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## **Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?**

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Russell Engler<sup>1</sup>

### INTRODUCTION

The past decade has seen an increased focus on issues facing unrepresented litigants in civil cases in the courts. With growing recognition that unrepresented litigants frequently forfeit important rights—not due to the governing law and facts of their cases, but rather due to the absence of counsel—courts, bar associations, and legal service providers have struggled to respond. The role of an expanded civil right to counsel as a component of an overarching access to justice strategy has gained increased importance.

As advocates push for an expanded civil right to counsel, often called a “Civil Gideon,” painful theoretical and practical choices challenge efforts to establish such a right. While the right is typically framed in sweeping terms, the call falls short of seeking publicly funded counsel for all litigants in all civil proceedings. Instead, the specter of line drawing looms large. Assuming there is an expanded right, who benefits? Which cases, or which clients, will be covered by such a right, and under what circumstances? As this article discusses, the challenges are nothing new, dating from the early writings regarding a civil right to counsel. Line drawing is evident in the evolution of the right to counsel on the criminal side as well.

This article discusses line drawing in the proposals for a civil right to counsel and lines that might be drawn in the short term to lay the groundwork for progress in the fight to expand access to counsel. Part I provides the backdrop to the conversation, which includes the revitalized

civil right to counsel movement, the challenges presented by unmet legal needs, the flood of unrepresented litigants in courts, and the increased focus on access to justice. Part II discusses articles and initiatives in the efforts to establish a civil right to counsel. While line drawing is inherent to these efforts, and the particular lines drawn differ in some respects, the common theme is that these efforts look to a final landscape as to what the right should entail, often including or excluding entire categories of cases. Part III urges a focus on line drawing as strategy, not necessarily with an eye toward the final landscape, but toward starting points on which to build a movement.

#### I. THE CONTEXT: UNMET CIVIL LEGAL NEEDS, ACCESS TO JUSTICE, AND THE RIGHT TO COUNSEL MOVEMENT

This part positions the revitalized civil right to counsel movement against the backdrop of unmet legal needs, unrepresented litigants, and access to justice, summarizing each trend in turn. The final two subsections discuss more recent events in the civil right to counsel movement: first, the national response to the 2006 American Bar Association (ABA) resolution discussed below, and second, the scenario in Washington State, the site of the conference for which this article was written.

##### *A. The Revitalized Civil Right to Counsel Movement*

The fortieth anniversary of *Gideon v. Wainwright*<sup>2</sup> was celebrated in 2003, and in the years that followed, there was a sharp increase in activity supporting a civil right to counsel. Articles<sup>3</sup> and conferences<sup>4</sup> addressed the issue, while membership surged in the newly formed National Coalition for a Civil Right to Counsel.<sup>5</sup> Some advocates have attempted to establish the right to counsel by court decision by pursuing test case strategies,<sup>6</sup> while others have pursued a legislative strategy.<sup>7</sup> In 2006, the ABA unanimously adopted Resolution 112A, urging the provision of legal counsel as a matter of right at public expense to low-income persons in those categories of

adversarial proceedings where basic human needs are at stake—such as those involving shelter, sustenance, safety, health, or child custody—as determined by each jurisdiction.<sup>8</sup>

*B. Unmet Needs and Unrepresented Litigants*

The focus on an expanded civil right to counsel occurred against the backdrop of unmet legal needs and unrepresented litigants flooding the courts. Legal needs studies consistently show that 70–90 percent of the legal needs of the poor go unaddressed.<sup>9</sup> Many unmet legal needs involve housing, family, and consumer issues.<sup>10</sup> Legal services offices represent only a fraction of eligible clients seeking assistance.<sup>11</sup>

In the “poor people’s courts,” one or both parties appear without counsel in most cases. Most family law cases involve *at least* one party without counsel, if not two.<sup>12</sup> Most tenants, many landlords, and most debtors appear in court without counsel.<sup>13</sup> Unrepresented litigants are disproportionately minorities and are typically poor.<sup>14</sup> They often identify an inability to pay for a lawyer as the primary reason for appearing without counsel.<sup>15</sup> Unrepresented litigants often fare poorly in the courts, which can have devastating consequences.<sup>16</sup>

As reality set in that unrepresented litigants—also referred to as self-represented or pro se litigants—were here to stay, the phenomenon gained attention across the country.<sup>17</sup> Conferences, publications, and websites began focusing on problems involving cases with unrepresented litigants.<sup>18</sup> One area of focus is on the changing roles for judges, mediators, and clerks in courts with a high volume of unrepresented litigants.<sup>19</sup> Innovative assistance programs, such as hotlines, technological assistance, clinics, pro se clerks offices, Lawyer-of-the-Day programs, and self-help centers are another focus. These programs were developed to provide assistance to litigants who otherwise would receive no help at all.<sup>20</sup>

*C. Access to Justice*

Concern about the fate awaiting unrepresented litigants in the courts gave rise to a renewed commitment for access to justice. Conferences of judges and state court administrators adopted resolutions calling for the courts to provide meaningful access to justice.<sup>21</sup> Spurred by these conferences, access to justice initiatives intensified across the country.<sup>22</sup> The number of state access to justice commissions increased rapidly; sixteen states created commissions between 2003 and 2008.<sup>23</sup> The commissions are comprised of members from an array of stakeholders in the legal system.<sup>24</sup> The commissions also have a broad charge to engage in an ongoing assessment of the civil legal needs of the poor and to develop initiatives to respond to those needs.<sup>25</sup> The work of expanding a civil right to counsel is often coordinated with, and bolstered by, the work of state access to justice commissions.

