

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

Copyright (c) 2003 Georgetown Journal on Poverty Law & Policy
Georgetown Journal on Poverty Law & Policy

Winter, 2003

10 Geo. J. Poverty Law & Pol'y 1

LENGTH: 21323 words

ARTICLE: Public Civil Defenders: A Right to Counsel For Indigent Civil Defendants

NAME: Simran Bindra * and Pedram Ben-Cohen **

BIO:

* The author is an associate in the Los Angeles office of Heller Ehrman White & McAuliffe LLP; the views expressed herein are solely those of the author and do not reflect those of such firm. The author wishes to thank his mother, father, and sister, Reba, for their love and support throughout the years.

** Pedram Ben-Cohen is a third year law student at Georgetown University Law Center. He received a B.S. in accounting, cum laude, from the University of Southern California in 2000. For another article by Mr. Ben-Cohen see Pedram Ben-Cohen, *The Real Estate Exception to the Passive Activity Rules in Mowafi v. Commissioner and the New Burden Shifting Statute*, 55 TAX. LAW. 961 (2002).

SUMMARY:

... Instead, "most often, the rights of . . . indigent litigants simply will not be enforced, despite romantic notions of *pro se* capacity and judicial paternalism." ... In fact, *Lassiter* establishes the presumption that "an indigent litigant has a right to appointed counsel only when . . . he may be deprived of his physical liberty." ... *Lassiter* instructs that the three elements to test due process must be balanced against one another, and "then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." ... The rest of the world has recognized this, with European countries such as England, France and Switzerland assuming that the only way for the poor to have meaningful access to the courts is to provide representation by counsel. ... Thus a government schema denying indigent civil defendants a right to appointed counsel deprives them of a fundamental right, and should be subject to the death ray of strict scrutiny. ... This fundamental question is why many are anxious to consider such programs as a system of mandatory pro bono to alleviate the shortage of representation for indigent civil litigants. ...

HIGHLIGHT: *I think the best cross-examination I ever saw came from a criminal defendant who had decided to represent himself. I had the officer who arrested him on the stand, and I had finished my direct examination. The defendant stood up, looked at the jury, looked at the officer, and in a loud voice asked the cop, "Where did you get to be such a good liar?" Then he just sat down. The jury just smiled, and I knew he had them. Of course, we still won the case.*

- True Story from a Los Angeles City Attorney

TEXT:

[*1] INTRODUCTION

We've all heard these types of anecdotes, whether while watching a show on television or hearing the urban legends that emerge from the legal profession. It's the story of the layman who is so much better in court than the lawyer, the common woman who walks into the courtroom and makes the professional attorney and his training and experience look like a jumble of wasted years.

Sadly, however, these stories really are just urban legends. Victory for the *pro se* litigant is rare. Instead, "most often, the rights of . . . indigent litigants simply will not be enforced, despite romantic notions of *pro se* capacity and judicial paternalism." n1 For each layperson sophisticated enough to approach the legal system on his own, at least ten are

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

unable to make heads or tails of it. Nor can most afford an attorney to represent them. Studies have shown that in some civil courts as many as ninety percent of the defendants were without counsel. n2 Pro [*2] bono and current governmental efforts, though valiant in their attempts, have been relatively unsuccessful in addressing the problem.

Indigent defendants are particularly vulnerable. An indigent civil defendant is brought into court against his will. Unlike a plaintiff, who can often induce a lawyer to take the case based on a prospect for recovery, the civil defendant generally lacks even that lure. The indigent civil defendant is alone, forced to confront a system in which "the assistance of counsel is often a requisite to the very existence of a fair trial." n3

Faced with this problem in the context of indigent criminal defendants, the Supreme Court responded by mandating an absolute right to counsel. n4 Faced with the issue in a civil context, however, the Court has not been nearly as responsive. In *Lassiter v. Social Services*, the Court came up with a test balancing: (1) the private interests at stake; (2) the government interest involved; and (3) the risk that the procedures used will lead to erroneous decisions. n5 Yet *Lassiter* calls for these factors to be balanced against the presumption that the indigent's right to appointed counsel comes only if the indigent person is in danger of losing his or her personal freedom. This presumption has proved nearly impossible to overcome, and led to the widespread notion that appointment of counsel in a civil case is "a privilege and not a right." n6

This Article seeks to change that notion by arguing for an absolute right to counsel for indigent civil defendants. To achieve this goal, the government must establish some form of civil public defender's office. Just as the state is required to supply counsel for those indigent criminal defendants brought before a court, it must also do the same for indigent civil defendants, regardless of whether the plaintiff is the government or another private party. An indigent civil defendant would only need prove he is unable to afford counsel. n7 Thereafter, the system must provide counsel for any indigent defendant who requests it.

Part I of this Article describes why such a solution is necessary. The general landscape for the indigent civil litigant (plaintiff or defendant) in America is set forth. Because of the dearth of legal services for the poor, and the lack of alternatives to help them, this system of civil public defenders is necessary. Part I also emphasizes the particular vulnerability of the indigent defendant, explaining why defendants, more than plaintiffs, are in need of protection. Arguments focus both on practical realities favoring plaintiffs and traditional notions of jurisprudence that place a greater burden on plaintiffs than defendants.

Part II analyzes why the denial of counsel to indigent civil defendants is a [*3] Constitutional violation. Seventy-nine percent of Americans believe the Constitution guarantees an impoverished litigant counsel in any type of civil case. n8 As it turns out, the masses are right. One argument is based on the Due Process Clause, exploring the line of cases that developed the right to counsel in the criminal setting. These cases imply the indigent criminal defendant's right to counsel is based not on the liberty interest at stake (as *Lassiter* implies), but rather on the inability of even the most sophisticated layman to navigate the contours of the legal system. The Court's real concern is access to the system, because without a trained representative the non-lawyer will be overwhelmed.

Part II also discusses why the Equal Protection Clause requires that the government provide counsel for indigent civil defendants. Denial of counsel to an indigent defendant brought before the court (which is an arm of the state) is both the absolute denial of a fundamental right and a form of invidious wealth discrimination. In either scenario, the denial of counsel should be subject to strict scrutiny, which is generally the kiss of death for a governmental action.

Part III sets out the numerous benefits flowing from providing counsel to indigent civil defendants. Tangible benefits come in the form of reduced litigation, conservation of judicial resources from a reduction in *pro se* litigants, and money saved from reduced societal aid needed for the unsuccessful indigent. Intangible benefits accrue from an increased faith in the judicial system, and a reduction in the number of people feeling the need to take extra-judicial action due to a lack of confidence in the system's protection. Seventy-one percent of the population favors using tax revenues to provide counsel for those who need it, regardless of cost. n9 It is time to heed the public's sentiment.

I. THE WORLD OF THE INDIGENT CIVIL LITIGANT

A. *The Ongoing Failure to Meet the Need of Indigent Litigants*

Were the needs of indigent civil litigants being met through currently available resources, this Article would be moot. After all, the need for this proposal comes from the scarcity of options for indigent civil litigants. In writing a draft of this Article, we made the statement, "the time has come to change the system in which an indigent civil defendant cannot be guaranteed the right to counsel." An editor responded by asking, "why now?"

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

It is a valid question, with a seductive argument. There are myriad resources available to indigents seeking legal assistance. Those without legal assistance either do not deserve it or are simply not working hard enough to find it. In either event, the indigent civil litigant is the one at fault. So why bother providing her with counsel?

[*4] There are many resources available for indigent civil litigants; the problem is that so many more are needed. Battles over legal funding for indigents have been fought across the country, primarily over funding for the Legal Services Corporation. The Legal Services Corporation (LSC) is a private, non-profit organization established during the Nixon Administration to give grants to legal organizations providing assistance to low-income people in civil cases. n10 Over the years, LSC, like many Congressional programs, has seen its funding cut. For example, LSC's 1999 funding was at \$ 300 million, \$ 21 million below the 1981 level and far below the \$ 600 million that would be the inflationary equivalent of the 1981 level. n11

There are more and more indigent civil litigants with increasingly complex problems. n12 As one observer put it, there has been an "increase in the number of Americans living at or below the poverty threshold in the 1980s [and] . . . increasing complexity and 'legalization' of our society," accompanied by "stagnant federal funding for legal services in the context of the federal deficit." n13 This view is shared not only by private commentators, but also by the United States Supreme Court itself. In *Mallard v. United States*, n14 the Court rejected the notion that 28 U.S.C. § 1915(d) was meant to allow federal courts to force counsel to represent an indigent litigant. Frustrated by the elimination of a judicial option to help indigent litigants, the Court noted that we live "in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace." n15

Despite this sentiment, many believe that there are countless options for the indigent civil litigant. A paradigmatic view of this comes via testimony before the U.S. House of Representatives in the battle to increase funding for the LSC. Allyson Tucker, an Executive Director for the Individual Rights Foundation in Los Angeles (a nationwide organization of attorneys providing pro bono assistance), put forth many of the most common arguments in testimony before the Judiciary Subcommittee on Commercial and Administrative Law. n16 By [*5] examining her arguments (and the flaws therein) about the "thousands of places that the poor can turn to for legal assistance," n17 the indigent's need for counsel may be better understood.

First, Tucker starts off by announcing the "good news" that "pro bono legal assistance in this country is so widespread that many lawyers who wish to donate their time actually have difficulty finding needy clients." n18 Statistics from Maine suggest a different outcome. Despite the fact that Maine has the highest pro bono rate in the country amongst its lawyers, a study showed that it was impossible for the State's lawyers to volunteer enough time to meet the legal needs of its indigents. n19 Similarly, the Executive Director of the Mississippi Bar's Volunteer Lawyers Project, estimates having "over 15,000 requests for lawyers a year," yet only completing about "1,500 cases." n20

Considering the widely reported statistic that only twenty percent of the legal needs of the poor are being met, n21 why don't the other eighty percent find those unoccupied lawyers that Tucker speaks of? Judging by the requests documented above, it is clear that indigents are attempting to find counsel. Further, even of the twenty percent of clients whose needs are met, "the vast majority will be represented by lawyers who work for government-funded legal services programs." n22 Ironically, even as Tucker cites the existence of pro bono availability as one reason federal funding for legal services is unnecessary, she admits that many of the organizations providing pro bono services actually rely on LSC funding. n23

[*6] Pro bono, while certainly of great assistance, is by no means a solution to the problem. Consider the 1996 Senate finding that, despite pro bono work being done at record levels, even a doubling or tripling of that level would barely replace a fraction of work done by the LSC, n24 which itself is not enough to meet the needs of indigent litigants. Tangibly, it means that "even if every private attorney in the United States provided fifty hours of pro bono services per year," it would not account for even a thirty percent drop in funding to LSC. n25 Obviously, pro bono cannot account for even a drop in already inadequate LSC funding, let alone provide an answer to the overall shortage of representation.

