, guaranteed under the 14th Amendment rights to due process and equal protection, had been violated. After being denied by Florida's higher appellate courts, Gideon promptly filed a writ of certiorari with the U.S. Supreme Court. Although Gideon did not know it, the 6th

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[62] In this momentous case, the Supreme Court granted under due process the right for all criminal defendants to be represented by an attorney. Indigent defendants were granted the right to free, court-appointed counsel for their defense. *Gideon v. Wainwright, 372 U.S. 335 (1963).*

[63] Parental rights cases, specifically.

Amendment did not apply to the states; the Court had decided twenty years earlier in *Betts v. Brady* that the 14th Amendment did not encompass the right to counsel in state criminal trials. Nonetheless, this was only the beginning for Gideon, since the Court eventually agreed to hear his petition.[64]

In 1942, in its decision in *Betts v. Brady*[65]—the primary precedent in question during Gideon's case—the Court ruled that a lawyer was only required in state trials under the 14th Amendment in non-capital cases, when being tried without counsel would result in a "denial of fundamental fairness" due to "special circumstances," like illiteracy, mental retardation, or youth.[66] In other words, the Court in *Betts* decided that the appointment of counsel is not a fundamental right. Notably, this method left significant room for error or prejudice in lower courts, upon which *Gideon* would shed light. Moreover, the *Betts* decision protected a method in which the efficient prosecution of judicial proceedings suffered, with denials of counsel in lower courts filling the dockets of appeals courts.

In Gideon's case, the Court overruled the *Betts* decision, due in part to widespread state support of a reversal, firmly holding that the case-by-case analysis method of *Betts* was inefficient and unworkable, while also holding that

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[64] See Lewis 1-40.
[65] *Betts v. Brady, 316 U.S. 455 (1942).*
[66] See Lewis 8-9.

the right to counsel was "fundamental and essential to fair trials."[67] Moreover, Justice Black claimed 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."

Referencing history, the Court rooted its argument in the United States' "very beginning," in which "state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." The Court explained its contrasting standpoint, applying the Sixth Amendment as a fundamental right for all citizens, binding upon states through the powers of the Fourteenth Amendment. Further attacking the *Betts* decision, the Court opined that ideals of fairness and equality within courts "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."[68] The decision was earthshaking, requiring all U.S. courts to provide appointed counsel to indigent defendants in criminal trials.[69]

Lassiter v. Department of Social Services-

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[67] See Lewis 198.
[68] *Gideon v. Wainwright, 372 U.S. 335 (1963).*
[69] See Abel 529-531.

On the civil side, however, the concept of a federal constitutional right to appointed counsel broke with the reasoning of the *Gideon* court, striking down the notion of a universal, fundamental right to counsel, in *Lassiter v. the Department of Social Services* in 1981.

In the case, Abby Gail Lassiter, an incarcerated mother, attempted to defend herself in a lower court in a case in which the state threatened to nullify her rights as a parent and remove from her custody her children. She could not afford counsel, and it ensued that she lost the case. She appealed and eventually brought her case before the Supreme Court on the grounds that she did not receive due process as a result of not being appointed a lawyer.

The Court in *Lassiter* began its approach to the case with the intent to examine relevant precedent regarding due process and fundamental fairness, notions that the Court admitted cannot be "precisely defined." After examining relevant precedent, the Court analyzed the interests at stake in the case.

Drawing on its interpretation of precedent, the Court in *Lassiter* maintained a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." The Court continued, "It is against this presumption that all the other elements in the due process decision must be measured." According to the Court, Ms. Lassiter was not entitled to appointed counsel because her personal liberty was not in

jeopardy—a notion the court described as a central issue to previous cases addressing the right to counsel.

For example, using *Gideon* as a supporting precedent, the Court suggested that "when the Court overruled the principle of *Betts v. Brady*, 316 U.S. 455, that counsel in criminal trials need be appointed only where the circumstances in a given case demand it, the Court did so in the case of a man sentenced to prison for five years…" Continuing this rationale, the Court also claimed that "*Argersinger v. Hamlin*, 407 U.S. 25, established that counsel must be provided before any indigent may be sentenced to prison, even where the crime is petty and the prison term brief."[70] In other words, the Court determined a litigant's interest in physical liberty to be the central element of focus of precedent involving the right to counsel.

The Court in *Lassiter* combined this presumption against counsel provision in cases not involving physical liberty with the "*Mathews* test," developed in *Mathews v. Eldridge,*[71] which is a method of determining the necessary extent of due process under the Fifth or Fourteenth Amendment. In *Mathews*, the respondent Eldridge challenged the constitutionality of the administrative procedures under which his disability benefits had been

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[70] The Court also referred *to Scott v. Illinois, 440 U.S. 367; Vitek v. Jones, 445 U.S. 480; In re Gault, 387 U.S. 1; Morrissey v. Brewer, 408 U.S. 471;* and *Gagnon v. Scarpelli, 411 U.S. 778*, as support for its presumption against counsel in cases not involving physical liberty.
[71] *Mathews v. Eldridge, 424 U.S. 319 (1974);* see also Boyer 638-639.

terminated. He claimed that sufficient due process in his case required an evidentiary hearing before the termination of his benefits, as in welfare disputes. Disagreeing with the respondent, the Court in *Mathews* found the nature of his circumstances markedly different from those relevant to administrative welfare procedures, in which people seeking relief faced a greater potential injury as a result of benefit termination, due to financial need. Conversely, disability benefits do not rely on stated financial need but instead on medical circumstances. Because of these differences, the Court deemed Eldridge's claim to more administrative procedural protection unconvincing.

Citing *Morrissey v. Brewer*,[72] The Court in *Mathews* held that "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands…'" To determine the level of process due for a particular situation, the Court in *Mathews* developed a three-factor balancing test that weighs the interests of those involved in a dispute:

> "Resolution of the issue here involving the constitutional sufficiency of administrative procedures prior to the initial termination of benefits and pending review, requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and

[72] *Morrissey v. Brewer, 408 U. S. 471 (1972).*

> administrative burdens that the additional or substitute procedures would entail."

In other words, the test balances the importance of the private interests of the litigant at stake, the usefulness of a specific procedural right in avoiding an erroneous or unfair decision, and the government's fiscal interest in the case.

Notably, in its application of the *Mathews* test in *Lassiter*, the Court extended the *Mathews* test to determining due process in judicial proceedings, going beyond the original scope of the test in *Mathews*, which was administrative by nature. With respect to the first element of the test, the *Lassiter* Court determined Ms. Lassiter to have a significant private interest in the official action being taken, thus providing one justifying step toward her claim to appointed counsel. Because of the state's interest in the welfare of the child, the Court also claimed to share Ms. Lassiter's interest in having counsel appointed for the sake of an "accurate and just decision," ensuring the "equal contest of opposed interests."

Secondly, the Court determined that indigent parents in parental rights cases "are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation." The Court added, "That these factors may combine to overwhelm an uncounseled parent is evident…" Indeed, the

Court found the deprivation of counsel contributive to the probability of an erroneous decision.

Thirdly the Court's pecuniary interests diverged from Ms. Lassiter's, insofar as the state aimed to avoid the added costs and delays of appointing counsel.

Thus, the Court undertook the balancing of the interests of the case with the presumption against physical liberty. The Court found that, although the private interests in this case were indeed high, those of the state low, and the risk of error high, the circumstances of the case did not outweigh the physical liberty presumption.