*D. Activity in Response to the ABA Resolution*

The adoption of ABA Resolution 112A in 2006 spurred a flurry of nationwide activity. In Massachusetts, the Boston Bar Association (BBA) created its Task Force on Expanding the Civil Right to Counsel—which was expanded to include members from key statewide stakeholders. In an effort to explore starting points for expanding the right to counsel, the Task Force identified nine pilot projects in four substantive areas.<sup>26</sup> In California, advocates drafted two model statutes providing for an expanded civil right to counsel.<sup>27</sup> In the fall of 2009, California Congressman Mike Feuer championed a bill to provide funding for the launching of pilot projects.<sup>28</sup> Advocates in Maryland held a conference dedicated to the topic in 2007.<sup>29</sup> An April 2009 resolution from the Philadelphia Bar Association calling for an expanded right to counsel has continued to develop.<sup>30</sup> And, in New York, advocates convened in March 2008 for a day-long symposium designed to create a blueprint for a civil right to counsel in their state.<sup>31</sup> Continuing to build momentum for change in New York, Chief Judge Lippman called for

implementation of a civil right to counsel and appointed the Task Force to Expand Access to Legal Services.<sup>32</sup>

Efforts to raise awareness and increase support for the expanded Civil Gideon include a steady stream of articles, speeches, and conferences.<sup>33</sup> At the same time, concerns regarding the initiatives emerged: some skeptics dismissed the idea as idealistic and unachievable,<sup>34</sup> some rejected efforts to draw lines or envision the use of lesser forms of assistance,<sup>35</sup> and some expressed concerns regarding the impact that implementation of such a right would have on existing civil legal services and criminal defense programs.<sup>36</sup>

As the pace of activity has increased, the worst recession since the Great Depression has dramatically increased the number of Americans whose basic human needs are at issue in legal proceedings and who need counsel.<sup>37</sup> Yet, the same funding crisis that increases the numbers of those needing help has decimated the ability of legal services offices to provide assistance.<sup>38</sup> Offices relying on money from Interest on Lawyers Trust Accounts (IOLTA) have faced devastating cutbacks with plummeting interest rates and the collapse of the real estate market.<sup>39</sup> Offices dependent on aid from state and local governments have faced cutbacks due to the fiscal crises facing the government.<sup>40</sup>

#### *E. Washington State's Access to Justice and Civil Right to Counsel*

While trends in Washington State are consistent with those nationwide, Washington often plays a leadership role in right to counsel initiatives. The Washington State Supreme Court established the Access to Justice Board in 1994,<sup>41</sup> which is a forerunner of the commissions that have proliferated around the country. The ensuing annual access to justice conferences laid the groundwork for the subsequent calls for recognition of a civil right to counsel,<sup>42</sup> with portions of the 2002 Access to Justice Conference dedicated to the topic.<sup>43</sup> The Northwest Justice Project was a founding member of the National Coalition for a Civil Right to Counsel and, soon thereafter, created a full-time staff position dedicated to the topic.<sup>44</sup> Washington State

advocates published articles dedicated to access to justice and the right to counsel<sup>45</sup> and filed litigation seeking to expand the right to counsel in a number of areas.<sup>46</sup> In 2007, the state supreme court promulgated Rule 33, which provides for requests for accommodation by persons with disabilities; among its authorized accommodations are “to otherwise unrepresented parties to the proceedings, representation by counsel.”<sup>47</sup>

Despite the path-breaking efforts of many in Washington State, its indigent residents face many of the same problems as those around the country. The state’s 2003 Civil Legal Needs Study “found that approximately 87 percent of low-income households in Washington experience a civil legal problem, and of that group, 88 percent were forced to navigate their way through the judicial system without the benefit of a lawyer.”<sup>48</sup> As Dean Kellye Testy of the University of Washington School of Law noted, the current “numbers are even starker when we consider the subsequent deterioration of our state’s economic health, the historic rise in unemployment, and the significant increases in the poverty rate.”<sup>49</sup> Continuing to tackle the intractable problems of access to justice and right to counsel, the state’s three law schools collaborated to host the February 2010 symposium entitled, “Civil Legal Representation and Access to Justice in Washington: An Invitation to an Important Conversation,” the symposium for which this article was written.<sup>50</sup>