Tucker also discusses the assistance courts offer to litigants proceeding *pro se*. For example, Tucker discusses how judges in California will refer unlawful detained defendants to pro bono counsel willing to help, thus ensuring these indigent litigants have representation. n26 Yet, even with such assistance, there is but one lawyer for every 10,000 California indigents, leaving 1.5 million poor families without counsel. n27 On a similar note, a study by the New York State Bar Association found that ninety percent of low-income tenants in New York City's Housing Courts lacked representation "because of the lack of available civil legal services." n28 Further, some reports indicate that sixty-two to eighty-nine percent of family law cases involved *pro se* litigants. n29

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

The absence of representation for these indigent litigants is consistent with the general idea that it is extraordinarily difficult for judges to protect indigent civil litigants without counsel. Michael Millemann, responding to the argument that judges go out of their way to help the *pro se* indigent litigant, points out a key assumption about the courts' provision of effective assistance:

It operates on the Alice-In-Wonderland assumption that busy judges who [in a span of less than six hours] consider many cases--sometimes as many as one hundred or more--have reviewed carefully the scribbled pleadings of *pro se* litigants, and will patiently divine merit from often excited and fractitious *pro se* exclamations. Judges, particularly "mass justice" judges who sit in the nation's lower courts, simply cannot . . . perform these basic functions of an advocate. n30

[*7] In her testimony, Tucker also discusses the possibility of arbitration and alternative dispute resolution (ADR). Citing information from the National Institute for Dispute Resolution, Tucker notes that twenty-seven states have incorporated ADR alternatives into their systems. n31 Yet two difficulties arise in getting into such alternatives. First, diverting actions to such forums often requires the consent of both parties, an unlikely occurrence considering that the party represented by counsel will be loath to cede that advantage.

Second, even a non-courtroom setting will not guarantee that an indigent will be able to properly assert his rights without counsel. In a bureaucratic system, the rights of the poor are likely to be compromised, particularly for those lacking the necessary education to access these systems. Karen Dennis, the Executive Director of Memphis Area Legal Services, describes the plight: "If you're undereducated, underemployed, under-experienced . . . your level of interaction with the bureaucratic systems that are not geared toward the individual is going to be much more intense than the average person." n32

Even in systems designed to allow indigent individuals to resolve matters on their own, the bureaucratic nature of the system can disproportionately harm those without knowledge. Recently, in *Ford v. Shalala*, n33 a federal district court judge recognized this, ordering the Social Security Administration (SSA) to send out less obtuse notices to those receiving benefits. The judge recognized that one channel of knowledge for the indigent was representation, finding, "Some of the problems presented by the agency's notices might be alleviated if claimants were represented by legal counsel . . . [but] the availability of assistance in dealing with the problems raised by SSA's notices is extremely limited." n34

If the courts are finding that indigent litigants cannot deal with notices of the SSA, such litigants are even less likely to be able to present their case before a court, or even an arbitrator. Nor are they likely to find the requisite *pro bono* or judicial assistance. The bottom line is that a 1994 ABA survey found that forty-seven percent of low-income Americans have a civil legal need in the course of a given year. Of those needs, seventy-one percent are unmet. n35 No matter what options one considers for representation of the indigent civil litigant, there are not enough. That lack of representation compromises the rights of indigent civil litigants, and necessitates examination of other approaches to ensure their needs are met.

[*8] *B. Why the Indigent Civil Defendant Requires More Protection than the Plaintiff*

Considering the lack of services available to indigent civil litigants, a logical question arises: why restrict this absolute right to counsel only to indigent civil defendants? On the surface, it would seem that the indigent plaintiff needs counsel as much as the indigent defendant does. However, there are several rationales for providing the indigent defendant with more protection than the indigent plaintiff.

First, the typical indigent plaintiff has a better opportunity to find counsel than an indigent defendant. For example, courts have recognized in many cases (such as employment discrimination) that a viable option for plaintiffs is to employ the services of a contingency-fee attorney. n36 The prospect of recovery motivating the attorney to take the indigent plaintiff's case, however, does not exist for the indigent defendant. n37

Realistically, however, many plaintiffs will not be able to use a contingency-fee attorney, because the matter will be too small for a private attorney to take on. In a state like California, where the Small Claims Court prohibits lawyers from representing either party, n38 the matter may end up in that court, putting the plaintiff and defendant on equal footing. If such is the case, perhaps neither side needs an attorney.

But examining statistics of courts where attorneys are allowed shows the defendant is much less likely to have counsel than the plaintiff. A study of Boston's housing courts (where the landlords are usually the plaintiffs) showed that landlords had counsel seventy-four percent of the time while tenants had counsel in only fourteen percent of the

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

cases. n39 Stepping away from the housing court situation, statistics for the Small Claims Court in Washington, D.C. (where attorneys are allowed) shows that eighty-nine percent of the plaintiffs are represented compared to four percent of the defendants. n40

Where indigent plaintiffs and defendants compete for scarce legal services, the plaintiff is more likely to have access to these services. This has been one of the criticisms of the LSC: that it spends more time attempting to change the status quo on behalf of plaintiffs than it does helping to maintain the status quo on the [*9] behalf of defendants. As one LSC critic testified before the Senate, "Lawyers in legal services programs have broad discretion as to which cases will be accepted and which will be rejected. Poor people with cases that are not ideologically popular with the prevailing liberal activist philosophy of the legal services program are simply not accepted." n41 Such a philosophy may lend itself more to representation of plaintiffs in a civil matter, given that the plaintiff is typically the one seeking change. This can leave defendants out in the cold, since "clients simply are at the mercy of their legal services attorney as to whether their case is even accepted." n42

All of this evidence indicates that indigent defendants, more than indigent plaintiffs, are likely to be left out in the cold when seeking representation. However, a discrepancy may exist in the figures because unrepresented indigent plaintiffs rarely file suit due to their lack of knowledge of the legal process. As such, these statistics may fail to capture the indigent civil plaintiffs who want to file suit, but cannot do so. n43

The most logical response to this argument is a systemic one: that our legal system traditionally places greater burdens on a plaintiff filing suit than on a defendant defending against one. For example, the burden of proving a claim is on the plaintiff in any given matter, since it is the plaintiff striving to disturb the status quo. n44 Further, the entire civil system is premised on the plaintiff taking on greater burdens than the defendant. For example, a civil plaintiff filing suit in a given jurisdiction is deemed to have consented to jurisdiction in that venue to suits by third parties, even when the plaintiff has no other contact with such jurisdiction. n45 The defendant, by contrast, is not subjected to such a requirement just by defending against suit in such jurisdiction.

The explanation behind this exception to the typically strict requirements of contact for *in personam* jurisdiction is similar to that for the burden of pleading. As the Supreme Court found in *Adam v. Saenger*, "the plaintiff . . . by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court." n46 This is a general theory behind litigation: the plaintiff [*10] is the one seeking to change things, and therefore must jump over more hurdles to do so.

Finally, there is the issue of cost containment. Many fear that a program giving both plaintiffs and defendants a right to counsel will result in an explosion of litigation. One way to limit the costs of the right to counsel is to provide it only to defendants. n47 Giving the defendant an attorney would actually limit lawsuits, since "prompt representation by legal services attorneys results in resolution of most disputes without court action." n48 To both ensure fiscal responsibility and maintain consistency with the traditional view of plaintiffs and defendants, the absolute right to public counsel should be limited to defendants.

II. THE CONSTITUTIONAL ARGUMENTS FOR THE INDIGENT CIVIL DEFENDANT'S RIGHT TO COUNSEL

A. *The Due Process Clause*

The development of a state-assisted right to counsel began with the Sixth Amendment to the Constitution, calling for the accused in all criminal prosecutions to have the right "to have the assistance of counsel in his defense." n49 While the Sixth Amendment has been the sparkplug in developing what limited right to counsel exists at present, it has also been amongst the greatest limiting factors in developing the right to state-assisted counsel in the United States. Since the right to counsel developed in the criminal setting (primarily due to the Sixth Amendment's influence), cases and academics discussing a right to counsel have focused on equating the right they seek to protect with the type of liberty interest implicated by a criminal prosecution.

The most recent case setting forth the test for state appointed counsel to an indigent civil defendant, *Lassiter v. Department of Social Services*, makes the same error. n50 In *Lassiter*, an indigent mother's right to counsel in a parental termination hearing was denied, with the Court decreeing that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel." n51 In fact, *Lassiter* establishes the presumption that "an indigent litigant has a right to appointed counsel only when . . . he may be deprived of his physical liberty." n52

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

This same presumption has caused others advocating a right to state-appointed [*11] counsel for indigent defendants to attempt the aforementioned analogizing of their issue with a loss of personal liberty. n53 *Lassiter*, building on *Mathews v. Eldridge*, uses three elements to determine if due process is being met, and thus requires appointed counsel or not: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." n54

So far, so good. In fact, examining these elements in isolation will lead to the conclusion that due process requires the appointment of counsel in most every case. An example of this is *Lassiter* itself, involving the custody of a child. There, the Court found that the private interest at stake (the loss of a child) was enormous to the parent. The government had the same vital interest, since the welfare of the child was of paramount importance. Finally, the risk of an erroneous decision was significant, since the child custody hearing was likely to involve "people with little education . . . who are at the hearing, thrust into a distressing and disorienting situation." n55

Even without the involvement of child custody rights, these three elements could be satisfied in nearly all civil settings. The private interest at stake is always important to the civil defendant, if for no other reason than that its relationship with some deprivation of property, an important interest with the same import as any denial of liberty. The Supreme Court has recognized as much, finding that:

The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth a 'personal' right . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other. n56

Considering this "interdependence," a proceeding depriving a defendant of property in any context is of crucial interest to him, whether such deprivation is at the hands of the government or another citizen. That a court proceeding is being [*12] used does not mean that the government is no longer involved. The court's involvement means that rather than a mere individual plaintiff challenging the defendant, society as a whole is doing so. In that regard, the property/liberty distinction further falls apart. n57 In step one of the *Lassiter* analysis, then, the importance of the matter to the defendant can never be questioned, and always weighs in favor of the litigant.

Assessing the government's interest is another matter altogether. In *Lassiter*, it was the welfare of the child that was at stake, increasing the state's interest in a proper decision. One could argue that there are few things as important as the welfare of a child. As such, it seems unlikely that the average situation could come close to measuring up to that standard, in that most civil litigation cases involve property, which cannot approach the stature of a child's well-being or a criminal defendant's desire to avoid jail.