> "While hearsay evidence was no doubt admitted, and while Ms. Lassiter no doubt left incomplete her defense that the Department had not adequately assisted her in rekindling her interest in her son, the weight of the evidence that she had few sparks of such an interest was sufficiently great that the presence of counsel for Ms. Lassiter could not have made a determinative difference…[T]he absence of counsel's guidance on this point did not render the proceedings fundamentally unfair."[73]

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[73] The Court also commented on Ms. Lassiter's disinterest in attending a hearing as a contributive reason for denying her counsel: "Finally, a court deciding whether due process requires the appointment of counsel need not ignore a parent's plain demonstration that she is not interested in attending a hearing. Here, the trial court had previously found that Ms. Lassiter had expressly declined to appear at the 1975 child custody hearing, Ms. Lassiter had not even bothered to speak to her retained lawyer after being notified of the termination hearing, and the court specifically found that Ms. Lassiter's failure to make an effort to contest the termination proceeding was without cause. In view of all these circumstances, we hold that the trial court did not err in failing to appoint counsel for Ms. Lassiter."

Ultimately, the Court ruled against Ms. Lassiter, denying her counsel and setting a precedent against a categorical right to counsel for indigents in civil trials. Additionally, the Court left the responsibility of determining the necessary amount of process to the experimentation of state courts. In other words, instead of implementing a categorical rule that guarantees the appointment of counsel in parental rights cases for financially disadvantaged litigants, courts must determine on a case-by-case analysis whether a litigant qualifies under a set of particular circumstances gleaned from the facts of the case, which requires the appointment of counsel. In doing so, the Court adopted a strikingly similar method supported in *Betts* and rejected in *Gideon*. Nonetheless, the Court left the door open to states to exceed its minimum standard holding that "[a] wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution."

In his dissenting opinion, Justice Blackmun argued that Ms. Lassiter was completely unable to understand legal procedure, while also pointing out that the lower court had been prejudiced against her because of her lack of representation.[74] Consequently, as one commentator observed immediately after the decision, "*Lassiter*, for all practical purposes, stands for the proposition that a drunken driver's night in the cooler is a greater deprivation of liberty than a parent's permanent loss of rights in a child."

[74] See Boyer 638-639.

The Problematic Post-Lassiter Environment-

The rules established in the *Lassiter* case arguably appear to have exacerbated an already growing problem in the provision of legal aid to those who cannot afford it, both in parental rights cases and civil cases in general. By denying a constitutional right to civil counsel, *Lassiter* serves to block efforts aimed at providing legal services to the poor. Notably, these efforts, headed by organizations like the Legal Services Corporation and the American Bar Association, struggle with extremely limited resources in attempting to fulfill what they believe to be the idea of equal justice for all in resolving disputes, leaving many of the nation's poor who need legal aid unable to obtain it.

Demonstrating this need, for example, in 1993, the American Bar Association conducted a study that showed that 70 percent of low-income people in the US could not afford to retain counsel for serious litigation requiring legal expertise. Other studies have shown that the figure is closer to 90 percent.[75] As another example, one study in California concluded that there is one lawyer for every 10,000 indigents of that state, hypothetically leaving 1.5 million families without access to legal counsel in civil trials.[76] In New York, the

[75] See Marvy article.
[76] See Bindra 6.

State Bar Association discovered that 90 percent of indigent litigants in New York City's Housing Courts lacked adequate legal representation.

Ultimately, as a 2004 LSC report points out, "the majority of low-income people with civil legal problems currently do not have and cannot get legal assistance."[77] Validating the findings above and compiling other data from various local and state-focused studies, this report underscores the growing "justice gap" in the civil legal system in the United States. The report's principal findings point out that less than one in five low-income people seeking legal aid receive it, while many low-income people requiring legal aid do not seek it because they do not know about legal aid programs or simply lose faith in these programs because of their inability to serve the majority of those who come to them seeking help.[78] Not including clients of non-LSC organizations, the report finds that over one million people seeking aid from the LSC were turned away in 2005.[79] Moreover, while the legal needs of the poor do not differ substantially from those of middle-income citizens, the report concludes that there is only one legal aid lawyer for every 6,861 low-income people in the United States. In

[77] See LSC report 19.
[78] See LSC report 18.
[79] See LSC report 7.

comparison, there is one private lawyer for every 525 people in the general American population.[80]

The LSC cites annually diminishing federal funding as the root of its inability to serve effectively low-income families and individuals who need lawyers in civil proceedings. In 1981, the LSC received the highest amount of federal funding in its history, which failed by far to meet the increasing legal needs of the poor, but today, federal funding in 2005 for the LSC amounted only to 49% of the 1981 figure, adjusted for inflation. Conversely, funding from state governments and other sources has increased over three-fold since 1981.[81] Nonetheless, non-federal contributions are small in comparison with the potential resources of the federal government, indicating the need for federal involvement in providing civil legal aid.

Accordingly, the results of providing counsel in civil cases as a federal mandate would be to encourage and even obligate legislative bodies to provide adequate funding to legal aid providers. In other words, the gravitas and binding characteristics of a constitutional right to counsel would enable the current institutional providers of legal aid to obtain adequate financial resources and credibility, pursue their goals more effectively, and strengthen their efforts.

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[80] See LSC report 17.
[81] See LSC report 18.

In addition to the potential deprivation of civil rights the *Lassiter* decision poses, as well as the financial limitations it places upon civil legal aid institutions, the practice established in the *Lassiter* decision is also arguably detrimental to the efficient administration of the judicial system. For example, judges regularly witness the helpless attempts of unrepresented indigents at making sense of a complicated civil proceeding. Accordingly, many of these judges second-guess the justness of the rulings they make, primarily because they claim these rulings are based mostly on the facts and advantaged propositions of a poor litigant's represented opponent.[82] One judge pointed out, "Every trial judge knows [that] the task of determining the correct legal outcome is rendered almost impossible without effective counsel."[83] Furthermore, *Lassiter* forces state courts to bear the burden of determining whether the right to counsel applies in thousands of cases, individually, on a case-by-case basis. As a result, in the event of a denial of counsel, many of these cases are appealed, significantly taxing appellate courts' time and resources while leaving state governments and lower courts uncertain about the correct standards to apply.[84]

Cases following Lassiter-

[82] See ABA Resolution 518.
[83] Quote by Robert Sweet, United States District Judge for the Southern District of New York; Bindra 13-14.
[84] See Abel 529-532.

In subsequent cases, the *Lassiter* Court's decision has often come under the scrutiny of lower courts and state policymakers. As a result, *Lassiter's* reasoning has often been distinguished, with courts and legislatures going beyond *Lassiter's* conclusion to provide more procedural protection to indigent civil litigants by expanding the provision of counsel.

In one example, in the *Matter of K.L.J.*,[85] the Alaska Supreme Court found the appointment of counsel to be required under due process for an indigent father[86] whose parental rights were terminated in an initial adoption hearing. In this case, emphasizing the innate flexibility of due process with regard to the circumstances of a case, the Alaska Supreme Court focused on the Alaska State Constitution[87] and previous state cases as its primary legal references in its decision to defend the right to appointed counsel for indigent litigants in a parental rights termination case as a fundamental right, protected under due process.