## II. LINE DRAWING IS INHERENT TO THE CONCEPT OF A RIGHT TO COUNSEL

### *A. Early Efforts to Establish the Right*

The ink was barely dry in the U.S. Supreme Court’s landmark decision in *Gideon v. Wainwright*<sup>51</sup> before advocates sought to expand the right to counsel to the civil context. The litigation strategy of expanding the right as a matter of federal constitutional law achieved noteworthy success in *In re Gault*, expanding the right to counsel to juvenile cases, before crashing

famously in *Lassiter v. Department of Social Services*, a case involving termination of parental rights.<sup>52</sup>

The efforts to expand the right from felony cases in *Gideon* to juvenile cases in *Gault* and termination of parental rights cases in *Lassiter* reflect only one form of line drawing and expansion—by category of cases. In his now-classic law review note appearing in the *Yale Law Journal* in 1967, Stanford Professor Thomas Grey articulates other bases for drawing lines.<sup>53</sup> Noting that the U.S. Supreme “Court’s own decisions on the right of representation foreclose any claim that counsel is inessential in civil trials,”<sup>54</sup> Professor Grey asserts that the doctrinal justification for such a right was easy to make under due process and equal protection grounds,<sup>55</sup> he then turns to line drawing. While pausing briefly to consider the merits of a case-by-case approach similar to that endorsed by *Gideon*’s predecessor *Betts v. Brady*,<sup>56</sup> Professor Grey relies on the Supreme Court’s own assessment of *Betts* in *Gideon*, and warns that “the ‘troubled journey’ of the special circumstances standard should discourage the Supreme Court from starting a second trip.”<sup>57</sup> A very different Supreme Court operating in very different political times would choose to start exactly that trip with *Lassiter*.

Professor Grey takes the need for line drawing as a given. He charts a likely path to expansion as involving the articulation of a new right in broad terms, though actually applying it, at first, to a small number of cases. His note identifies bases for line drawing that seem familiar to those involved in the right to counsel movement. These include distinctions based on the type of case and, therefore, the interest at stake;<sup>58</sup> the plaintiff-defendant distinction, a theory justified by the voluntariness of the plaintiff’s decision to head to court;<sup>59</sup> the public plaintiff distinction, which is based on the role of the state in the case;<sup>60</sup> and what he calls “statutory manipulation,” distinctions between state and federal court.<sup>61</sup> At every turn, Professor Grey discusses the shortcomings of the lines being drawn, noting that “not all of these possibilities are equally serviceable.”<sup>62</sup> The scope of the right is gradually broadened, a technique that “requires resting points, at which the

Court can halt expansion of the new right while its implications are digested and institutions are developed to carry it into effect.”<sup>63</sup> Professor Grey labels this process “The Path to an Unqualified Right to Appointed Civil Counsel.”<sup>64</sup>

The path to an unqualified right to appointed counsel—and the need for line drawing—was hardly unique to the civil side. Professor Grey recounted the history and charted the expansion on the criminal side: first, the establishment of the right in federal capital cases in *Powell v. Alabama*,<sup>65</sup> second, the expansion through *Betts v. Brady*<sup>66</sup> up through *Gideon* where state felonies are involved; and finally, the expansion into the appellate process in *Douglas v. California*.<sup>67</sup> Benjamin Barton recently traced this history in far more depth—not to chart the course for expansion of a right to counsel on the civil side, but as a cautionary tale of the pitfalls of such a process; his concerns increase with each expansion beyond the original context of serious felonies.<sup>68</sup>

Even with the right to counsel firmly established on the criminal side, line drawing persists. The criminal line-drawing doctrine limits the right to scenarios involving incarceration.<sup>69</sup> In its application, judges, fearful of depleting the local budgets that finance the provision of counsel for indigent defendants, avoid the appointment by assessing the likelihood that a lengthy incarceration will, in fact, be the outcome. Even where the right attaches, the quality of counsel, including the painfully low threshold that must be achieved to pass muster under the standard of effective assistance of counsel, remains a hotly contested issue for analysis and critique.<sup>70</sup>

#### *B. States' Expansion of the Right to Counsel*

While *Lassiter* thwarted efforts to establish a broad-based civil right to counsel as a matter of federal constitutional law, states continued to expand the right. As Laura Abel and Max Rettig have catalogued, “states have passed hundreds of laws and court rules guaranteeing the right to counsel in a wide variety of civil cases.”<sup>71</sup> The development varies from court

decisions establishing a state constitutional right, to efforts to implement federal laws applying to specific categories of individuals, to legislative determinations that providing counsel in a particular type of case is sound policy.<sup>72</sup>

The line drawing in these contexts turns on the type of proceeding. As Abel and Rettig observe, most state right-to-counsel statutes and court rules fall into three broad categories: “family law matters, involuntary commitment, and medical treatment.”<sup>73</sup> The family law matters typically include abuse and neglect cases and termination of parental rights cases. Certain states provide for counsel in domestic violence proceedings, divorce and annulment proceedings, paternity proceedings, and child custody proceedings.<sup>74</sup> Abel and Rettig also identify a few statutes where the right to counsel has been given in other areas, including civil arrest or imprisonment, individuals under disability to sue, and release of mental health records.<sup>75</sup>