Ignoring for a moment the civil cases that do involve vital issues (such as housing claims), it is unusual that the government would not have a pressing interest in ensuring that members of society have confidence in the system of law that governs them. After all, "accessibility to the courts on equal terms is essential to equality before the law." n58 When one party enters the proceeding with a lawyer, while the other enters the proceeding unrepresented, the law's basic premise of "equal terms" is undermined. n59 This threatens the base of the entire legal system: the confidence that citizens ostensibly have in it. The adversarial system currently employed by the United States works only if both sides have competent representation. n60

Assuming *arguendo* that systemic concerns are not a sufficient government interest to justify the state appointment of counsel for indigent civil defendants, it is but one element of the test. Considering that the first element (the private interest at stake) weighs heavily in favor of the unrepresented defendant, the appointment of counsel should hinge on an examination of the third element: "the risk that the procedures used will lead to an erroneous decision." n61

In *Lassiter*, the state argued that the risk of error was almost nil, considering: (1) myriad procedural safeguards were met before a parental termination petition was filed; (2) the proceeding was unlikely to involve substantive points of law; and (3) these hearings were so commonplace that even the state was often [*13] represented by a social worker rather than an attorney. n62

Despite this reasoning, the Court recognized the risk of an erroneous result if the defendant mother was forced to proceed without counsel. In the bulk of cases seeking a right to counsel, the courts have been willing to recognize this high risk of error only in situations where the government was the protagonist in the matter and the defendant was unrepresented. As one commentator put it, "the Supreme Court has recognized that an adversarial proceeding between the

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

government and an unrepresented indigent can engender a mistaken outcome because the resources of the state are overwhelming." n63

Therefore, when state action is at issue, the risk of error to the unrepresented defendant is quickly recognized. Courts are especially swift to make this distinction in a criminal setting. In *Argersinger v. Hamlin*, n64 the Supreme Court defined its paradigmatic view on this subject. *Argersinger* established the principle that no person could be jailed for any offense unless given the opportunity to be represented by counsel at trial. n65 Justice Douglas, writing for the majority, notes:

[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skills to protect himself when brought before a tribunal to take his life or liberty, wherein the prosecution is (re)presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious. n66

Few would disagree that what is simple to the trained lawyer is difficult to the layperson. In *Argersinger*, the Court itself shatters the distinction between a trial for a petty offense and a felony, noting that little supports the notion that "legal and consequential questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more." n67

This common-sense thinking should apply to all civil cases as well. Indeed, Justice Powell's concurring opinion in *Argersinger* points out that the majority's reasoning makes no distinction between proceedings involving liberty and those involving property interests. n68 Justice Powell's reasoning exemplifies that the risk of error is as great in a civil trial as in a criminal trial, should one proceed without counsel. Robert Sweet, a United States District Judge for the Southern [*14] District of New York, simply notes, "As every trial judge knows, the task of determining the correct legal outcome is rendered almost impossible without effective counsel." n69

Of the three elements of the *Lassiter* test, the private interest involved and risk of error without the involvement of counsel weigh heavily in favor of the defendant having counsel. The state interest involved may or may not favor the defendant. However, certain situations will bolster the state interest involved. For example, the nature of the claim (such as a defendant's right to retain housing) bolsters the government's interest as part of its interest in child welfare. Further, the state's perpetual interest in maintaining confidence in an adversarial system provides at least a modicum of interest even if the underlying case involves something seemingly trivial. The indigent civil defendant, based on these three elements, should always have a right to appointed counsel.

Here, however, is where *Gideon v. Wainwright* rears its ugly head. *Lassiter* instructs that the three elements to test due process must be balanced against one another, and "then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." n70 The fatal flaw in *Lassiter* is its failure to explain where that presumption comes from. *Mathews* is not the answer, in that it is not a case about appointed counsel, but merely the requirements of due process in a procedure for termination of social security benefits. n71

The Court attempts to reconcile the presumption with its past pronouncements that a criminal defendant has a right to appointed counsel. Working from the seminal decision in *Gideon v. Wainwright* n72 through *Argersinger v. Hamlin* n73 and *Scott v. Illinois*, n74 the Court decreed physical liberty to be the dividing line between whether counsel was to be appointed for an indigent defendant or not. Since civil actions rarely result in such an outcome, an indigent civil defendant would not be entitled to appointed counsel.

The adoption of the "physical liberty" presumption raises several questions. First, considering the three *Lassiter* elements purport to be the "three elements to be evaluated in deciding what due process requires," n75 one presumption should not be able to overcome that. Due process, while a flexible doctrine, is not a sliding scale that allows for due process in part. If the three elements (the private interest at stake, the governmental interest at stake, and the risk of an erroneous [*15] decision) are balanced, and the result points toward the appointment of counsel, a general presumption should not change that result. If applied, the presumption would mean that due process was eliminated, not that due process was actually given.

Mathews, to which *Lassiter* cites, is informative of how to examine a due process claim. While noting "due process is flexible and calls for such procedural protections as the particular situation demands," n76 *Mathews* is clear that "identification of the specific dictates of due process generally requires consideration of three distinct factors." n77

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

Those three are the aforementioned private interests, governmental interest, and risk of erroneous decision. Nowhere does this due process analysis call for a presumption to counterbalance the elements. Either there is due process or not.

To determine where the physical liberty presumption comes from, one must reach into the past and examine the line of authority delineating the right to counsel for indigent criminal defendants. The reasoning in these cases makes it unclear why a loss of liberty must be present before an indigent has a right to appointed counsel.

B. Giddiness Over Gideon and its Progeny

Gideon was the landmark decision finding that the Sixth Amendment right to counsel extended to defendants at the state level being tried for felonious offenses. n78 Ostensibly, *Gideon* is based on the application of the Sixth Amendment's right to counsel in all criminal matters to the states via the Fourteenth Amendment's Due Process Clause. At its core, *Gideon* implies that appointment of counsel is of such a nature that it is essential to a fair trial and therefore required by due process of law. n79

Though *Gideon* holds that indigent defendants charged with a felony should have a right to appointed counsel, the decision has little to do with the difference between a loss of liberty and a loss of any other aspect of life. Indeed, the Sixth Amendment's right to counsel is classified as a "fundamental freedom," and analogized with other provisions of the Bill of Rights, such as the Fifth Amendment's Takings Clause. n80 This in and of itself dispels the illusion that the inherent nature of the loss of liberty is the driving force behind the case.

What drives *Gideon* is the idea that no fair trial is possible without counsel on both sides. "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 [*16] lawyer, cannot be assured a fair trial unless counsel is provided for him." n81 At no point, however, does the Court distinguish why an indigent civil defendant without counsel is guaranteed a fair trial but an indigent criminal defendant lacks that guarantee. The focus is on the process of the litigation, not the end result.

The remainder of *Gideon* is like reading an advertisement for appointed counsel in all cases. The word "criminal" is used in Justice Black's opinion, but more for effect than anything else. For example, Justice Black cites Justice Sutherland's opinion in *Powell v. Alabama* n82 as proof that a defendant in court must have counsel:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put upon trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces a danger of conviction because he does not know how to establish his innocence. n83

Calling this "sound wisdom," n84 Justice Black uses it to close his majority opinion in *Gideon*. Yet a close examination reveals that if this is what concerns the *Gideon* Court, there is no reason to limit the indigent's right to appointed counsel to merely criminal cases. Consider the things Justice Sutherland (and by extension Justice Black and the *Gideon* Court) is concerned about the defendant having trouble with:

- . Difficulty in understanding the law,
- . Determining if the charges are legitimate,
- . Grappling with the rules and adequacy of evidence, and
- . Inability to properly present even a perfect defense. n85

No student of law could claim with a straight face that these problems are more prevalent in a criminal court than in a civil court. Yet, each day, courts across [*17] America attempt to do so. One case calls appointment of counsel a "privilege that is justified only by exceptional circumstances, such as where the facts and legal issues are so novel and complex as to require the assistance of a trained practitioner." n86

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

This conflicts with both *Gideon* and Justice Sutherland's opinion in *Powell v. Alabama*. Every case involving the potential of litigation has the potential for difficulty. It is as difficult to try a civil case as a criminal case, and the logic of *Gideon* never questions that. n87 In actuality, it may be easier to try a criminal case than a civil case:

Certain aspects of the criminal process are deliberately weighted to the advantage of the criminal defendant. There are no comparable doctrines in the civil process to benefit the low-income civil litigant. The criminal accused enjoys a presumption of innocence throughout; the case is carefully screened at several stages by personnel whose sworn duty is to release the innocent as well as prosecute the guilty; the prosecutor has an affirmative responsibility to search for and reveal evidence favorable to the accused; the case against the defendant must be proved beyond a reasonable doubt; and . . . only the defendant can appeal, meaning that judges have a strong motive to lean toward the defendant in rulings during trial. n88

An indigent civil defendant is not privy to these advantages. *Gideon* and *Argersinger* focused on the process itself, and not merely the outcome of the litigation. *Lassiter*, however, fails to track the logic of *Gideon* and *Argersinger*. Had the *Lassiter* Court actually examined *Gideon's* logic, it could not assert the right to counsel is presumed only when a person's liberty interest is at stake. *Gideon* stands for the proposition that "there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved." n89 Of course, future courts have been no better at deciphering the mess that is *Lassiter*. n90 Courts continue to blindly apply its presumption, never considering the origin of the presumption that a criminal case is somehow more difficult than a civil case.

While the reasons for the density and obtuseness of much of the legal language defining the rights of people are beyond the scope of this Article, there is ample evidence that even those writing the laws realize it is incomprehensible to the lay [*18] person. Consider the example of the Securities Exchange Act of 1934. n91 The Act, part of a series of laws to ensure the fairness and honesty of securities markets, looks similar to most other laws on the books in America. Filled with jargon and provisions that could keep any lawyer busy for years, Rule 14a-8 is a revelation. Covering "when a company must include a shareholder's proposal in its proxy statement," n92 the section is written in an easy to follow question and answer format that is a dramatic break from any other law on the books. The "plain English" format was adopted in 1997, in response to pressure to revamp the process of shareholder proposals so that shareholders would have a better opportunity at success in submitting proposals for inclusion in proxy statements. n93

In stark contrast are the Federal Rules of Evidence (of which many states have adopted versions). Obviously, these Rules are not novel or complex enough to require the assistance of counsel, since the rules of evidence come up in virtually any civil litigation context. Yet not one of them is written in the same, easy to follow format as the rules for shareholder proposals in the Securities Exchange Act of 1934.

The problem with evidence and other procedural codes is that they are so complex, yet so vital to American processes. As the Supreme Court found in *In Re Gault*,

The history of American freedom is, in no small measure, the history of procedure. But in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. n94

Unfortunately, truth cannot emerge from a system in which the laws are not generally written for clarity. Without a right to counsel, the procedures *Gault* exalts may as well be closed to the indigent civil defendant. *Gideon* and *Argersinger* recognized that by their reasoning. It is unfortunate the judiciary has yet to see that.

[*19] C. The Equal Protection Analysis

There are two paths by which denial of appointed counsel to indigent civil defendants represents a denial of the Fifth and Fourteenth Amendment's equal protection guarantees. As a rule, if a law "neither burdens a fundamental right nor targets a suspect class, [a court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." n95 The threshold of "rational relation to some legitimate end" is nearly always met by the state. Deference to the legislature is a trademark of an analysis under a rational basis standard. As the Supreme Court has articulated, "The judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." n96

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

But once a classification is deemed to affect a fundamental right or draw a suspect classification, the doctrine of strict scrutiny comes into play. To survive a strict scrutiny challenge, "classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." n97 Meeting that burden is exceedingly difficult.