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[85] *Matter of K.L.J., 813 P. 2d 276 (1991, Ak. Sup. Ct.)* In the case, the biological father contested termination of his parental rights as part of adoption proceeding by child's stepfather. Lower court denied request to appoint counsel and entered adoption decree, which stripped biological father of parental rights. It did so on the grounds that the father had failed to communicate significantly with the child, in addition to his failure to pay full child support—both tenable criteria for terminating parental rights in involuntary adoption proceedings under Alaska Statute 25.23.050. The father appealed the court's decision not to appoint him counsel, citing indigence and disability for his failure to show in court, hire a lawyer, and pay full child support, claiming that due process required that he be appointed counsel. The Supreme Court of Alaska held that the denial of the father's request for counsel violated his procedural due process rights under the State Constitution. The case was reversed and remanded.

[86] Ronald Miller.

[87] "No person shall be deprived of life, liberty, or property, without due process of law." Article I, Section 7, Alaska State Constitution. *Matter of K.L.J., 813 P. 2d 276 (1991, Ak. Sup. Ct.), at 278.*

The Alaska Supreme Court noted that the points of law in the case, including the terminology used in the statute in question,[88] were particularly complex for the defendant, who was indigent, disabled, and unable to appear in court to represent himself. Accordingly, the court found that the defendant was inherently disadvantaged and required the aid of an attorney to receive due process during the initial trial.[89]

Furthermore, part of the court's decision relied on the *Mathews* Test, established in *Mathews v. Eldridge*, which balances the private interests of the party affected by the official action, the risks of an erroneous decision and the value of potential safeguards, and the financial and administrative interests of the state. Essentially, the court determined that the interests of the defendant father were of a tremendous magnitude, the chances of error extremely high, and the financial interests of the state relatively low.[90]

Notably, relying on the *Mathews* test alone would have been compatible with the reasoning and results of the *Lassiter* decision, which allows for a particular combination of interests that sometimes results in the appointment of

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[88] Alaska statute 25.23.050.

[89] "Again, I do not know how to represent myself, that I hope I—I hope the court gives all consideration." *Matter of K.L.J., 813 P. 2d 276, (1991, Ak. Sup. Ct.) at 281.*

[90] The Alaska Supreme Court stated, "Even if we were not to establish a bright line right to counsel, we would conclude that the facts here are compelling enough by themselves to indicate a violation of Ronald's procedural due process rights…This also would be true under the federal constitution where the presumption against appointed counsel may be overcome when 'the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak' (*Lassiter v. Dept. of Social Services*)." *Matter of K.L.J., 813 P. 2d 276 (1991, Ak. Sup. Ct.), at 282, fn 6.*

counsel. Nonetheless, the Alaska Supreme Court went a step further, rejecting the reasoning of the US Supreme Court in *Lassiter*:

> "However, we reject the case-by-case approach set out by the Supreme Court in *Lassiter*. Rather, our view comports more with the dissent. As Justice Blackmun explained, the due process balancing in the abstract favors a bright line rule where 'the private interest [is] weighty, the procedure devised by the state fraught with risks of error, and the countervailing governmental interest insubstantial.' Moreover, we agree with Justice Blackmun's explanation of the benefits of procedural norms, and his caution about reviewability of case-by-case decision making."[91]

In addition, citing informed legal opinion to further express its opinion on the *Lassiter* ruling, the Court illuminated the problems it perceived with the decision:

> "First, as Justice Blackmun illustrated, the case by case approach adopted by the majority does not lend itself practically to judicial review…The transcript will not show whether the indigent litigant had adequate discovery or access to legal resources necessary for constructing a defense. Consequently, the reviewing court must expand its analysis into a 'cumbersome and costly,' time-consuming investigation of the entire proceeding. Since the case-by-case approach involves a constitutional inquiry, 'it necessarily will result in increased federal interference in state proceedings.' A case-by-case approach is also time consuming and burdensome on the trial court. Not only must it determine in advance the need for counsel, it must develop pretrial procedures and standards in order to determine properly the need for counsel. There is no

[91] *Matter of K.L.J., 813 P. 2d 276 (1991, Ak. Sup. Ct.), at 282, fn 6.*

> guarantee that these standards will produce equitable decisions in every case. Additionally, it will not always be possible for the trial court to predict accurately, in advance of the proceedings, what facts will be disputed, the character of cross-examination, or the testimony of various witnesses. These factors increase the possibility that appointment of counsel will be denied erroneously by the trial court. Because of the procedural delays encountered in litigation of appeals, the parent's right could be terminated erroneously for an extended period of time. The parent also would be denied the custody of his or her children during this period. An absolute right to counsel would avoid any erroneous denial of appointment of counsel and would eliminate the need for cumbersome and time-consuming standards, while preserving the right to family integrity."

Moreover, the *K.L.J.* court looked to precedent established in reaction to *Lassiter* immediately after it was decided, citing *In re Jay [R.]* to reinforce the argument in favor of a right to appointed counsel in parental termination trials.[92] Dealing with a similar case, the California appeals court deciding the case asserted that courts do not balance the factors[93] in a due process analysis with a "presumption" against appointed counsel in cases where a person's physical liberty is not at stake. Thus, in a proceeding nearly identical to the *K.L.J.* case, the California court concluded that the objecting parent's interest, along with the

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[92] *In re Jay [R.], 150 Cal. App. 3d 251, 197 Cal Rptr. 672, 678 (1983).* "That court noted that in California (like Alaska), courts do not weigh the factors in a due process analysis against a "presumption" that appointed counsel is required only if a person's physical liberty is at stake. Therefore, it engaged in a due process analysis identical to the one we conducted above and concluded that the objecting parent's interest, along with the risk of erroneous results, outweighed the state's interest which was largely financial."

[93] *Mathews* Test factors.

risk of error, prevailed over the government's largely financial and administrative interests in the case. Furthermore, the Alaska Supreme Court in *K.L.J* agreed with the Jay court's assertion that appointment of counsel makes the fact-finding process more accurate, protecting the state's interest in terminating the rights of parents who do actually neglect or abandon their children.[94]

In a recent example, *M.E.K v. R.L.K.*,[95] a Florida district appeals court likewise refused to follow the *Lassiter* decision, in turn expanding on the *K.L.J.* court's opinion by emphasizing a state's prerogative to impose higher standards of due process than those required by the federal Constitution.

Citing the Florida Constitution and the case *In the Interest of D.B.,*[96] the court stated that "…under the state due process clause, D.B. requires appointment of counsel in 'proceedings involving the permanent termination of parental rights to a child."[97] Ultimately, the *M.E.K.* court reinforced the idea that

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[94] *Matter of K.L.J., 813 P. 2d 276 (1991, Ak. Sup. Ct.), at 280.*

[95] *M.E.K v. R.L.K., 921 So. 2d 787 (2006, Fla. 5th DCA).* Parental rights case in which Department of Children and Families brought a child dependency case against a mother, but proceedings were abated during pendency of maternal grandmother's petition for private termination of parental rights, pending adoption. Grandmother's petition was granted by default, and the mother's attorney from dependency action filed affidavit of the mother's indigence, the motion for appointment of counsel, and the motion to set aside default judgment. The circuit court denied the motion to appoint counsel, using *Lassiter* as a basis, stating that "because this is a private termination of parental rights action there is no state action and accordingly the Mother is not entitled to Court appointed trial or appellate counsel." The mother appealed, and the appeals court ruled that, "With respect to indigent parent's due process right, under the Florida Constitution, to appointment of counsel in proceedings for permanent termination of parental rights, there is no distinction between state-initiated and privately initiated termination proceedings."