While Abel and Rettig focus on state statutes, Clare Pastore explores the expansion of the right through litigation that targets state constitutions.<sup>76</sup> After discussing how state courts have treated *Lassiter*, Pastore turns to the contexts in which litigants have requested a right to counsel. As with the state statutory initiatives, her exploration involves categories of proceedings, with analyses considering as key factors the interests at stake in the proceeding and the complexity of the process. Termination of parental rights cases make up the largest number of state court decisions that provide counsel, but the right is not limited to that context.<sup>77</sup> Decisions also consider the right to counsel involved with civil contempt, civil commitment for the mentally ill, paternity, and the regulation of minors’ access to abortions.<sup>78</sup> While many courts analogize the civil contempt and civil commitment cases to criminal context involving the loss of—or restrictions on—physical liberty, a significant number of courts find no categorical right in the context of civil contempt.<sup>79</sup>

In addition to achieving successes in establishing the right to counsel by state statutes and court rules, advocates and scholars continue to lay the foundation for expansion into areas not yet recognized by most courts. As with the expansion under state law, line drawing invariably focuses on categories of cases. Thus, for example, the literature from the period covering the first forty years after the *Gideon* decision set forth the case for establishing a right to counsel in eviction,<sup>80</sup> divorce,<sup>81</sup> termination of parental rights,<sup>82</sup> and immigration cases.<sup>83</sup>

### *C. Line Drawing in the Recent Initiatives*

The 2006 ABA Resolution 112A<sup>84</sup> triggered a renewed focus on line drawing as well. While the resolution does speak in terms of defined categories (shelter, sustenance, safety, health, and child custody), these categories are both broad and general in addressing basic human needs, as evidenced by the use of the phrase “such as” before the five articulated categories are introduced. Whether the ABA Resolution will prove to be merely aspirational or point the way to the ultimate formulation of a defined civil right to counsel remains to be seen. The sweeping language of the resolution, however, has not eliminated the need to undergo the painful process of line drawing in many of the initiatives.

While the core areas for proposed expansion retain many of the familiar contexts for the establishment of the right—such as housing, child custody, and immigration—many of the initiatives themselves have opened the door to establishing a right to counsel for a subset of the categories of those cases. Legislation filed in the New York City Council calls for the establishment of a right to counsel for senior citizens in eviction and foreclosure proceedings.<sup>85</sup> Initiatives in the immigration area include efforts to provide a right to counsel for unaccompanied minors facing deportation.<sup>86</sup> The Washington State court rule covering litigants with disabilities recognizes the appointment of counsel as one of the potential accommodations that would enable the litigant to achieve meaningful

access to the courts.<sup>87</sup> In Massachusetts, the legislature enacted what is recognized as a qualified right to counsel for elders facing “appointment of a guardian, conservator or other protective order” that is triggered not with the filing of each case, but “if the ward, incapacitated person or person to be protected or someone on his behalf requests appointment of counsel.”<sup>88</sup>

Advocates from California, who produced a model statute titled the Equal Justice Act,<sup>89</sup> confronted many of the challenges of line drawing anticipated by Professor Grey.<sup>90</sup> In 2004, the California Access to Justice Commission created a task force charged with drafting a model statute providing for a right to counsel in civil cases for those too poor to afford private counsel.<sup>91</sup> The task force considered questions regarding the scope of the right, including whether to extend the right beyond the litigation setting to administrative agencies.<sup>92</sup> The task force also imposed a merits test that reflected Professor Grey’s distinction between plaintiffs and defendants. Plaintiffs would be entitled to counsel in scenarios where a reasonable person with the financial means to employ counsel would likely do so in light of the costs and potential benefits. The standard was somewhat broader for defendants, on the theory that they did not choose to initiate the proceeding; defendants are eligible for services if there is a reasonable probability of achieving a fair outcome.<sup>93</sup>

The model statute also articulates exclusions primarily designed to avoid expanding the right and providing counsel at public expense, where the private sector is capable of filling the gap or where the proceedings are less significant. The exclusions include cases involving libel; slander; defamation; name change; uncontested, childless marriage dissolutions; property or support; and matters in which representation is available on a contingent fee basis.<sup>94</sup>

Perhaps most intriguingly and controversially, the Equal Justice Act recognizes a range of legal services that might be implicated by the right. Depending on the scenario, limited legal representation, lay advocacy, document preparation, and self-help advocacy, might be the level of

assistance implicated by the right might change.<sup>95</sup> The concept of a spectrum of services as part of the delivery system itself is nothing new and has been advocated for by many proponents of legal services and advocates for the poor.<sup>96</sup>