In the matter of not appointing counsel for all indigent defendants, it is likely that the state's best justification would be the considerable cost associated with such a program. But it is not enough for the state merely to say that it seeks to conserve resources. In *Saenz v. Roe*, n98 the Supreme Court struck down a California regulation requiring those moving to California to live in the state for one year before being eligible for full welfare benefits. In doing so, the Court saw the fundamental right implicated as the right to travel, and found that "the State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens." n99

D. Having Fun with Fundamental Rights

The key, then, is getting to the point where a strict scrutiny test would have to be applied to the state's failure to provide counsel. One way to trigger strict scrutiny is to demonstrate that a fundamental right is threatened. In this case, it needs to be shown that having an attorney for litigation is a fundamental right, and that the state's denial of this protection for indigent civil defendants constitutes deprivation of that right. In determining what a fundamental right is, one must begin with the Constitution. For a right to be fundamental, it must rise [*20] to the level of being "explicitly or implicitly guaranteed by the Constitution." n100

This is not an easy test to meet. Consider, for example, that education has never been deemed a "fundamental right." In *San Antonio School District v. Rodriguez*, the Court wholeheartedly endorsed the conclusion that education has "grave significance . . . both to the individual and to our society." n101 Later, in *Plyler v. Doe*, the Court maintained its stance on the importance of schools. "In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." n102 Yet, these strong words have not led the Court to declare education a fundamental right. n103

Considering the strong test the Court puts forth, recognizing legal representation as a fundamental right seems like somewhat of a stretch. In the context of a civil case, there seems to be no explicit Constitutional guarantee defining the right of counsel in civil litigation. Certainly there is no civil equivalent to the Sixth Amendment, which specifically provides access to counsel in a criminal proceeding. Instead, one is forced to analogize between the right to counsel in a civil case and other rights deemed fundamental. Assessing why other rights have been labeled fundamental leads to the conclusion that the right of counsel in any civil litigation is also fundamental.

Consider the right to suffrage. As important as the right to vote may seem, the Supreme Court has held that that "the right to vote, per se, is not a constitutionally protected right." n104 Despite that view, the Court has found that this is a right that is "fundamental," and worthy of strict scrutiny. One way in which the Court has expressed this is by describing the right to vote as the "guardian of all other rights." n105 In other words, the right to vote is so interconnected to other rights, that not ensuring its protection is tantamount to compromising other fundamental rights.

The interaction of one right with other rights, then, is a way for a right that is on the fringes of being "fundamental" to make itself fundamental. "As the nexus between the specific constitutional guarantee and the non-constitutional interest draws closer, the non-constitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed must be adjusted accordingly." n106 The issue is whether access to court, with counsel, is a fundamental right.

As a starting point, there is little doubt that access to court itself must be [*21] considered a "fundamental right." Court is where, as a society, our values are articulated and judged. When a person is found negligent, it is more than a statement of legal culpability; it is also a statement about his or her conduct. It is the state mechanism that, at the core, decides who is right and who is wrong. Any court is a state institution, financed by and run per the rules set by the government. It is folly to think that litigation is simply the interaction of two private parties. n107 The state (via statutes or its own judges) determines who has the burden of proof, what elements each party needs to prove, and how each side may present its evidence. These are not issues the parties can decide amongst themselves.

Even lawyers, ostensibly private actors representing private parties, represent the state. "It is 'private' lawyers who enforce government's civil laws in government's institutions before government's agents. . . . Lawyers exercise government's delegated sovereignty." n108 It is a state imposed system. Characterizing it as "the State's monopoly over techniques for binding conflict resolution" is by no means a stretch. n109

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

As a result, the idea that equal access to courts is a fundamental interest is not subject to question. As the Supreme Court stated as far back as 1885,

the Fourteenth Amendment . . . undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights . . . that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrong, and the enforcement of their contracts. n110

Absent counsel, however, a defendant cannot be said to have legitimate access to court. Many of the same considerations in the due process argument for the right to counsel apply here as well. It is not enough to open the doors of the courthouse to everyone. Once inside, each side must have an opportunity to present itself, since the parties, not the courts, will be the ones presenting the [*22] case. n111 While this does not mean that each party will have equally effective representation, there must be some threshold to present itself. The rest of the world has recognized this, with European countries such as England, France and Switzerland assuming that the only way for the poor to have meaningful access to the courts is to provide representation by counsel. n112

Without counsel, meaningful access to court is an illusory promise. As Judge Edward F. Hennessey, the retired chief justice of the Massachusetts Supreme Court put it, "Litigants who come to court *pro se* . . . are at a significant disadvantage in the courtroom, and it is extremely difficult for the judge in these cases to ensure that justice is served." n113

To some degree, the law has adapted this logic in several contexts. For example, under Title VII of the Civil Rights Act of 1964, a court may appoint counsel for the plaintiff in an employment discrimination suit upon request. n114 Generally, the court to whom the request is made must consider: (1) the financial resources of the plaintiff; (2) efforts made by the plaintiff to secure counsel; and (3) the merit of the plaintiff's claim. n115

This test offers an interesting prism through which to look at when counsel should be appointed for indigent defendants. First, the issue of financial resources will likely preclude the indigent defendant from obtaining counsel. At least a plaintiff with an employment discrimination suit may be able to induce an attorney to provide services through the prospect of a contingency fee. n116 The defendant in any given case has no such enticement, and lacks the resources to pay the retainer or fee needed to defend itself.

The efforts made by the plaintiff to secure counsel work in conjunction to a certain extent with the first element of financial resources. Though legal aid organizations and pro bono services are potentially available, those services are difficult to access due to lack of resources available to such organizations. n117

That leaves looking to the merit of the claim itself, which is disconcerting. First, it seems an odd phenomenon that the merits of the case are judged before [*23] such merits have been presented. Second, without counsel, the party seeking counsel will likely be unable to properly present the merits at all. The D.C. Circuit said as much in *Poindexter v. F.B.I.*, n118 finding that refusing to appoint counsel is often the functional equivalent of denying the employment discrimination plaintiff a day in court. But if a day in court can only come with counsel, and it takes a day in court (before a judge and the aforementioned state mechanisms) to establish a right to counsel, then that plaintiff never really had her day in court at all.

Of course, the counter argument is that "to appoint a lawyer to pursue a frivolous or near frivolous claim would surely be beneath the dignity and integrity of the court." n119 That may well be true, but the corollary of that statement is that to not appoint a lawyer to pursue a non-frivolous claim would also be beneath the dignity and integrity of the court. If an attorney is needed to truly see the merits in our adversarial system, then an indigent needs an attorney from the minute the litigation process begins.

Examining the factors from the employment discrimination cases yields two conclusions. First, the factors a court would consider all point to an appointment of counsel for indigent civil defendants. Second, the fundamental right of access to court is deemed compromised in the employment discrimination context unless the plaintiff has an attorney. Notice that the test asks either if the plaintiff sought counsel or will be appointed counsel. Asking a plaintiff to proceed *pro se* was not even considered. Counsel was denied for one of two reasons. Either the court determined that the claim lacked merit or the plaintiff had financial means or the ability to obtain counsel on a contingency fee basis. The assumption was never made that the plaintiff would be able to adequately represent his case without counsel.

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

Another weakness in these cases is the courts' ability to tell a frivolous from a non-frivolous issue without competent counsel presenting a party's case. It seems odd that a plaintiff could be articulate and able enough to come before a judge and present the merits of her case, and yet need counsel. n120 In fact, the logical end result is that a party asking for counsel can be punished for making an effective impression before the court, leading to the conclusion that counsel is not needed at all. In other words, the indigent asking for counsel is damned if she does represent the merits adequately (she deserves counsel, but just doesn't need it) or damned if she does not represent the merits adequately (she won't get counsel at all and likely find her suit or defense at an end).

A paradigmatic case of this (although not arising in the employment [*24] discrimination context) is *Fowler v. Jones*. n121 *Fowler* is the tale of a prisoner bringing a civil rights action against prison officials for infringing upon his constitutional rights. The plaintiff, incarcerated and proceeding *pro se*, brought an appeal from a directed verdict on three grounds. The first is the subject of this Article: the right to have had counsel appointed for him. The Eleventh Circuit denied *Fowler's* request at trial, finding there to be no "exceptional circumstances" justifying such an appointment. n122 The court, in fact, praised *Fowler's* skill:

As demonstrated by the quality of the plaintiff's written pleadings and his conduct of the trial, as well as by plaintiff's own statements about his experience assisting other inmates in legal matters, it is clear that the plaintiff is an accomplished writ writer who was capable of representing himself adequately in this matter. n123

Fowler appealed two other issues: (1) that the district court's denial of a continuance so *Fowler* could complete service on defendants was erroneous; and (2) that a special magistrate effectively presided over the trial without the plaintiff's consent. *Fowler* prevailed on both those issues during the appeal, thereby seeming to validate the Eleventh Circuit's belief that counsel was not necessary for this plaintiff at trial. A closer examination reveals the inaccuracy of that argument.

First, though *Fowler* prevailed on the issue of the magistrate serving in lieu of the judge, at no time during the trial itself did *Fowler* raise an objection on these grounds. n124 Normally, "failure to raise an issue, objection or theory of relief in the first instance to the trial court generally precludes raising the matter on appeal." n125 In this case, however, *Fowler* was fortunate in that this particular issue did not require a formal objection at trial.

One can easily imagine, however, a situation in which the failure to object would doom the appeal, in such issues as admissibility of certain evidence or jury instructions. Likely, even a well-trained layperson such as *Fowler* would not know precisely where and in what form to object. Needless to say, the lack of such knowledge could severely compromise his or any litigant's right to appeal the judgment. Denial of counsel serves not only to compromise the right of the indigent litigant to equal access to the court, but also to effectively destroy his right to appeal.

In *Fowler*, the plaintiff clearly made mistakes that were to his detriment due to his status as an unrepresented plaintiff. The court found that it was reasonable for [*25] *Fowler* to have believed the additional defendants were served, "given that he was incarcerated and unrepresented, so that neither he nor legal counsel acting on his behalf was able to check the case file at the courthouse to determine the status of service." n126 The court clearly found that it was ultimately *Fowler's* mistake, yet forgave him the issue.

Lest anyone think that this was the court making a concession to *Fowler's* status as an unrepresented indigent (thereby obviating the need that an indigent would have for legal counsel), *Fowler's* status as incarcerated likely swayed the court's thinking on this issue. An incarcerated person is better equipped than an indigent to prepare for a legal proceeding. Those in jail or prison likely have better access to needed legal digests and publications (notwithstanding recent laws withdrawing many legal resources from prisons). Incarcerated persons are also more likely to have time to prepare than the average indigent civil defendant, who is dealing with day-to-day life, family, and work. Realistically, the prisoner is more likely to peruse the files of the county courthouse as envisioned by *Fowler* than the unrepresented defendant.