[96] *In the Interest of D.B., 385 So 2d. 83, 90 (1980, Fla. Sup. Ct.)*

[97] *M.E.K v. R.L.K., 921 So. 2d 787 (2006, Fla. 5th DCA), at 790.*

Lassiter stands only as a minimum requirement. That Florida and other states in the union impose their own unique standards that exceed federal requirements demonstrates dissatisfaction with the *Lassiter* decision. In other words, the court felt it necessary to go beyond the minimum standard *Lassiter* established, classifying the appointment of counsel for indigents in parental rights termination cases as a fundamentally necessary right, thereby guaranteeing Florida citizens superior protection under due process.[98]

Most recently, in 2008, in the proceeding entitled *In the Interest of "A" Children: N.A., M.A. (1), M.A. (2), and L.A.*,[99] the Intermediate Court of Appeals of Hawaii applied the rules set in *Lassiter* to a case in which it decided that a lower court did not appoint an indigent father counsel in a sufficiently timely fashion[100] for his parental rights termination proceeding, depriving him of federal constitutional due process.

Although the court claimed that it based its decision on the balance established in *Lassiter* between the *Mathews* factors and a presumption against appointing counsel in cases in which personal liberty is not jeopardized, the court seems to have sidestepped the latter issue, focusing more on the former.

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[98] *M.E.K v. R.L.K., 921 So. 2d 787 (2006, Fla. 5th DCA), at 789-90.* See also *Battishill v. Arkansas Dept. of Human Services, 82 S.W. 3d 178 (2004, Ark. App.), at 179.* This case disagrees with *Lassiter* insofar as the appointment of counsel for an indigent is included in a fundamentally fair proceeding and is required by due process.

[99] *In the Interest of "A" Children: N.A., M.A. (1), M.A. (2), and L.A., ---P. 3d---- (2008, Hawaii App.) WL 2931637.*

[100] The indigent father was appointed counsel only 16 days before the proceeding.

For example, the Hawaii appeals court reasoned that the father in question "would have benefitted from the guidance of counsel to ensure that he did not incriminate himself as to possible criminal charges," thereby classifying the case as one that may jeopardize personal liberty.[101]

After quickly dismissing the issue of personal physical liberty, the court's opinion shifted toward explaining the various overwhelming factors that presented unfair disadvantages to the father in court.[102] For example, the court found the father to be ill equipped to understand expert testimony and complex legal proceedings because of his below average intelligence and inexperience in court. Citing the father's and the state's interests as substantial, as well as decrying the high risk of an erroneous decision, the court concluded that the father was denied his constitutionally guaranteed due process rights through the deprivation of timely counsel, remanding the case with *Lassiter* as its backing.[103]

Nonetheless, the Hawaii court quoted extensively from the dissenting opinions of Justices Blackmun, Brennan, Marshall, and Stevens to "express grave

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[101] *In the Interest of "A" Children: N.A., M.A. (1), M.A. (2), and L.A., ---P. 3d---- (2008, Hawaii App.) WL 2931637.* WL pg. 27.

[102] With respect to the obstacles an indigent faces in court, the Hawaii court even referenced the Supreme Court in *Lassiter*, quoting the majority: "The ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be. Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation*." Lassiter v. Dept. of Social Services, 452 U.S. at 30, 101 S.Ct. 2153.*

[103] *In the Interest of "A" Children: N.A., M.A. (1), M.A. (2), and L.A., ---P. 3d---- (2008, Hawaii App.) WL 2931637. WL pg. 26-29.*

concerns" about what it reasoned to be inherent flaws in the *Lassiter* decision. Ultimately, the Hawaii court concluded that dissenting opinions from *Lassiter* "present compelling arguments for a bright-line rule regarding the provision of counsel in termination-of-parental-rights cases…" In addition, in an attack against the *Lassiter* decision, the court encouraged the Department of Human Services, the Attorney General, and the Hawaii legislature to "re-examine" the current laws that allow for *Lassiter*-based discretion in appointing counsel for indigents in parental rights termination cases. In other words, the court encouraged in its opinion the replacement of the current case-by-case approach established in *Lassiter* with a bright-line rule for all courts to follow.[104]

IV. Civil Counsel: an International Perspective

Within the international community, both within the bodies of domestic law of other countries and within generally accepted international law, the provision of counsel in not only parental rights termination trials but also in other categories of civil cases, is emerging as a fundamental human right.[105] The internationally emerging status of the right to counsel, especially in civil matters,

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[104] *In the Interest of "A" Children: N.A., M.A. (1), M.A. (2), and L.A., ---P. 3d---- (2008, Hawaii App.) WL 2931637*. WL pg. 29.
[105] See Davis 28.

appears to support the argument for the provision of counsel not only to indigent parents in termination cases in the United States but also to indigent litigants in other categories of cases.

Notably, there is an obvious distinction at issue between dealing strictly with parental rights cases and providing civil counsel on a broader scale. In other words, while the United States wrestles with developing a universally applied right to counsel in parental rights cases, many of its foreign neighbors and international legal bodies have exceeded this standard, providing counsel in several different categories of cases as a fundamental right. This idea leads into a broader international, historical, and current policy argument discussed infra. Nevertheless, the broader right to civil counsel provided in other countries and in international law encompasses the right to counsel in parental rights trials, making the behavior of the international community with regard to this issue relevant to that of the United States.

International Agreements-

Among generally accepted, customary international law, the provision of a civil right to counsel appears in a number of United Nations-sponsored

standards, documents, and conferences.[106] Consequently, these standards, documents, and conferences are directly relevant to the United States as a participating member state.

The International Covenant on Civil and Political Rights (ICCPR) is particularly pertinent to the right to civil counsel in the United States.[107] The ICCPR, which the United States has ratified, addresses in Article 14 the notions of access to justice and impartiality for litigants in court, requiring that:

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[108]

While this language includes both civil and criminal trials, Article 14 specifically addresses criminal and civil cases, but it fails to make any specific reference to counsel as a safeguard of fairness. Nonetheless, according to the inquiries and general comments of the Human Rights Committee (HRC), which is

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[106] See Davis 3.
[107] See Davis 7; Unlike the Universal Declaration of Human Rights, which is not a legally obligatory document, the ICCPR is a formal legal document that obligates each participating member state "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the …Covenant, without distinction of any kind…"
[108] Ironically, in the drafting of the ICCPR, the United States lobbied for language specifically providing a right to civil counsel, but the drafting members ultimately decided that such particular language belonged in a treaty. See Davis 8-9.

the "principal interpretive body"[109] of the ICCPR, Article 14 applies in its entirety to both criminal and civil cases, with respect to the provision of counsel for the indigent. For example, among others, Australia, Canada, India, New Zealand, Japan, Zambia, Madagascar, South Africa, and Brazil provide free counsel in some form to a wide array of indigent civil litigants involved in varying types of cases as a response to the HRC or in response to the customary norms that bodies such as the HRC promote. Furthermore, in dealing with grievances filed by individuals involved in criminal cases, the HRC raises the issue of "equality of arms" between opponents in a trial, which the HRC defines as a balance of access and power that ensures the fairness of a proceeding.[110] Important to note, the issue the ICCPR and HRC appear to address is not the criminal/civil trial issue; rather, they maintain the necessity of counsel to ensure the fairness of a trial. Ultimately, the ICCPR and HRC indicate the growing importance of the provision of civil counsel as a right in the international legal community, setting an instructive example for the United States, which contrastingly focuses on the importance of physical liberty in determining counsel provision.[111]