With the ABA's passage of Resolution 112A in 2006, the California Task Force returned to the drafting table to produce a model act tailored to the language of the ABA's resolution. Labeled the State Basic Access Act,<sup>97</sup> the act is more limited than the Equal Justice Act in that it defines the scope of the right in terms of the five categories that the ABA resolution embraces: shelter, sustenance, safety, health, and child custody.<sup>98</sup> The act nonetheless retains the line drawing from the Equal Justice Act in terms of merits tests, categorical exclusions, and the potential for the right to be fulfilled by means short of full representation by counsel.<sup>99</sup>

The most recent effort to produce a model act is the ABA's "State Model Access Act."<sup>100</sup> The Model Access Act seeks to address the financial and administrative concerns of new rights to counsel. It provides for a right to counsel only in the five categories of cases specified by the 2006 ABA resolution as opposed to all civil cases, caps income eligibility at 125 percent of the federal poverty level, and includes several exclusions from coverage.<sup>101</sup> After "extensive and energetic debate," the ABA House of Delegates approved the model act and accompanying principles at the annual meeting in August 2010.<sup>102</sup>

At first blush, it might seem as if line drawing is more likely to occur in the legislative context rather than in the litigation context, where advocates have often sought a sweeping statement of the civil right to counsel. Thus, petitioners in *Kelly v. Warpinski*, a custody proceeding in Wisconsin, sought a formulation of the right to counsel that extended beyond custody proceedings by asking the Wisconsin Supreme Court to "determine whether the Wisconsin Constitution accords the right to counsel in civil cases."<sup>103</sup> Likewise, in *Frase v. Barnhart*,<sup>104</sup> Maryland advocates sought an

articulation of the right to counsel that was broader than that subset of custody cases. The Appellants' brief closed with:

Discussion and debate about the details, and the costs, of a suitably enhanced Maryland program of legal services to the poor are subjects for another day in another place. They should be conducted, however, against a judicial finding that a right to counsel inheres in the Maryland constitution. As Ms. Frase has demonstrated, she is entitled to such a finding here.<sup>105</sup>

A careful reading of the way in which these claims for relief have been raised in recent litigation suggests that line drawing will be inevitable, regardless of whether the trigger for analysis is litigation or legislation. As noted above, immigration advocates have used both administrative advocacy and litigation to try to create a right to counsel for a subset of claimants, namely unaccompanied minors.<sup>106</sup> Moreover, even the litigation in both Maryland and Washington that seeks to establish a broad-based right to counsel in private custody disputes, contains seeds for achievement for just a subset of the broader category of private custody disputes.

In framing the problem in *Frase v. Barnhart*, advocates for Ms. Frase hammered on the fundamental unfairness of cases pitting unrepresented litigants against represented parties.<sup>107</sup> While the relief requested in the appellant's brief did not suggest drawing lines within the subset of custody cases, a brief filed by *amici* ended by encouraging the court to "consider the inadequacy of services in Maryland in family law disputes . . . [and] require the State to afford pro se litigants like Ms. Frase full legal representation in order to protect the fundamental rights at issue."<sup>108</sup> While the court could have interpreted "pro se litigants like Ms. Frase" to mean all indigent pro se litigants in custody proceedings, it could also have limited its ruling to litigants in scenarios such as those presented by Ms. Frase, where she was pitted against a represented party and ill-equipped to adequately represent herself for the reasons reflected in the record.

Tension between the desire to expand the right to an entire category of cases—or even a subset of those categories—is evident from the briefs in the Washington case of *In re Marriage of King*.<sup>109</sup> In that case, advocates unsuccessfully sought to establish a broad-based right, at least in the context of custody cases. The facts in the record revealed numerous ways in which Brenda King was on the wrong side of a severe imbalance of power. As the dissent described at length, Ms. King had little formal education, having left school in the ninth grade.<sup>110</sup> The case involved complex issues, including expert psychological issues and allegations of domestic violence.<sup>111</sup> Ms. King was unable to obtain representation from the legal services office and was unable to pay for a private lawyer.<sup>112</sup> Not only was her husband represented by counsel, but the guardian ad litem expressed views adverse to her, and she was forced to play the roles of party, witness, lawyer, and scrivener during the emotional and contentious trial.<sup>113</sup> The trial court's frustration was palpable, and in the end, Ms. King, who had been the primary caregiver, lost custody of her children.<sup>114</sup>

Ms. King raised claims under the Washington State Constitution, including the protection of meaningful access to the courts, the duty to administer justice impartially, the due process clause, and the privileges and immunities clause. On appeal, Ms. King's lawyers also raised federal due process and equal protection claims.<sup>115</sup> While the National Coalition's amicus brief discussed the importance of a "categorical" right to counsel,<sup>116</sup> Ms. King's lawyers articulated the possibility that, should Ms. King prevail, the established right might fall short of representation by counsel for all indigent litigants in custody. Thus, her attorneys identified factors to be considered in determining which litigants should receive full representation by counsel, arguing that "[a]t a minimum, counsel should be appointed . . . when (a) the proceeding is adversarial; (b) critical interests are at stake; (c) the unrepresented litigant is indigent and has made reasonable, but unsuccessful, efforts to obtain counsel; and (d) the unrepresented litigant is unable to adequately or effectively advocate for his or her interests."<sup>117</sup> By

implication, the right to access might mean a lesser form of assistance where the factors were not present. The relief sought on appeal was reversal and remand “for a new trial with instructions for the Superior Court to provide counsel for Brenda King,” not a categorical declaration.<sup>118</sup>