Fowler and the employment discrimination cases show the threat to a party's right to both properly present his case and to preserve grounds for appeal absent counsel. Since these rights are the very essence of what access to court is, the only conclusion is that access to court is compromised in the absence of counsel. Denial of access to court is deprivation of a fundamental right. Thus a government schema denying indigent civil defendants a right to appointed counsel deprives them of a fundamental right, and should be subject to the death ray of strict scrutiny.

E. A Wealth of Classifications or Classification by Wealth?

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

The second reason that denial of counsel to indigent civil defendants should come under strict scrutiny is that it discriminates on the basis of wealth in accessing the court system. Traditionally, the Court has been loath to apply strict scrutiny to a wealth-based classification. n127 The fear is that calling every inequality a wealth classification will lead to enormous implications, since, "every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services." n128

This school of thought is consistent with the idea that a mere "disparate impact" is not enough to trigger strict scrutiny. Instead, a suspect classification will only be found when the disparate impact is accompanied by a purpose to [*26] discriminate against that particular class. n129 In effect, the Court only wants to use Equal Protection's suspect classification schema to protect racial groups. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." n130

Despite this categorical statement, the Court has paid lip service to the idea of making wealth a suspect classification in certain situations. In *San Antonio School District v. Rodriguez*, two characteristics were found to inhere in improper wealth classification. n131 First, the classification must operate "to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level." n132 Second, it must be a case where "lack of personal resources has . . . occasioned an absolute deprivation of the desired benefit." n133

In terms of this second factor, the Court itself is unclear as to what it means. Based on the plain language used in *San Antonio*, it should mean just what it says: absolute deprivation, and nothing less, satisfies this element. But earlier in the decision, the Court identifies the wealth classification factor as coming in play when "[the indigent class] sustained an absolute deprivation of a *meaningful opportunity* to enjoy that benefit." n134 The difference is crucial. If the standard is "absolute deprivation" rather than "meaningful opportunity," the indigent civil defendant is doomed. After all, since the indigent defendant has the option of appearing *pro se* (no matter how futile that option may be), they have not technically had an absolute deprivation of their access to court. But utilizing the concept of meaningful opportunity makes it easy to show that lack of counsel denies the indigent a true day in court. n135

Over the years, the Court seems to have come around to the "meaningful access" point of view. n136 At the same time, however, it has become abundantly clear that a facially neutral law is unlikely to violate the Equal Protection Clause simply because it disproportionately impacts on the poor. n137 The challenge, then, is to first show a scenario in which an Equal Protection analysis has found impermissible wealth discrimination, and then show why denying an indigent civil defendant access to counsel creates the same inequity.

[*27] A case finding such impermissible wealth discrimination was *Griffin v. Illinois*. n138 In *Griffin*, petitioners challenged an Illinois law forcing criminal defendants to purchase the trial transcript and court records needed to file an appeal. n139 The Supreme Court held that this violated the Fourteenth Amendment's equal protection principles because, although a state was not required to provide a right to appeal, once granted, such a right could not be exercised in such a way as to discriminate against indigent defendants. n140

In examining the statute at issue in *Griffin*, the Court acknowledged that some felt that "the Illinois law should be upheld, since by its terms it applies to rich and poor alike." n141 This is similar to the logic in *San Antonio*: since every denial of a benefit to an indigent creates a *de facto* wealth classification, not all can be put under strict scrutiny. n142 The Court, however, dispensed quickly with this logic, noting that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." n143 The broader point is the persistent idea in American justice that "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and to public interest as the perversity of a willful scheme." n144 This is what the right of counsel for indigent defendants is all about. It may seem an innocent omission, but the lack of thought behind its effect is tantamount to a denial of the indigent's rights.

"There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." n145 Further, the *Griffin* concurrence analyzes the practical effect the charge for the trial transcript had on indigent defendants rather than the theoretical "equal footing" all were on since all had to pay for the transcript. n146 The emphasis is on the effective right to come to court. The Court is not concerned about the bare right of review, but a denial of "adequate review to the poor [which] means that many of them may lose their life, liberty, or property because of unjust convictions which appellate courts would set aside." n147

In interpreting *Griffin*, the Court has held in hindsight that the real problem with the Illinois statute was that no proper alternative to the transcript was offered [*28] to the indigent appellants. n148 Therefore, it met the wealth dis-

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

crimination criteria by totally depriving the indigent of a legitimate opportunity to use the benefit as others could. Similarly, a Texas statute requiring a high filing fee to get on an election ballot was invalidated because it allowed "no reasonable alternative means of access to the ballot." n149

These cases offer insight as to the true meaning of "absolute deprivation." It is not about "those on whom the burdens of paying are, relatively speaking, great but not insurmountable." n150 Nor is it about equalizing the quality of counsel that each side has. The hallmark of the wealth discrimination the Court will invalidate is a situation in which an indigent, because of its lack of access to resources, has no realistic opportunity to access the desired benefit.

Absent counsel, there is no real right of access to court. Many of the same reasons supporting a due process right to counsel support such a statement. Therefore, requiring an indigent to pay for her own counsel is a form of wealth classification against the poor, and should be subject to strict scrutiny. But because of the general reluctance to use the Equal Protection Clause to protect against wealth discrimination, all possible arguments against a need for counsel must be considered.

One possible argument is that the state in these cases is not denying the indigent defendant counsel. Rather, it is merely saying that the State will not be the one to provide it. In divorce cases, for example, the courts have pointed to the myriad options available for one seeking an attorney. A case showing the difficulty in extending the *Griffin* rule to a right to counsel is *In re Smiley*. n151 There, a plaintiff petitioned the New York Court of Appeals to appoint counsel in her divorce proceeding. Plaintiff relied on *Boddie v. Connecticut*, which held that a state could not preclude an action for divorce by indigents simply because they could not pay the required fees. n152 Despite saying that counsel was often "essential" in complicated matrimonial litigation, *Smiley* held that counsel was not required in a matrimonial action "as a condition to access to the court." n153 Instead, the court focused on all of the options available to indigent litigants, such as:

- (1) Discretionary assignment of uncompensated counsel by the courts;
- (2) Voluntary legal aid and charitable organizations; and
- (3) Federally funded legal services programs for the poor. n154

[*29] *Smiley* (like other cases dealing with a right to counsel) does not stand for the proposition that the indigent does not need an attorney to have his day in court. It merely stands for the idea that there are plenty of ways to find an attorney. The court wants these litigants to have an attorney. It simply does not want the state to pay for it. Denial of counsel would be wealth discrimination, in the *Smiley* court's eyes, but for all the available alternatives. n155

Assuming all of these options are viable, it is true that not providing counsel for indigent litigants is not wealth discrimination. After all, there are attorneys available to those who are indigent, who even if not as effective (due to a lack of time and/or resources) as private counsel, still allow the indigent a voice. Since "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages," n156 all is well. The key question is if the options presented by the *Smiley* court are realistic alternatives.

Since the goal of this Article is to change the "Discretionary" to "Mandatory" in (1), and to make it compensated counsel via a public system, the crucial question is if (2) and (3) are legitimately available. Part II above established the difficulty in accessing either option (2) or (3). n157 The key point to remember is that only twenty percent of the legal needs of the poor are being met. n158 If the options set for them by the *Smiley* court are the ones available for those in need of assistance, how do we deal with the eighty percent who cannot access (2) or (3)? Should the name of the Equal Protection Clause be changed to the "Equal Protection for Twenty Percent Clause?" Or do we put these eighty percent into (1)?

To get into (1)-- the "discretionary assignment of uncompensated counsel by the court"-- *Smiley* relies on such statutes as 28 U.S.C. § 1915(e), which allows a federal court to request an attorney to represent an indigent. n159 However, such assignment of uncompensated counsel is not as much of an option as it was in the *Smiley* days. The Court has held that in 28 U.S.C. § 1915(e), request means request, meaning a federal court must "permit attorneys to decline representation of indigent litigants if in their view their personal, professional, or ethical concerns bid them to do so." n160 Though twelve states have statutes permitting a court to compel representation by private counsel, n161 that still leaves thirty-eight states and an entire federal system unable to take advantage of (1).

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

Considering that *Smiley's* options are all gone, what does that mean for the [*30] indigent civil litigant? The indigent needs counsel at public expense. n162 Anything less would be an absolute deprivation of that right to counsel, and therefore deprive the indigent litigant of meaningful access to the court.

Of course, using a divorce case to stand for such a proposition is somewhat disingenuous, in that the Supreme Court has usually held that divorce proceedings are different from other proceedings, since the Court has "on many occasions . . . recognized the fundamental importance" of "interests that surround the establishment and dissolution of the marital relationship." n163 Recognition of the marital relationship, in fact, occupies such a special place in American jurisprudence that proceedings regarding one's marital status are even exempt from many jurisdictional rules requiring the court to show the "minimum contacts" requisite for jurisdiction over both plaintiff and defendant. n164

Such is rare in American jurisprudence. In *Lassiter*, for example, the importance of the parent-child relationship was not enough to overcome the presumption that an attorney was only to be appointed if a liberty interest was at stake. n165 Even a bankruptcy proceeding, happening at a most perilous economic time for the indigent litigant, fails to rise to the level of a marital proceeding. n166 The Court distinguishes between cases, such as bankruptcy and debt proceedings, where access to court is only one option, and other cases, such as marital proceedings, which "[require] access to the State's judicial machinery." n167

The point of using divorce as an example, is to show the law's inherent contradiction. Despite pontificating about how "choices about marriage, family life, and the upbringing of children are among associational rights [the] Court has ranked as 'of basic importance in our society,'" n168 there is still no right of appointed counsel for indigents in situations where the central issue is marriage or children. n169

Of course, such a difference is deceptive, considering that the state is the one with a monopoly over binding conflict resolution. Justice Black, in advocating an extension of the *Boddie* principle of paying fees for the poor to other [*31] cases, n170 properly concludes that "almost every . . . kind of legally enforceable right is also fundamental to our society." n171 That combination of fundamental rights and a state monopoly in the procedures for enforcing these rights indicates that the state should provide counsel so indigents can access those rights. Not providing indigent defendants a chance to defend themselves discriminates against them.

Nor does this violate the Court's long-standing notion that the "Constitution 'generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure . . . interests of which the government itself may not deprive the individual.'" n172 First, because the situations are all taking place in court, the government has involved itself in depriving the individual of his rights. This is one reason it is more important to protect the defendant and not the plaintiff. The defendant has no choice about coming into court. The myth of the extra-judicial procedures for settling matters is not available to her.

Second, government-provided counsel does not necessarily equalize the indigent defendant and the wealthier plaintiff. Those with more resources will still be able to hire private attorneys, via contingency agreements or retainers. The issue is bare access to the court. As Judge Robert Sweet puts it, "accessibility to the courts on equal terms is essential to equality before the law. If we cannot provide this foundational protection through the courts, most of the rest of our promises of liberty and justice of all remain a mockery for the poor and oppressed." n173 Providing counsel for indigent defendants is the only way to make sure they are not absolutely deprived the foundational right of access to court. Quality of counsel is not the issue. Having someone who can actually get the indigent into a position to present his case is.