In addition to the implications of the ICCPR, the United States is a member of the Organization of American States (OAS), as well, which was created and ratified by its member states to "achieve an order of peace and justice, and to

[109] See Davis 10.
[110] See Davis 13.
[111] See Davis 15.

promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence."[112] Like the ICCPR or the Universal Declaration of Human Rights, Article 45 of the OAS Charter arguably encompasses the civil right to counsel, requiring "every effort to the application of…[a]dequate provision for all persons to have due legal aid in order to secure their rights," and is relevant to the United States as a membership requirement.[113]

The mentioning of "rights" in the Charter is a term that warrants definition to clarify its relevance to the provision of civil counsel. Indeed, the American Declaration of the Rights and Duties of Man—which was created simultaneously as a supplementary document to the OAS Charter—defines human rights for the OAS. Among these many rights, the Declaration lists life, liberty, property, legal equality, due process, and the right to familial integrity and security. Thus, it would appear that the provision of counsel—which can be construed to be included textually in the Charter as "every effort" to provide "due legal aid"—is essential to achieving fundamental fairness in judicial proceedings, regardless of whether a given trial is criminal or civil in nature.

Moreover, reinforcing this conclusion, the Declaration, in its eighteenth article on the right to a fair trial, provides that "[e]very person may resort to the

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[112] See Davis 23.
[113] See Davis 23, Paoletti 653-654.

courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." The Declaration, in tandem with the OAS Charter, arguably demonstrates how the policy of the United States is inconsistent even with its own international agreements, not only regarding parental rights but also the provision of civil counsel in general.[114]

In all, these documents appear to follow a general theme in which the nature of the basic rights in jeopardy determines the level of procedural protection, including the provision of counsel for the indigent. In other words, whether a trial is criminal or civil is not the point of focus, whereas equal and impartial protection of fundamental human rights is.

Airey v. Ireland-

As an instructive non-binding example to the United States, the entire Council of Europe (COE)—composed of 49 member countries—considers the right to counsel in civil cases as a basic human right. Several COE members even

[114] See Davis 24; also, the Inter-American Court of Human Rights affirmed these ideas in an advisory opinion.

provide counsel to protect foreigners and non-profit organizations.[115] The COE defends its practice by referencing the European Convention for the Protection of Human Rights and Fundamental Freedoms, of which all members of the COE are signatories.[116] The Convention states in Article 6: "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."[117]

While Article 6 does not explicitly mention the appointment of counsel as a right, the European Court of Human Rights interpreted Article 6 in the *Airey v. Ireland*[118] case of 1979 to mean entitlement to representation by an attorney in both civil and criminal cases. In the case, an indigent mother, Airey, applied to the European Commission of Human Rights for a judicial separation order from her husband, whom she accused of alcoholism, physical abuse, and causing mental anguish.[119] Airey complained, inter alia, that the High Court of Ireland, through the prohibitively high costs of the proceeding and her inability to pay for a lawyer, deprived her of obtaining a judicial separation order. The

[115] See Lidman 770-780; Davis 11-13.
[116] See Lidman 770-780.
[117] See Lidman 775.
[118] *Airey v. Ireland 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305.*
[119] She had unsuccessfully tried for eight years prior to 1972 to have her husband sign a nullification agreement.

Commission referred the case to the court to determine whether the High Court of Ireland had violated Article 6 of the Convention.

The court held that that there is for the state "an obligation to secure an effective right of access to the courts," and that "such an obligation may require the state to provide legal counsel."[120] The court justified this decision on the grounds that basic rights ought not be illusory and thus imply obligations upon the state, thereby requiring the state to act to render them effective.[121] Accordingly, with respect to Article 6, the state should have made every effort to allow Ms. Airey meaningful access to the courts among other rights the Convention deems basic. Notably, in Ms. Airey's case, the court found that self-representation did not suffice as effective access to a court because of the complex nature of the proceedings in the High Court of Ireland,[122] the emotional dimension of marital disputes,[123] and the possibility of her husband being represented by an attorney. For these reasons, the court held, it is "most

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[120] See Paoletti 656-658; *Airey v. Ireland 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305*

[121] "The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective." *Airey v. Ireland 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305.*

[122] Judicial separations are not obtainable in lower courts in Ireland. Only the High Court, which requires expensive representation and involves complicated procedures, may provide judicial separation orders.

[123] "Furthermore, litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined. What is more, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court." *Airey v. Ireland 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305.*

improbable that a person in Mrs. Airey's position, can effectively present his or her own case." In other words, the court considered simply appearing before the High Court insufficient in fulfilling meaningful access.

Specifically addressing the issue of providing counsel in civil cases, the court held that some cases might necessitate the assistance of counsel due to their nature:

> "…Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case."

Notably, the court focused on the complexity of judicial procedures in its justification of appointing counsel for an indigent litigant as a right.

Ultimately, the court held that the High Court of Ireland did, in fact, violate Article 6 of the Convention, which deals with the right to access courts, due in part to the High Court's failure to appoint an indigent free counsel in a complex, expensive proceeding.

V. Analysis of the Facts and Exploring Reform

The provision of counsel in civil trials as means to secure basic rights and meaningful access to courts for indigents is a notion found consistently throughout the historical evolution of the practice, the comparative reasoning of *Gideon v. Wainwright*, the practices of the international community, the problems created in the wake of *Lassiter*, and the cases that have subsequently gone beyond the *Lassiter* decision. For liberty, for property, for family, courts of the past and of today have consistently found that—regardless of their perception of the practice as a right, professional obligation, or charitable exercise—the provision of counsel has served as a facilitator for the protection of what are considered basic rights. In this sense, whether ascribed the status of "right" or seen differently, the importance of providing counsel as an element of fundamental fairness and meaningful access to courts is evident, especially in the complex legal environment facing indigent civil litigants today.

History Speaks for Itself-

Throughout Anglo-American history, the appointment of civil counsel to indigents has existed in different forms, fluctuating between legislative dispensation, charitable gesture, and ethical obligation. In spite of this, lessons from the past provide reasonable examples for the correct method for

appointing civil counsel in parental rights trials and other cases of critical import, today.[124]

Simply put, the historical treatment of the appointment of civil counsel reveals recurring efforts in the Anglo-American judicial tradition to protect the basic rights[125] of the inherently disadvantaged in judicial proceedings. Whereas assigning civil counsel was obscure in a more simplistic, individualistic legal environment of the past, the complexities and widespread inequality of today's society require the concrete establishment of this practice, especially in such life-altering cases as parental rights proceedings.

Indeed, courts today ought to continue to provide counsel to inherently disadvantaged litigants, much as courts have in the past. Accordingly, because of the intricate, overwhelming complexity of today's legal system, the rationale of the past—equating "inherently disadvantaged" with "indigent"—ought to apply to all people unable to afford a lawyer for representation. To clarify, beginning with the Statute of Henry VII in Britain and resurfacing in 19th century America, courts have considered the disadvantaged in society—paupers, slaves, women, and minors—to be distinctly unable to prosecute cases themselves in an appropriate manner, thus furnishing these litigants with semblances of due

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[124] A standard for significant or critical civil cases, as opposed to minor or frivolous cases, is discussed infra.
[125] E.g., rights to liberty, to property, and to family.

process by appointing free counsel to represent them. In the same spirit, courts today ought to bestow counsel on indigents in civil trials for the sake of judicial access and equality.