Whether a court were to draw the lines itself or leave the matter to the legislature and whether the litigants seek a broad formulation of the right or suggest ways in which it might be tailored, the drawing of lines is inevitable. The line drawing might occur between categories or within categories, but it likely will be based on the same types of considerations that advocates, scholars, and courts have considered in analyzing the development of existing rights and charting possible courses for expansion.

The next section returns to the process of line drawing, suggesting that a key component to the puzzle is strategic: what if the questions were not defined by a vision of the final landscape of the right to counsel, but rather the consideration of the scenarios that might most successfully present starting points or beachheads for moving forward?

### III. LINE DRAWING AS A STRATEGY

Many of the examples of line drawing above share a common approach: they seek to envision the ultimate landscape by setting forth categories at the outset that will likely define the scenarios in which the right to counsel should attach. Whatever the benefits are in having clear terms to identify the scenarios in which the right to counsel should exist, the reality is that we are approaching the fiftieth anniversary of *Gideon*, and only minimal progress has been made to expand the right to counsel beyond the scenarios recognized by state statutes and courts in the 1970s and 1980s. This reality suggests that we should try a different approach and instead explore the challenge of line drawing not with an eye toward the final landscape, however just and compelling as it may be, but with an eye toward starting points on which to build momentum. Although Professor Grey focused on a litigation strategy leading to an unqualified right to counsel, he recognized

the need to start with a small number of cases—with resting points—as the right expands.<sup>119</sup>

The notion of identifying likely starting points in an incremental strategy for broader expansion is hardly new. The strategy that led to *Brown v. Board of Education* is a familiar story to many; it targeted graduate schools and built toward public elementary schools over a journey that stretched for roughly thirty years. That strategy carried with it the belief that victory in one context would not limit the right to only that context but sow the seeds for expansion.<sup>120</sup> The path to a right to appointed counsel in the criminal context, from *Powell* to *Gideon* and its progeny, never reflected the belief that the right should be limited to each new context, but that the case pending was compelling and might lay the foundation for future expansion. The same is undoubtedly true with immigration efforts focused on unaccompanied minors, eviction or foreclosure cases in New York City focused on elders, and Washington's court rule focused on disabled litigants. Advocates do not pursue those strategies because they believe the right should be limited to those contexts, but because they present compelling starting points.

This section discusses both a framework for beginning the process of identifying starting points and the manner in which existing data might be useful in the process. It concludes by discussing experiments under way in Massachusetts and the process that led to those experiments, before identifying scenarios that might lend themselves to the most promising starting points.

#### *A. A Framework for Decision Making*

A civil right to counsel should, therefore, be developed as a component to a coherent access to justice strategy.<sup>121</sup> I have articulated elsewhere a three-pronged approach:

1. the expansion of the roles of the court system's key players—such as judges, court-connected mediators, and clerks—to require them to assist unrepresented litigants as necessary to prevent a forfeiture of important rights;
2. the use of assistance programs, rigorously evaluated to identify which programs most effectively protect litigants from the forfeiture of rights; and
3. the adoption of a civil right to counsel where the expansion of the roles of the key players and assistance programs do not provide the necessary help to vulnerable litigants.<sup>122</sup>

With regard to Prong 1, I have explored the need and justification for a revision of the roles of the key players.<sup>123</sup> The rules implicating the analysis are general, and the standard application of the rules governing judges, mediators, and clerks in fact patterns that confront the court personnel daily depends on the custom established in court, not the text of the rules. While judges and clerks historically viewed their roles toward unrepresented litigants passively, the past decade has seen a shift in attitudes. Conferences, trainings, access to justice resolutions, and the work of state access to justice commissions accelerated these trends.<sup>124</sup>

The need to revise the roles of key players flows from needs of the litigants—consumers of the courts—appearing without counsel in vast numbers.<sup>125</sup> The underlying goals of our justice system are to be fair and just. The ethical rules shaping the roles of the players in the adversary system imply that unrepresented litigants are the exception. Given the realities of many of our courts, our traditional understanding of these roles frustrates rather than furthers the goals of fairness and justice. As between abandoning the goal and changing the roles, we should change the roles.