III. THE BENEFITS TO SOCIETY FROM PROVIDING COUNSEL TO INDIGENT DEFENDANTS

The common refrain to a call for a right of appointed counsel for indigents is that such a program would bankrupt the government. After all, if the government's financial problems are such that the Legal Services Corporation cannot even maintain the funding level it had twenty years ago, n174 it seems near impossible to pay for what proves to be a more expensive program. The most theoretical (and perhaps most popular) response is to say that no matter how expensive this right is, it is necessary to preserve faith in America's justice system [*32] and system of democracy. In a system in which forty-seven percent of Americans feel that the legal system is biased against the poor and minorities, and nearly ninety percent feel that the affluent and corporate have the upper hand, erosion of faith in the system is both rampant and troublesome. n175 Judge Sweet eloquently makes the point, by saying:

Society's paramount interest must be in a just determination of a person's fundamental rights and privileges. While there will undoubtedly be a cost to providing counsel to impoverished litigants, erosion of

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

faith in the judicial system would exact an even higher price . . . As for the money to finance such a constitutional right, it must come from the public fisc as it does for the representation of criminals, security for the aged, and protection for the poor and the infirm. n176 This fundamental question is why many are anxious to consider such programs as a system of mandatory *pro bono* to alleviate the shortage of representation for indigent civil litigants. n177

In that vein, there is a tendency to rationalize the money needed for indigent litigants as more important than the resources used for other purposes. n178 Likewise, a right to counsel for indigent civil litigants is not as outlandishly expensive as it seems. Compared to Medicaid or welfare programs, for example, even a program affording every indigent a right to counsel (such as a vastly expanded LSC) seems inexpensive. n179 On those same grounds, the civil system may be seen as an analog to the criminal system. After all, the criminal system is one in which both the plaintiff (the prosecution) and indigent defendants are supported by public funds. Providing counsel for indigent civil litigants would be a similar burden. n180

Another argument for providing counsel to impoverished litigants simply [*33] compares the United States to the rest of the world. "When it comes to the legal entitlement to free counsel for indigent civil litigants, the United States is in a distinct minority among the industrial democracies of the world." n181 Considering that all of these other countries can fund their programs, the United States should be able to do the same. Despite the world's strongest economy, the United States spends only \$ 1 per capita on civil legal services. n182 This is a far cry from the \$ 3 per capita spent by Great Britain, or the \$ 4 per capita spent by the Netherlands. n183

None of these arguments, however, truly address where the money comes from. This Article does not strive to do so either. However, there is a strong argument to be made that providing counsel to the indigent civil defendant would actually save money for society in the long run. The savings come from a combination of factors. First is an offshoot of the argument made above, the right to counsel is not as expensive as it seems. n184 That reduced cost is offset by the savings via maximizing Pareto-optimal results from a proper determination of rights, the reduction in litigation inhering from indigent defendants being represented, and the reduction in court costs from the elimination of delays associated with *pro se* representation. At least one study has concluded as much, finding that "the funding of legal services programs is highly cost-effective and results in the savings of significant state funds" and, "in many instances, the savings to the state outweigh the costs of providing counsel several times over." n185

The most expensive aspect of state-provided counsel would be the attorneys themselves. However, by employing young lawyers looking to gain experience, the new attorneys needed for such a project may not be overly expensive. In the vein of a judicial clerkship, or working for a prosecutor or city attorney to gain experience deemed valuable to employers, young lawyers can work as part of this program. This program, focusing on civil litigation, could be a valuable training ground for those seeking to enter private practice. As Allyson Tucker describes it, "many young lawyers who find employment at large and medium sized firms difficult to obtain work in *pro bono* programs for little or no money simply to obtain marketable experience." n186

Statistics from the LSC tend to verify this point. One estimate is that only about \$ 300 per case is spent in delivering legal services to indigents. n187 Part of the reason for this surprisingly low cost is that cases with represented parties are far less likely to end up in court than those with one or both parties unrepresented. [*34] Allaying the fear that adding attorneys to the process actually increases litigation, only eight percent of the 1,686,313 cases completed by legal service programs in 1994 were actually litigated. n188 Because representation often discourages suits by those seeking to take advantage of an adversary with limited means to fight back, cases are unlikely to go as far in the process. n189 Often, a single phone call from an attorney can clear up what would have been the subject of dispute. As John Pickering testifies, "legal service programs encourage the swift resolution of disputes with minimum conflict; only about 10% of matters handled by programs are resolved through litigation." n190

Moreover, the reduction in litigation because of representation for indigent civil defendants also means elimination of the *pro se* defendant, who takes up an inordinate amount of judicial time and resources. On reading this, one may be surprised, considering that the capacity of judges to assist *pro se* litigants was previously called into question. n191 However, the issue was that despite their best efforts, judges simply had too great a caseload to be of true assistance to the indigent litigant. That did not mean, however, that the judge did not make an effort, or attempt to give the *pro se* litigant the opportunity to express himself. The problem is that the combination of the harried *pro se* litigant and a busy court creates circumstances incongruent with effective assistance.

But even ineffective judicial assistance takes up a good deal of courtroom time. The former Chief Justice of the Massachusetts Supreme Judicial Court complains that, "judges and court personnel do make efforts to help unrepre-

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

sented clients understand the system--efforts that take time, adding further delays to already severely backlogged courts." n192 One judge estimated that a case involving *pro se* litigants took three times as long as one with represented parties, leading to the logical conclusion that providing counsel would at times be cheaper than the courtroom resources expended helping the *pro se* defendant. n193

The savings of providing indigent defendants a right to counsel comes from more than conservation of judicial resources. Money spent on issues flowing from the initial matter can be saved via effective representation. One well-documented example of this phenomenon concerns housing courts. As documented above, n194 having counsel is likely to reduce eviction proceedings. Moreover, representation is the best way to ensure the correct result, meaning that wrongful evictions will be reduced in a regime where indigent tenants are [*35] provided representation. n195 Studies in New York Housing Court support this, indicating that providing counsel to tenants would save nearly \$ 67 million annually in shelter costs. n196

In addition to money saved by reducing homelessness and the need for income support and social services . . . the State, by providing funding for civil legal representation of the poor, would achieve greater stability by giving low-income communities the means to air and resolve legitimate grievances through the judicial system. n197

The latter point is particularly important. Allowing indigent defendants to feel that they will have a fair day in court ensures that they will not turn to illegal or violent methods of settling disputes. This saves money for society, with fewer calls for police intervention and reduced need to use other legal remedies to enforce rights and obligations. As Robert Buck, President of the North Mississippi Rural Legal Services, says about the current perception that justice is denied to the indigent litigant:

What you have is a level of frustration that has a negative impact on society. . . . You have people turning to means other than the courts to resolve disputes Taken to its extreme, you literally could have civil unrest and anarchy if people feel their rights are not being protected. n198

Ironically, the argument for the right of counsel for indigent civil defendants is back to where it was at the beginning: the rationale for giving a right to counsel is to prevent erosion of faith in the judicial system, which is the greatest price of all. Given that sentiment, the low cost at which it can be achieved, and the potential conservation of judicial resources that would come from it, society can only benefit from providing a right to counsel for indigent civil defendants.

CONCLUSION

The inability to provide legal services to indigents is an ongoing problem in America today. Despite the fact that other countries and the American public accept the idea that those unable to afford counsel should be provided an attorney, the United States has yet to achieve a workable solution to the problem. A mere belief that fiscal prudence counsels against expanding the rights of indigent litigants is no reason not to do so.

[*36] Moreover, the Constitution requires it. The Due Process Clause, with its emphasis on maintaining procedural safeguards and fair access to the courts, mandates it. All of the reasons underlying the right to counsel for an indigent criminal defendant likewise support the right to counsel for an indigent civil defendant. Moreover, the denial of counsel to indigent civil defendant should trigger strict scrutiny under the Equal Protection Clause. As strict scrutiny is usually the kiss of death for most any governmental action, so too must it be for the denial of a lawyer to an impoverished civil defendant.

The solution that accommodates fiscal conservation is providing counsel for indigent civil defendants. Doing so allows society to conserve resources, and inspires confidence in America's system of justice. Equal access to the courts is a vital component of maintaining the democratic system. If the indigent defendant is given counsel with which to assert his claim, he will maintain that confidence. True, indigent plaintiffs are left out. But not only do they already have more options, but they also, as plaintiffs, have traditionally been forced to overcome more to get their claims to court. Public counsel for indigent defendants maintains that tradition, and allows indigent civil defendants to feel connected to America's system of justice.

Legal Topics:

For related research and practice materials, see the following legal topics:

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

Criminal Law & Procedure Counsel Right to Counsel General Overview Legal Ethics Public Service Public Health & Welfare Law Social Services Legal Aid

FOOTNOTES:

n1 Michael Milleman, *For: Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 27 (1990).

n2 See Russell Engler, *And Justice For All--Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM. L. REV. 1987, 2047 n.263 (1999).

n3 *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972).

n4 For an analysis of the cases creating this right, see *infra* Part II.

n5 452 U.S. 18, 27 (1981) (citing *Matthews v. Eldridge*, 424 U.S. 319, 335 (1953)).

n6 *United States v. Madden*, 352 F.2d 792, 793 (9th Cir. 1965).

n7 This Article does not explore what the threshold level is for one to be found indigent. However, any definition of indigent in the context of hiring an attorney would be incomplete if it failed to account for both those citizens below the poverty line and those labeled the "working poor" who are just above it. Both groups need to be accounted for, and both need access to counsel.

n8 Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POLY REV. 503, 504 (1998) (citing ASS'N OF TRIAL LAWYERS OF AMERICA 1991-92, DESK REFERENCE SUPPLEMENT: COMMEMORATING THE 200TH ANNIVERSARY OF THE SIGNING OF THE BILL OF RIGHTS (1991)).

n9 *Id.*

n10 Phillip S. Anderson, *More LSC Funding Necessary to Ensure Equal Justice for All*, CHI. DAILY L. BULL., Nov. 23, 1998, at 6.

n11 *Id.*; see also Reed Branson, *Federal Funding Cuts Are Leaving Many Poor Without Legal Recourse*, THE COMMERCIAL APPEAL, Aug. 24, 1997, at A1, available at 1997 WL 11967508 (estimating that Legal Services Corporation funding was cut by one-third in 1996, its lowest level in twenty years, forcing its caseload to be reduced from 1.7 million to 1.4 million).

n12 Consider that at the establishment in 1974, LSC's goal was to provide "minimum access" to legal services for indigent Americans--requiring one lawyer per 5000 indigents. As of now, there is less than one lawyer for every 10,000 indigents. See LEGAL SERVICES REFORM ACT OF 1996, COMM. ON LABOR AND HUMAN RESOURCES, S. REP. NO. 104-392, at 25 (1996) (additional views of Senator Simon) [hereinafter LEGAL SERVICES REFORM ACT OF 1996].

n13 Esther F. Lardent, *Against: Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 79, 96 (1990).

n14 490 U.S. 296 (1989).