Admittedly, throughout the colonial era and the 19th century, the provision of counsel was an obscure, unusual course in dealing with civil litigants. Nonetheless, the practice was obscured in a society with a much simpler judicial and legislative system. Indeed, an individualist, "do-it-yourself" attitude permeated not only the court system but also society in general during that era. What matters, however, is that the reasoning behind providing counsel to civil litigants throughout history remains relevant for today, insofar as the practice was implemented to secure the rights of the disadvantaged in society.

This poses the question: from what root does this reasoning spring? Why were courts inclined to protect the weak in situations of their own unavoidable disadvantage? Arguably, despite their perceptions of the status of the practice of providing civil counsel, courts over the years looked to the basic principles intended to uphold fundamental fairness in supposedly impartial arenas for the settling of disputes. When courts viewed a litigant in a dispute to be so unevenly pitted against a significantly more formidable opponent, they saw fit to even the playing field for the sake of the basic rights at stake, like liberty or property.

This concept is at the heart of American constitutional culture, iterated in notions of equality before the law, due process, and the right to fair trial.

Gideon as a Guide-

If the historical record of cases that contain evidence for the provision of a right to appointed counsel in parental rights trials is not sufficiently convincing, history's juxtaposition with the characteristics of today's legal system significantly reinforces the validity of providing such a provision on a national level. For a paramount example of this juxtaposition, as a testament to the foundational legal traditions of due process established centuries ago and developed over the years, the landmark *Gideon v. Wainwright* decision reinforced the concept of representation for indigents as a critical safeguard against an unfair trial for an indigent in court. Writing the majority opinion, Justice Black addressed the inherent dilemmas of fairness within the modern American judicial system:

> "Reason and reflection, require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly

> society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.[126]"

While Justice Black addressed issues only within the criminal realm, pertinent to the case at hand, the reasoning he applied in the majority opinion rests at the heart of the argument in favor of providing counsel to indigents in parental rights termination trials. Demonstrated in the legal annals of centuries past, counsel in Britain and the United States was provided for those whom courts considered especially disadvantaged—in other words, the exceptionally marginalized and powerless members of society, who lacked money, education, and social connections. Today, however, as Justice Black points out, the nuanced complexities of the American legal system today liken all modern indigent litigants to these especially disadvantaged few of centuries past. In fact, the complexities of today's system unfairly disadvantage any layperson who has not

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[126] *Gideon v. Wainwright, 372 U.S. at 344 (1963).*

been trained as a professional in jurisprudence and the presentation of sound legal arguments. Thus, the line of reasoning regarding civil counsel that was previously developed and passed down should remain essentially the same, differing only in the breadth of its sphere of influence, expanding at least to protect indigent parents living in a vast, unequal, and complex society, which now, more than ever, demands the preservation of constitutional rights.

To keep in line with the evolving and expanding conceptualization of counsel's role as fundamental to fairness, the *Lassiter* court could have come to a similar conclusion as the Court in *Gideon*. However, it did not, due likely in part to a conservative fear of a "slippery slope," in which the resources of the judicial system were irresponsibly spent in cases in which basic rights or fundamental interests became indistinguishable from lesser interests. Indeed, the Court in *Lassiter* left the door open for states go above and beyond the standard it set, but was unwilling to tread into controversial territory, which would require a large undertaking in restructuring policy within the states.

In addition to parting with the reasoning of the *Gideon* court, the *Lassiter* court also ignored strikingly similar circumstances that preceded the *Gideon* case. In the period leading up to the *Gideon* decision, there was an extensive history of academic condemnation of the strictly case-by-case analysis of special circumstances that the *Betts* decision established. Currently, the situation is

very similar, with many lawyers and scholars lobbying for categorical provision of free civil counsel, using the *Gideon* decision as a major premise for their arguments.

In addition, preceding the *Gideon* decision, there was a wide base of state and organizational support for the creation of a categorical constitutional right to free appointed counsel in criminal trials, with 45 states providing the right either through statute or constitutional provision, and 23 states, as well as the ACLU, becoming amici curiae during the case to urge the court to overrule *Betts*. Similarly, today, a majority of states provide for the appointment of counsel in parental rights termination cases.[127] Discussed above, the cases from Alaska, Florida, California, and other states demonstrate the lines of reasoning these state courts, constitutions, and statutes take in rejecting and surpassing *Lassiter* in parental rights proceedings.

Additionally, the supreme courts in certain states have ruled in favor of providing free counsel in an array of categories relating to parent-child relations. For example, the Supreme Courts of Maine and Oregon ruled that the right to free civil counsel for parents in dependency/neglect cases was required under due process; the Alaska Supreme Court ruled that free counsel for indigents was required in child custody proceedings; and the California Supreme Court ruled in

[127] See Abel 529-539.

favor of the right to free appointed counsel under due process for litigants in paternity-determination hearings.[128]

Furthermore, state judges and legislators are voicing concern for the inability of low-income litigants to obtain counsel, especially through "access to justice commissions" organized in many states.[129] Likewise, the American Bar Association has passed a resolution that supports the right to counsel for the indigent in "serious" civil trials and affirms the growing hopes that the decision in *Gideon v. Wainwright* would apply in civil cases as a means of guaranteeing fundamental fairness.[130] It states:

> "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." [131]

There is even a National Coalition for a Civil Right to Counsel, composed of advocates from over 30 states, which provides networking, coordination,

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[128] See ABA Resolution 515-516.
[129] See Abel 529-539.
[130] See Lidman 769-771.
[131] See ABA Resolution 508.

research assistance, and other support to advocates of a civil right to free appointed counsel.[132]

Notably, these organizations stand for a broader provision of counsel, transcending specific parental rights cases for an array of categories of cases of a critical nature and involving "basic human needs." This notion leads into the broader conclusion to which the body of historical and current legal evidence extends: that counsel should not only be provided to indigent litigants in parental rights termination cases, but free lawyers for indigents should also be provided in a variety of cases of a serious nature, which is discussed infra. Evidently, both the reasoning and the preconditions of *Gideon* remain, standing together with history, cases decided after *Lassiter*, as well as other indicators to illuminate the need for counsel in critically important cases tried in an overwhelmingly complex legal environment. In other words, the lessons gleaned from history's pattern of providing counsel for the inherently disadvantaged and from states' frequent rejection or expansion of *Lassiter's* decision hold true not only for parental rights cases but also in several types of other serious cases.

The International Community-

[132] See ABA Resolution 515-516.