The focus on fairness and justice, in substance and not simply appearance, requires shifting the approach to cases involving unrepresented litigants. We must revise our understanding of what it means to be impartial

and reject the idea that impartiality equals passivity.<sup>126</sup> A system favoring those with lawyers, without regard to the law and facts, is a partial, not impartial, system. Judges, court-connected mediators, and clerks must play an active role to maintain the system's impartiality and ensure that unrepresented litigants do not forfeit rights due to the absence of counsel.<sup>127</sup>

Access to justice or equal justice initiatives speak in sweeping terms consistent with Prong 1. Thus, the Conference of Chief Justices (CCJ) promulgated Resolution 23, titled "Leadership to Promote Equal Justice," which resolved in part to "[r]emove impediments to access to the justice system, including physical, economic, psychological and language barriers."<sup>128</sup> In 2002, the CCJ and Conference of State Court Administrators (COSCA) resolved that "courts have an affirmative obligation to ensure that all litigants have meaningful access to the courts, regardless of [their] representation status."<sup>129</sup>

Prong 2 captures an array of assistance programs beyond the work of court personnel but short of full representation by counsel. Telephone hotlines, self-help centers, pro se offices, advice-only clinics, and court-annexed limited legal services programs all assist unrepresented litigants in the courts.<sup>130</sup> These innovative programs are an important component in the strategy to increase access to justice. Yet, a comprehensive access to justice strategy requires that we evaluate assistance programs carefully. Evaluation tools must identify which programs help stem the forfeiture of rights and which only help the courts run more smoothly, without affecting case outcomes.<sup>131</sup> Programs not affecting case outcomes may be worthwhile, but they are not a solution to the problem of the forfeiture of rights due to the absence of counsel.

When revising the roles of judges, mediators, and clerks and when using assistance programs short of full representation, we can no longer accept the denial of access and routine forfeiture of rights as acceptable outcomes. In those instances, we must recognize and establish a right to appointed counsel in civil cases. The scope of the right to counsel is directly

dependent on the effectiveness of the first two prongs in the access to justice program. The more that judges, mediators, clerks, and assistance programs are effective in stemming the forfeiture of rights due to the absence of counsel, the smaller the pool of cases will be in which counsel is needed. Where nothing short of full representation can provide the needed assistance, the right to counsel must attach.

*B. Using Data to Inform Line Drawing*

The framework for access to justice initiatives should be informed not only by the existing data but also by the identification of research agendas that can help fill gaps in that existing data. Many reports from across the country explore the impact of counsel in various settings that handle civil cases.<sup>132</sup> Reports consistently show that representation is a significant variable affecting a claimant's chances for success in eviction, custody, and debt collection cases, as well as administrative proceedings. Rebecca Sandefur's meta-analysis of studies on the effects of representation reports that "parties represented by lawyers are between 17 percent more likely and 1380 percent more likely to receive favorable outcomes in adjudication than are parties appearing pro se."<sup>133</sup>

While the presence of counsel can dramatically affect case outcomes, that factor is only one variable. Other key variables include the substantive law, the complexity of the procedures, the individual judges, and the overall operation of the forum. The data show that the greater the imbalance of power between the parties, the more likely it is that extensive assistance will be necessary to impact the case outcome. That power or powerlessness can derive from the substantive or procedural law, the judge, or the operation of the forum. Disparities in economic resources, barriers such as those due to race, ethnicity, disability, and language, and the presence of counsel for only one side can affect the calculus as well. The greater the imbalance of power is, the greater the need for a skilled advocate with expertise in the forum to provide needed help.<sup>134</sup>

While gaps in our knowledge suggest the need for additional research, the stakes for unrepresented litigants are too high for us to refrain from acting. Where we can already identify likely starting points for reform, the price of delay outweighs the costs of uncertainty. As we continue to evaluate existing and new programs, developing and considering additional data will provide critical information in helping to identify the most important starting points and the manner in which to respond to those areas of need.

### *C. Using Experimentation to Inform Line Drawing*

#### **1. The Process of Sorting**

Given the importance of identifying starting points, it is helpful to identify discrete steps to undertake in moving the analysis along. An unwillingness to begin with incremental steps runs the risk of achieving no movement at all, as the initiatives get stalled by concerns about the ultimate landscape, or opportunities for potential gains are passed over because of the enormity of the task of achieving a more broad-based right. One approach for identifying starting points is the seven-step strategy I presented at the 2010 Washington Conference and have developed elsewhere:

1. **Identify likely areas in which counsel is most needed.**
2. **Review available data.**
3. **Put 1 and 2 together.** This step involves matching each area identified in Step 1 with available data on the impact of representation in Step 2 to identify core areas in which data demonstrates the importance of counsel. Some areas, such as small claims cases—in which counsel has a big impact—may drop back if the interest at stake does not involve a core area from Step 1. Others, such as eviction cases and custody cases, may move forward—but not necessarily for the entire docket—absent

evidence that power imbalances seem to be extreme across the board.