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

n15 *Id.* at 310.

n16 *Legal Services Corporation Oversight: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 104th Cong. (1996) (statement of Allyson Tucker, Executive Director, Individual Rights Foundation), available at 1996 WL 353949 [hereinafter Tucker Testimony].

n17 *Id.*

n18 *Id.*

n19 Editorial, *Access to Justice*, BANGOR DAILY NEWS, Mar. 15, 1997, at 1, available at 1997 WL 4759720.

n20 Branson, *supra* note 11. Thornton goes on to estimate that even if each lawyer in Mississippi took on three divorce cases, demand for services still would not be met.

n21 *See Oversight Hearings on the Legal Services Corporation: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. On the Judiciary*, 106th Cong. (1999) (statement of John Pickering, Member, American Bar Association's Standing Committee on Legal Aid and Indigent Defendants), available at 1999 WL 27594949 [hereinafter Pickering Testimony] ("studies show that only 20% of the legal needs of the poor are being met"); *see also* Millemann, *supra* note 1, at 27 ("Only one in five . . . indigent litigants will be able to obtain the legal help that is essential to enforce their rights."). The problem is worse in some places. A New York study found that only fourteen percent of the state's poor with civil legal problems had access to an attorney. *See* James C. Moore, Editorial, *Constitution Is For the Poor, Too: State Has a Duty to Provide Legal-Services Money*, SYRACUSE HERALD-JOURNAL, June 29, 1998, at A8, available at 1998 WL 4364971. *But see Legal Services Corporation Reauthorization: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 103rd Cong. (1995) (statement of Kenneth Boehm, Chairman of the National Legal and Policy Center) [hereinafter Boehm Testimony] (explaining that the twenty percent figure is too low because it fails to distinguish between "needs" and "wants" and also tends to use unrealistic standards).

n22 Millemann, *supra* note 1, at 27.

n23 Tucker Testimony, *supra* note 16 (stating that the Legal Services Organization of Indiana received eighty-four percent of its \$ 4.5 million budget from the LSC and acknowledging that some of the 100 pro bono legal organizations in California are LSC grantees). *See* LEGAL SERVICES REFORM ACT OF 1996, *supra* note 12, at 16 ("Pro bono programs typically depend upon legal services attorneys for training and support and legal services funding for basic intake and referral.") (additional views of Senators Kennedy, Pell, Dodd, Simon, Harkin, Mikulski, and Wellstone).

n24 *See* LEGAL SERVICES REFORM ACT OF 1996, *supra* note 12, at 16.

n25 *Id.* at 25.

n26 Tucker Testimony, *supra* note 16.

n27 *See* Henry Weinstrein, *Legal Aid to the Poor Falls Short*, LA. TIMES, Nov. 21, 2002, at B1.

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

n28 Helaine M. Barnett, *An Innovative Approach to Permanent State Funding of Civil Legal Services: One State's Experience--So Far*, 17 *YALE L. & POLY REV.* 469, 470-71 (1998) (citing September Jarett & Michael McKee, HOUSING COURT, EVICTIONS AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL 8 (1993)). The same study goes on to note that those indigent tenants who did have counsel won in ninety percent of their cases.

n29 Engler, *supra* note 2.

n30 Millemann, *supra* note 1, at 62 n.213.

n31 Tucker Testimony, *supra* note 16.

n32 Branson, *supra* note 11 at A1.

n33 87 *F. Supp. 2d* 163 (E.D.N.Y. 1999).

n34 *Id.* at 173.

n35 *Id.*

n36 *McIntyre v. Michelin Tire Corp.*, 464 *F. Supp.* 1005, 1010 (D.S.C. 1978).

n37 Congress has recognized that a plaintiff likely has more legal options than the defendant. One such example of this comes from looking at the Legal Services Corporation, which prohibits the LSC from providing legal services in any "fee-generating case," unless it is to recover Social Security or statutory benefits. "Fee-generating case means any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to a client, from public funds or from the opposing party." 45 *C.F.R. § 1609.2* (2002). This is, in effect, Congress telling the indigent plaintiff to find a contingency-fee attorney if possible.

n38 *See CAL. CIV. PROC. CODE § 116.530* (West 2002).

n39 Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 *CAL. L. REV.* 79, 116 n.163 (1997).

n40 *Id.* at 118 n.174.

n41 *See Boehm Testimony*, *supra* note 21.

n42 *Id.*

n43 Actually, a system providing counsel to the indigent defendant would reduce the number of cases that would require pro bono representation for a defendant. As such, the attorneys doing pro bono work could be employed to do more work representing indigent plaintiffs. The indigent defendants have the public system, or can find a private, pro bono attorney (though less would need to do so). The indigent plaintiffs can be handled by the private system of pro bono attorneys.

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

n44 See Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 *STAN. L. REV.* 5, 7 (1959) ("Since plaintiff is the party seeking to disturb the existing situation by inducing the court to take some measure in his favor, it seems reasonable to require him to demonstrate his right to relief.").

n45 See GEOFFREY C. HAZARD, COLIN C. TAIT, & WILLIAM A. FLETCHER, *PLEADING AND PROCEDURE* 339 (8th Ed. 1999).

n46 *Adam v. Saenger*, 303 U.S. 59, 67 (1938). Note also that the Court made no requirement that the subject of the complaint be related to the subject of the suit.

n47 See Note, *Right to Counsel in Civil Cases*, 76 *YALE L.J.* 545, 555 (1967) ("A major talking point of those who oppose expansion of the legal rights of the poor is the specter of a flood of frivolous and harassing lawsuits by the poor. A simple way to appease this fear would be to grant the right only to civil defendants.").

n48 J. Donald Cowan, Editorial, *Representing the Poor*, *THE NEWS & OBSERVER* (RALEIGH N.C.), Oct. 11, 1998, at A32, available at 1998 WL 6158904. Mr. Cowan is the President of Legal Services of North Carolina Inc., an organization providing legal services to indigent litigants.

n49 U.S. CONST. amend VI.

n50 452 U.S. 18 (1981).

n51 *Id.* at 25.

n52 *Id.* at 26-27.

n53 See, e.g., Mark D. Esterle, *Gideon's Trumpet Revisited: Providing Rights of Indigent Defendants in Paternity Actions*, 29 *J. FAM. L.* 1, 9 (1985) ("Although paternity actions are civil in most jurisdictions, an adjudication of paternity may result in the future loss of physical liberty."); Earl Johnson & Elizabeth Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants, Part One: The Legal Arguments*, 11 *LOY. L.A. L. REV.* 249, 261 (1978) ("Most judicial proceedings involve disputes over what any court would denominate as property or liberty."); David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 *HASTINGS L.J.* 281, 321 (1990) ("Deprivation of an indigent's property rights . . . may be more significant than a minor intrusion on an indigent's liberty interests."); Sweet, *supra* note 8, at 506 ("A right to property or economic justice, to custody, or to housing, for example, is as significant in real terms as a right to a constitutional guarantee."). For a discussion of application of the due process clause to civil suits when the clause requires state or federal action, see *infra* text accompanying notes 111-113.

n54 *Lassiter*, 452 U.S. at 27 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1953)).

n55 *Id.* at 30.

n56 Johnson & Schwartz, *supra* note 53, at 262 (citing *Lynch v. Household Finance Corp.*, 405 U.S. 537 (1972)).

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

n57 See *Douglas v. California*, 372 U.S. 353, 358 (1963) ("When society acts to deprive one of its members of his life, liberty, or property, it takes its most awesome steps.") (citing *Coppedge v. United States*, 369 U.S. 438, 449 (1962)).

n58 Sweet, *supra* note 8, at 506 (citing Jack B. Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 655 (1981)).

n59 See *infra* text accompanying note 173.

n60 Todd Macfarlane, Note, *Mallard v. United States District Court: Without Imposing Compulsory Service, How Can the Legal Profession Meet Indigents' Pressing Needs for Legal Representation?*, 1990 UTAH L. REV. 923, 926 (1990) ("The need for counsel is just as great in civil cases because 'our adversary system of justice works best when both sides are zealously and competently represented.'") (citing *McKeever v. Israel*, 689 F.2d 1315, 1323 (7th Cir. 1982)).

n61 *Lassiter*, 452 U.S. at 27.

n62 *Id.* at 29.

n63 Jay Rosenberg, Note, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390, 404 (1988).

n64 407 U.S. 25 (1972).

n65 *Id.* at 30-31.

n66 *Id.* at 32 (citing *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938)).

n67 *Id.* at 33.

n68 *Id.* at 51 (Powell, J. concurring).

n69 Sweet, *supra* note 8, at 505.

n70 *Lassiter*, 452 U.S. at 27.

n71 *Mathews v. Eldridge*, 424 U.S. 319 (1975).

n72 *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (holding that the Sixth Amendment's requirement of counsel in all criminal prosecutions extends to defendants tried for a felony on the state level).

n73 407 U.S. 25 (1972).

n74 440 U.S. 367, 373 (1979) (interpreting *Argersinger* to mean that actual imprisonment is the line defining the right of appointed counsel).

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

n75 *Lassiter*, 452 U.S. at 27.

n76 *Mathews*, 424 U.S. at 334 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

n77 *Id.* at 335.

n78 *Gideon*, 372 U.S. at 345.

n79 *Id.* at 340.

n80 *Id.* at 341.

n81 *Id.* at 344.

n82 287 U.S. 45, 67 (1932) (calling the right to retain counsel in a capital case a "fundamental principle of liberty and justice").

n83 *Gideon*, 372 U.S. at 344-45 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

n84 *Id.* at 345.

n85 *Gideon*, 372 U.S. 335.

n86 *Fowler v. Jones*, 899 F.2d 1088, 1096 (11th Cir. 1990).

n87 Note, *Right to Counsel in Civil Cases*, *supra* note 47, at 548 ("Trying one's own civil case is just as difficult [as trying a criminal case]. A civil trial is conducted under technical rules of evidence and procedure; it demands skill in marshalling and presenting facts.").

n88 *Johnson & Schwartz*, *supra* note 53, at 265.

n89 *Gideon*, 372 U.S. at 349 (Clark, J., concurring).

n90 *See Rosenberg*, *supra* note 63, at 402-03 ("The actual effect of the *Lassiter* presumption, however, is far from clear. The Supreme Court has not commented on it further, and the lower federal courts have applied the presumption only sparingly.").

n91 Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78mm, (2002).

n92 *Id.*

n93 71 C.F.R. § 230.321 (2002); 62 *Fed. Reg.* 50682 (1997). *See generally*, Andrew T. Serafin, *Kicking the Legalese Habit: The SEC's "Plain English Disclosure" Proposal*, 29 LOY. U. CHI. L.J. (1998); Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters*, 83 CORNELL L. REV. 921 n. 202 (1998).