In addition to the reasoning that history and current policy provide, the international community also provides lawmakers and judges in the United States with pertinent examples and even obligations to provide counsel in civil cases on a scale beyond parental rights cases. While the will of the UN, documents like the ICCPR and the UDHR, and the generally accepted norms of other nations are not binding on the United States, the implications of international legal opinion and the United States' role in expanding global human rights cannot be ignored. For example, the Supreme Court itself has admitted the importance and evolutionary nature of the legal standards of today's globalizing society, which include international law and foreign domestic law and play a major role in defining civil and political rights.[133]

Airey v. Ireland serves as an instructive example for the United States with regard to providing civil counsel for the indigent, providing a definition of basic rights and fundamental fairness that the entire Council of Europe accepts and seeks to uphold. Indeed, the case explicitly requires appointed counsel in civil cases dealing with what the European Convention on Human Rights considers

[133] *Lawrence v. Texas, 539 U.S. 558 (2003).* In response to weapons disturbance in a residential area, Houston police entered the petitioner's apartment and discovered him and another man engaging in a sexual act prohibited by Texas law and affirmed by the Supreme Court decision in the case *Bowers v. Hardwick, 478 U.S. 186*. The Court, in this case, however, overturned its previous decision in Bowers and ruled that the changing standards of today's world qualify the right to sexual privacy as protected under the 14th Amendment. "[The founding fathers] knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

basic rights to meaningful access to the courts and to the security of the family. Moreover, the case also provides an example of a group of sovereign countries that defer to the ruling of an international human rights court. As a superpower and a self-proclaimed bastion of democracy and freedom, the United States should see its lack of progress with regard to civil counsel in the international community as a legitimate cause of action to improve upon its treatment of the poor within its courts and remain true to principles like due process and the right to a fair trial, which it holds dear.

Setting a Standard-

Accordingly, these ideas from the realms of history, policy, and the global community pose this question: by which criteria or standards of criticality would civil cases be determined requiring the provision of the right to appointed counsel? And furthermore, how could such a practice be pragmatically implemented in an already overburdened judicial system?

A reasonable place to explore feasible answers to these questions is within the functioning judicial systems of other nations, which, as aforementioned in the *Airey* case, often consider the right to counsel in civil trials as fundamental. Because of the Council of Europe's simultaneous senses of diversity and unity, it serves as a particularly relevant comparison to the geographically expansive and culturally

diverse United States. Among COE members, several different factors for determining which cases qualify for provision of counsel are implemented as part of domestic law. Often, these factors are based upon a litigant's financial need and, in some countries, to other circumstances like age, disability, and veteran status.[134] For example, many COE countries use a "sliding needs scale."[135] In other words, in many cases, the nature or substance of the civil proceeding does not determine the provision of the right to counsel; instead, financial need is the determiner.

In addition, some COE countries maintain certain eligibility requirements for litigants that deal with the nature or substance of their case. A majority of COE countries provide counsel in parental rights procedures, other family law issues, debtor cases, personal injury trials, and labor law cases.[136] Countries also use merit tests, which often focus on the legitimacy and likelihood of success to determine whether a civil case is eligible for provision of counsel.[137]

While their methods of implementation and standards of determination differ, a common theme of protecting fundamental rights predominates among COE nations and others, as well. This notion correlates with the aforementioned ideas expressed in the ABA Resolution regarding the civil right to counsel and access to

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[134] See Lidman 783.
[135] See Lidman 772.
[136] See Lidman 779-781; Many countries limit the provision of civil counsel by listing specific situations in which the right is excluded; for example, common small claims cases and defamation lawsuits are almost universally excluded in the COE. These types of cases are almost always considered not to deal with fundamental human rights.
[137] See Lidman, Appendix A, 789; discussed infra.

justice, which lobbies for reform in the United States. Thus, the strands of legal thought that took hold in Europe and other countries years ago are slowly moving toward reclaiming their appropriate place in American legal culture.

The reflection of the ideas of "basic human needs" expressed in the ABA Resolution—i.e., "shelter, sustenance, safety, health or child custody"[138]—within foreign and international law is a compelling example for lawmakers and judges within the United States to consider. These ideas ought to be the central focus in the expansion of a right to appointed civil counsel in the United States, transcending parental rights into a broader realm of fundamental rights, primarily defined through documents like the Universal Declaration of Human Rights.[139] Furthermore, these ideas are consistent with the venerated American idea of due process in protecting life, liberty, and property, and the protection of these fundamental basic needs arguably served as the basis for the provision of counsel in many of the previously discussed 18th and 19th century cases.

Accordingly, consistent with the aforementioned fundamental rights enumerated in the ABA Resolution, a new system for determining the provision of counsel in civil proceedings ought to emerge. To balance the challenges of practicality and protecting the rights of US citizens, the United States should adopt a flexible system that attacks the problem of inadequate representation

[138] See ABA Resolution 508.
[139] See UDHR, which enumerates a list of fundamental rights that everyone possesses. See especially Articles 7, 8, and 10 with respect to fairness and equality within a court proceeding.

for the poor from a variety of angles, in accordance with the evolving ideas of human rights and legal principles of today's increasingly global world. Such a system would require gradual transformative steps, as well as streamlined procedural standards, with the judicial system's capability to provide counsel coinciding with the level of fundamentality of the rights at stake in certain categories of cases.

The system ought be intended not only to prevent the unfair or erroneous endangerment of a litigant's basic rights—engendered by a lack of counsel—but should also consider the inherently disastrous real-world consequences for an indigent litigant after losing in certain types of cases. For example, being evicted or fired is by nature more negatively life-altering for an indigent than for a person with financial security. After such an outcome, an impoverished person would have significantly less resources to find work or housing to remedy their adverse circumstances than would a person with enough money available for temporary self-support.

For some cases, with basic rights and the consequences of their endangerment in mind, determining the need for counsel would seem reasonably simple. Hearkening back to the narrower argument for the provision of civil counsel in parental rights trials, cases in which a right deemed so fundamental to human existence and liberty ought be covered unquestionably

under a provision of the right to free civil counsel. In essence, forty individual U.S. states and much of the world have already answered this question for themselves, with the United States differing markedly on the parental rights issue.[140]

Nevertheless, beyond protecting rights as clearly fundamental as the right to be a parent, a grey area exists, presenting a challenge for any judge, lawmaker, or Supreme Court justice faced with deciding upon the extent to which the right to civil counsel covers litigants. Essential to the establishment of a system capable of dealing with this grey area, the basic rights listed in the ABA Resolution, which are concurrently acknowledged as such in the Universal Declaration of Human Rights and other human rights documents, serve as a beginning point for setting the standards of providing counsel within a reformed system. As a first step, with the rights enumerated by the ABA in mind, courts ought to evaluate prima facie the facts of a given case to determine whether a basic right is jeopardized or infringed upon, as well as the extent to which the right is jeopardized or infringed upon. In other words, the gateway qualification for receiving counsel would require a litigant to convince a court before a trial of the basic, rudimentary right or rights at stake in his or her dispute, which demands a particular level of process to ensure fairness in an important case. Thus, a litigant able to prove that his or her "shelter, sustenance, safety, health or

[140] See Lidman 770-780.

child custody" is threatened would fulfill the first condition for receiving free counsel.[141]

With efficiency and frugality in mind, after determining quickly whether a case involves basic human rights, courts would subsequently apply a second test to determine whether such a case has merit. This second test, much like the merits tests implemented in many European countries,[142] would be a simple "frivolousness" filter, in which a court removed from consideration for appointed counsel any pointless cases in which a litigant has little to no chance of winning, evidenced by the facts of the case. For instance, while shelter is considered a basic human right and would be at stake in eviction cases, an evicted indigent tenant who has refused to pay rent for no apparently valid reason—with no viable complaint against the landlord or a residence's living conditions—would not be granted counsel on the grounds that he or she would likely lose such a frivolous case. In other words, courts would provide counsel in cases in which counsel would likely make a significant, positive difference for an indigent litigant. This way, in conjunction with ensuring that a basic right is at stake, certain categories of cases in which the right to appointed counsel is or is

[141] It is assumed that courts will ensure that a litigant is indeed indigent before engaging in an analysis of the need to appoint counsel.
[142] See Lidman 781; Appendix A, 789. Large European countries like France, Germany, and Italy implement similar versions of this type of merits test to eliminate cases that are manifestly groundless or unlikely to succeed. "A common standard is similar to a prima facie showing and does not involve the weighing of evidence regarding each claim."

not granted could be established, with the resources of the judicial system conserved.