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

n94 387 U.S. 1, 21 (1967) (citing *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., separate opinion)).

n95 *Romer v. Evans*, 517 U.S. 620, 631 (1996).

n96 *New Orleans v. Dukes*, 427 U.S. 297, 303 (1975).

n97 *Adarand Constructions, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

n98 526 U.S. 489 (1999).

n99 *Id.* at 507; see also *Plyer v. Doe*, 457 U.S. 202, 227 (1982) ("Of course, a concern for the preservation of resources, standing alone can hardly justify the classification used in allocating those resources.").

n100 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

n101 *Id.* at 30 (citing *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 283 (W.D. Tex. 1971)).

n102 *Plyler*, 457 U.S. at 221.

n103 *Id.* at 223.

n104 *Rodriguez*, 411 U.S. at 36.

n105 *Plyler*, 457 U.S. at 218 n.15.

n106 *Rodriguez*, 411 U.S. at 62-63 (Brennan, J., dissenting).

n107 See Note, *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM & MARY L. REV. 627, 660 (1989) ("In a tort action, where only property is at risk and the indigent party is opposed by another private party, fundamental fairness does not require that the state . . . [appoint] counsel.").

n108 Milleman, *supra* note 1, at 74.

n109 *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971). See also Medine, *supra* note 53, at 333 ("Someone may retort that it is not the state but another person or merely unfortunate personal circumstances that might inflict the damage. But the government cannot easily wash its hands.") (citing Francis W. O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L.J. 1, 1 (1967)).

n110 *Barbier v. Connolly*, 113 U.S. 27, 31 (1884).

n111 See HAZARD, *supra* note 45, at 32 ("The theory of our adversary system . . . is that each litigant . . . will be most effective in seeking, discovering, and presenting the materials which will reveal the strength of his own case and the weakness of his adversary's case so that the truth will emerge.") (citing MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 3 (1956)).

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

n112 See Earl Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 *LOY. L.A. L. REV.* 341, 359 (1985).

n113 Edward F. Hennessey, Editorial, *Legal Services Program for Poor is Still Alive-As it Should Be*, *BOSTON GLOBE*, July 25, 1998, at A15.

n114 42 *U.S.C.A. § 2000e-5(f)(1)* (1994). See also 28 *U.S.C. § 1915(d)* (1994) ("The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case . . . if satisfied that the action is frivolous or malicious.").

n115 *Brown v. Continental Can Co.*, 765 *F.2d* 810, 814 (9th Cir. 1985).

n116 See *McIntyre v. Michelin Tire Corp.*, 464 *F. Supp.* 1005, 1010 (D. S.C. 1978) (denying appointment of counsel by concluding that if the plaintiffs' claim was meritorious, they would likely be able to retain counsel on a contingency basis).

n117 See *supra*, Part IA.

n118 737 *F.2d* 1173, 1188 (D.C. Cir. 1984) (citations omitted).

n119 *McIntyre*, 465 *F. Supp.* at 1008 n.6.

n120 See Gerald F. Uelman, *Simmering on the "Backburner:" The Challenge of Yarbrough*, 19 *LOY. L.A. L. REV.* 285, 319 (1985) ("The initial hurdle of showing the need for a lawyer will become a complex task which itself requires a lawyer's assistance.").

n121 899 *F.2d* 1088 (11th Cir. 1990).

n122 *Id.* at 1096.

n123 *Id.*

n124 See *id.* at 1092.

n125 *Id.*

n126 *Fowler* 899 *F.2d* at 1095-96.

n127 *Maher v. Roe*, 432 *U.S.* 464, 470 (1977) ("But this court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.") (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 *U.S.* 1, 29 (1973) and *Dandridge v. Williams*, 391 *U.S.* 471 (1970)).

n128 *Harris v. McRae*, 448 *U.S.* 297, 323 (1980).

n129 See *Washington v. Davis*, 426 *U.S.* 229 (1976).

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

n130 *Id. at 239.*

n131 *San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).*

n132 *Id. at 22-23.*

n133 *Id. at 23.*

n134 *Id. at 20* (emphasis added).

n135 Johnson & Schwartz, *supra* note 53, at 282 ("[A] low income individual may be denied any judicial services at all if he cannot afford to employ the lawyer essential to effectively activate the legal system.").

n136 See *Lewis v. Casey, 518 U.S. 343, 374 (1996)* (saying that "a group claiming discrimination on the basis of poverty [must] show that it is 'completely unable to pay for some desired benefit, and as a consequence, . . . sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.'" (quoting *San Antonio, 411 U.S. at 20*)).

n137 See *Lewis, 518 U.S. at 373-374.*

n138 *351 U.S. 12 (1956).*

n139 *Id. at 13-15.*

n140 *Id. at 18.*

n141 *Id. at 17 n.11.*

n142 See *supra* text accompanying note 127.

n143 *Griffin, 351 U.S. at 17 n.11.*

n144 *Hawkins v. Town of Shaw, 461 F.2d 1171, 1173 (5th Cir. 1972)* (citing *Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2nd Cir. 1968)*).

n145 *Griffin, 351 U.S. at 18.*

n146 See *id. at 23* ("Law addresses itself to actualities. It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances.") (Frankfurter, J., concurring).

n147 *Id. at 19.*

n148 *San Antonio, 411 U.S. 1.*

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

n149 *Bullock v. Carter*, 405 U.S. 134, 149 (1972).

n150 *San Antonio*, 411 U.S. at 21.

n151 36 N.Y.2d 433 (N.Y. 1975).

n152 401 U.S. at 380-81.

n153 *Smiley*, 36 N.Y.2d at 440.

n154 *Id.* at 439.

n155 *Smiley*, in fact, expresses the fear that "the need and burden of representing indigent matrimonial suitors . . . will overtax voluntary private resources and the voluntary services available from the Bar on a non-compensated basis." 36 N.Y.2d at 440. The court then implores the legislature to provide funding to publicly-compensated legal services to account for the problem. *Id.*

n156 *Lewis*, 518 U.S. at 374 (citing *Rodriguez*, 411 U.S. at 24).

n157 *See supra* Part IIA.

n158 *See* Pickering Testimony, *supra* note 21.

n159 28 U.S.C. § 1915(e).

n160 *Mallard v. United States Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296, 303 (1989).

n161 *See id.*

n162 *See Smiley*, 36 N.Y.2d at 441.

n163 *United States v. Kras*, 409 U.S. 434, 444 (1973).

n164 *See* HAZARD, *supra* note 45, at 227.

n165 452 U.S. 18 (1981).

n166 *See Kras*, 409 U.S. at 445 (stating that elimination of one's debt burden does not rise to the same constitutional level as ability to dissolve one's marriage).

n167 *M.L.B. v. S.L.J.*, 519 U.S. 102, 115 (1996).

n168 *Id.* at 116 (citing *Boddie*, 401 U.S. at 376). In *M.L.B.*, appellant was merely seeking permission to proceed *in forma pauperis* in a case dealing with forced dissolution of parental rights. *M.L.B.*, 519 U.S. at 121. Using the *Lassiter* Court's theory about the importance of the parent/child relationship, the Court ruled that the

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

State needed to pay the court costs for an indigent appealing the termination of parental rights. However, the issue in that case was not about providing counsel for the indigent parents. Thus, the *Lassiter* presumption still stands.

n169 *Cf.* Note, *supra* note 107, at 631 (suggesting that cases involving children may implicate fundamental rights, and thus merit appointment of counsel).

n170 *Meltzer v. LeCaw & Co.*, 402 U.S. 954, 957-58 (1971).

n171 *Id.* at 957-58.

n172 *M.L.B.*, 519 U.S. at 125 (1996) (citing *DeShaney v. Winnebago Country Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989)).

n173 Sweet, *supra* note 8, at 506 (citing Jack B. Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 *CONN. L. REV.* 651, 655 (1981)).

n174 Branson, *supra* note 11.

n175 *See* Pickering Testimony, *supra* note 21.

n176 Sweet, *supra* note 8, at 506. *See also* Deborah Goldberg, Editorial, *State Should Respect Equal Justice*, *TIMES UNION* (ALB.), June 5, 1998, at A11, available at 1998 WL 7261079 ("We will all pay for more than the price of basic legal services if we allow [lack of funding for legal services] to undermine respect for the rule of law . . .").

n177 *See generally*, Benjamin L. Cardin & Robert J. Rhudy, *Expanding Pro Bono Legal Assistance in Civil Cases to Maryland's Poor*, 49 *MD. L. REV.* 1 (1990) (discussing a recommendation of the Advisory Council of the Maryland Legal Services Corporation for a court rule establishing mandatory pro bono service by all attorneys to assist low-income persons in civil matters).

n178 *See* Laura K. Abel, *No Money for the Voiceless*, *NAT'L L. J.*, December 20, 1999, at A20. So, who were the winners of the federal budget process? The wine industry received \$ 1 million. Thirty million dollars went to subsidize the timber industry's construction of roads. And tens of millions of dollars were awarded to oil companies, preserving their privilege of taking oil from public lands at a fraction of the market cost. Apparently need isn't as important as political connections. *Id.*

n179 *See, e.g.*, *Johnson*, *supra* note 112, at 359 (calling the funding level needed to establish a fund to represent impoverished litigants in California "miniscule" compared to the \$ 9.5 billion spent by the state on Medi-Cal and Medicare).

n180 *See, e.g.*, Medine, *supra* note 53, at 338 (estimating that the total expense of providing expert assistance to indigent litigants would not be much, "since the number of civil cases filed nationally approximately equals the number of criminal filings").

n181 *Johnson*, *supra* note 112, at 345.

n182 *Id.* at 358.

PUBLIC CIVIL DEFENDERS: A RIGHT TO COUNSEL FOR INDIGENT CIVIL DEFENDANTS

n183 *Id.*

n184 See Barnett, *supra* note 28, at 472-74 (examines an interesting approach that explores transferring New York's Abandoned Property Fund to an Access to Justice Fund, which would provide representation for indigent civil litigants).

n185 *Id.* at 472 (citing LEGAL SERVICES PROJECT, FUNDING LEGAL SERVICES FOR THE POOR 7 (1998)).

n186 Tucker Testimony, *supra* note 16.

n187 Pickering Testimony, *supra* note 21.

n188 See LEGAL SERVICES REFORM ACT OF 1996, *supra* note 12.

n189 See Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 591 (1988) (prophesizing that allowing all tenants facing eviction access to counsel would reduce the number of eviction proceedings, based on the theory that landlords would be more likely to negotiate settlements with tenants).

n190 Pickering Testimony, *supra* note 21.

n191 See *supra* text accompanying notes 26-29.

n192 Hennessey, *supra* note 113. See also LEGAL SERVICES REFORM ACT OF 1996, *supra* note 12.

n193 See BANGOR DAILY NEWS, *supra* note 19.

n194 See Pickering Testimony, *supra* note 21.

n195 See Engler, *supra* note 39, at 154-55.

n196 *Id.* at 155 n.352 (citing COMMUNITY TRAINING & RESOURCE CENTER & CITY-WIDE TASK FORCE ON HOUSING COURT, INC., HOUSING COURT, EVICTIONS AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL iv (1993)).

n197 Barnett, *supra* note 28, at 472-73.

n198 Branson, *supra* note 11.