Ultimately, the result of establishing a system like this would be a restructured, simplified, and streamlined manifestation of the intentions of the *Mathews* test. Since the Court in *Lassiter* applied the *Mathews* test to a judicial proceeding when, in fact, the Mathews test was developed within and on behalf of administrative proceedings, the *Mathews* test by itself is arguably inappropriate. Since *Lassiter*, this test has been viewed within a judicial setting, even when its creators arguably did not intend for its use outside the administrative realm. In light of this, a new system ought be tailored to the specific needs of judicial proceedings.

Establishing a middle ground between the overly conservative case-by-case analysis of *Lassiter* and the ideal but impractical notion of a right to appointed counsel in all civil cases, this two-pronged system would take into account the interests of both the litigant and the state: the indigent's basic right at stake and the merit of the case in the eyes of the state. In doing so, such a system would also maintain a presumption in favor of counsel, rather than against it, as the *Lassiter* court decided. While this system would certainly implement elements of both the case-by-case and categorical approaches, cases would be able to proceed more quickly and smoothly, easing pressure on

appeals courts by preempting the issue of providing counsel, protecting the basic rights of individuals, and ensuring fairness in the courtroom.

Obstacles to Reform-

While the legal and historical reasoning as well as societal circumstances for overturning *Lassiter* and providing assigned civil counsel to indigents are compelling, implementing such a decision would prove very difficult for states' already burdened legal systems. In addition to easily foreseeable fiscal and logistical issues involved in developing a new system, a key problem for states—were they able to create a functioning system in which indigents had rightful access to assigned civil counsel—would be providing *effective* counsel. In other words, while creating a system in which indigents are entitled to counsel may prove to be quite doable, providing effective, prepared, qualified, and unburdened counsel to indigents is an entirely different feat.

This dilemma is adequately demonstrated in the analysis of a recent New York case, *Nicholson v. Williams*.[143] According to a New York state statute,[144] all parents involved in parental rights proceedings are guaranteed the aid of counsel. While New York counties bear the cost of the system, the statute sets

[143] *Nicholson v. Williams, 203 F.Supp.2d 153 (2002, East D. NY).*
[144] N.Y Fam. Ct. Act 262 (Consol. 2002).

the compensation rates for participating attorneys at relatively low levels, in comparison to private rates. These rates are out of step with inflation; moreover, with overhead costs, lawyers often lose money when serving indigent clients.

Thus, in New York and in other states, the current system creates a financial disincentive for lawyers, discouraging and even preventing them from spending an adequate amount of time and effort in dealing with indigents' cases. In turn, in addition to making counsel less available for indigent cases, the current system causes attorneys who are available to take on an unmanageable number of filings.[145] Ultimately, the system is overburdened with indigents who are unable to obtain counsel, while those who are able to obtain counsel are often represented inadequately.[146] Furthermore, the situation discussed in *Nicholson v. Williams* only refers to parental rights cases—not civil cases in

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[145] "Low assigned counsel rates have [a] pernicious effect on the delivery of indigent defense: they create an economic disincentive for lawyers to do a good job of representing their clients. Good legal work requires time, but for the assigned lawyer, the more time spent on the assigned case means that much more negative cash flow. This, in turn, means that the assigned defense lawyer will only make money…if she accepts far too many assigned cases and then resolves them as quickly as possible, regardless of the merits of individual cases." Kathryn M. Kase, a former President of the New York State Association of Criminal Defense Lawyers, cited in the analysis of *Nicholson v. Williams, 203 F.Supp.2d 153 (2002, East D. NY).*

[146] "[Lawyers assigned to indigents in parental rights cases] regularly are appointed too late, fail to appear in court for hearings, do no properly prepare for hearings, inadequately interview and advise clients, and are not available to return phone calls about court or related matters…These problems are a direct result of the fact that [these] lawyers are compensated at a level at which they cannot afford the essential accoutrements of basic professional service…" *Nicholson v. Williams, 203 F.Supp.2d 153 (2002, East D. NY).*

general, which would certainly present even larger problems, especially on a national scale.

Aims of the System-

While the given example is simplified, arguably idealistic, and subject to certain limitations and obstacles, the need of practical reform remains salient and feasibly attainable with the resources at the disposal of the United States. The exact details of a sustainable reform effort would certainly evolve with changing circumstances and would likely be unpredictable, but the seminal concept of the equal and fair resolution of disputes that characterizes the American judicial culture demands a system in which the poor are fairly represented in court.

Ultimately, a system of this nature would recognize the need for counsel in today's judicial system as a means to protect the basic rights of its diversely stratified citizens. In addition, this system would look to Anglo-American legal history, the Constitution, groups like the ABA, and the international community to define these basic rights.

VI. Conclusion

The current method with which the United States deals with the providing free appointed counsel for the indigent in civil trials is unacceptable under the Constitutional guarantee of due process and a fair trial. In addition to the denial of the means to protect constitutional rights for America's poor, the current presumption against the right to civil counsel and the related *Mathews* balancing test established in *Lassiter* place an undue burden on both trial and appeals courts, forcing them to examine and reexamine on an inefficient case-by-case basis the situations of indigent civil litigants.

Hearkening to the history of the provision of counsel, the United States should respect and uphold a practice that has proven its relevance and commanded reverence for centuries in the evolving Anglo-American judicial system. From its inception in 15th century Britain, to its obscured survival in the American colonial system, to its newly rendered resurgence during the Civil War era, and to its current status within the modern judicial system, the provision of civil counsel has remained necessary, and it must be modeled to fit within a society in need of such a safeguard.

Moreover, the lessons learned from the progression of the criminal right to counsel, which culminated in *Gideon*, ought to provide instructive, analogous reasons to effect change in the realm of the civil trial right. Indeed, similar

circumstances that encouraged the *Gideon* decision exist today for overturning *Lassiter.*

In addition to history and current domestic circumstances, the United States is also obligated by the international community, behind which it lags markedly in providing civil counsel. Furthermore, international treaties and agreements obligate the United States in upholding the right.

While the reasons for reform are powerful and distinct, the method of reform is less so, with obstacles abounding. To overcome these obstacles and achieve effective reform, the United States should look to systems already in place in its peer countries, which serve as instructive models for change. Keeping in mind the importance of counsel in securing a fair trial, the shortcomings of the current system, an understanding of the reasons for change, the capabilities of the government and other sources of legal aid to meet the needs of the poor, the methods of other countries in dealing with providing civil counsel, and the need for the efficient use of resources, the United States can achieve a reasonable, effective system of reform within its judicial system.

The first major step toward change, however, must be taken by the Supreme Court. To meet the urgent legal needs of the poor, the Court must act; it must overturn *Lassiter*. The pieces of the puzzle are coming together, and the initiative that some term the "Civil Gideon" movement is building momentum.

According to Emerson, “Patience and fortitude conquer all things.” For the Civil Gideon movement, it may only be a matter of time.

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