4. **Identify areas of consensus.** The process of Steps 1 through 3 might produce a list of potential areas where the interest at stake is important and data demonstrates the impact of counsel. However, there might not be consensus in a jurisdiction on the wisdom of moving forward on each area remaining on the list. Since the effort to achieve an expanded civil right to counsel must be recognized as intensely political, Step 4 urges that a promising starting point include areas around which there is consensus.
5. **Obtain estimates as to the volume of cases involved.**
6. **Identify existing resources.**
7. **Identify the best delivery mechanism where new resources are needed.**<sup>135</sup>

Steps such as these allow access to justice communities to begin the difficult but essential process of sorting through specific challenges facing the delivery system. The process of sorting the most ripe cases for an expansion of a right to counsel (Prong 3) necessarily entails leaving entire categories of cases, and subsets of other categories, to a form of assistance less than full representation. However, with a civil right to counsel understood as a component of a larger strategy, the full panoply of options is available, including expanding the roles of key players in the court system (Prong 1) and expanding assistance programs (Prong 2). The full array of access to justice initiatives remains particularly essential to scenarios that do not make the first cut for potential starting points. The focus on data requires a more disciplined analysis of the scope of the problem need by need, court by court, or group by group. The emphasis on evaluation encourages experimentation, but with an eye toward measuring the effectiveness of the assistance received in terms of case outcome, rather than accepting the mere fact of assistance as sufficient.

## 2. The Massachusetts Pilot Projects

Advocates in Massachusetts began the process of experimentation and line drawing through the work of the BBA Task Force on Expanding the Civil Right to Counsel. Created in 2007 in response to the adoption of ABA Resolution 112A (and including members from key statewide leaders in the legal community), the Task Force used a process similar to the seven-step approach to identify subject areas by pairing basic human needs with evidence of the impact of counsel in order to yield starting points in the areas of housing, family, juvenile, and immigration law.<sup>136</sup>

In the area of housing, the Task Force obtained input from judges and advocates, in addition to collecting statistics and relevant data regarding summary process (eviction) cases in housing and district courts—the two types of courts in Massachusetts that handle these cases. To assist unrepresented litigants, the Task Force committee members also read reports and data from around the country on housing, eviction, and homelessness, in addition to interviewing advocates and court personnel about existing programs.

The survey responses, while often indicating a preference for providing representation for all unrepresented tenants, identified scenarios in which the power lined up against the unrepresented litigant was overwhelming, such as evictions related to criminal conduct, scenarios in which governmental agencies were involved in the eviction, or cases in which the litigants were particularly vulnerable. As the Task Force worked to identify discrete areas for representation around which a feasible pilot project could be constructed, tensions emerged with respect to the role of discretion in screening cases, the need to provide some form of assistance for cases not accepted for full representation, and the reality that the housing courts already possessed certain resources (such as Housing Specialists and Tenancy Preservation Projects) that do not exist in the district courts. A final tension involved the potential imbalance in any representation proposal regarding assistance for landlords and tenants.<sup>137</sup>

After weighing the input from all sources and considering the various tensions raised, the Task Force settled on pilot projects which would eventually be launched in one housing court and one district court.<sup>138</sup> As the report explained, the representation proposal resolved the tension between discrete categories and the need for discretion by identifying two specific categories, plus a carefully subscribed discretionary category guided by six explicit factors. The first subsection focuses on potentially the most vulnerable tenants—those with mental disabilities. The second subsection responds to the concerns where criminal behavior is at risk, thus avoiding the anomalous and inefficient situation in which representation is available by right in the criminal context, but not for the related eviction. Subsection three was crafted to guide the careful exercise of discretion—it requires consideration not only of the tenant’s vulnerability, but focuses further on cases in which the landlord is represented, the housing is affordable, and the tenant has potentially meritorious claims and defenses.<sup>139</sup> On the landlord’s side, the goals remained to provide representation for indigent litigants where shelter is at stake and the opposing party is represented. Finally, regarding the tension between crafting a representation proposal and furthering the goal of obtaining at least some assistance for all tenants, the proposal endorses the expanded use of assistance programs throughout the state.<sup>140</sup>

Despite the bleak economic picture, proposals urged by the Task Force moved forward, even if more slowly than was hoped for. Task Force leaders obtained funding to launch Civil Gideon eviction defense pilot projects in the Quincy District Court and the Northeast Housing Court. Because a staff-based model was selected, the project had the dual effect of launching the first pilot projects and cushioning further legal services layoffs.<sup>141</sup> The pilot projects were scheduled to run for a year, beginning in May 2009. The projects were supported by forms of evaluation that included analysis of a randomized study, assessment of the court dockets, efforts to follow

litigants after the period of the study, and interviews with judges, advocates, and other personnel involved.<sup>142</sup>

In the area of family law, the Task Force's work coincided with reforms of the guardianship laws that included the establishment in 2009, by statute, of a right to counsel for elderly people facing guardianship petitions.<sup>143</sup> In the custody area, data collection was key to moving the ball forward. Informal analysis of the dockets in both probate and family courts suggested that the number of custody cases pitting an indigent, unrepresented party against a represented one was smaller than anticipated. This revelation led to renewed planning for a pilot project for this subset of custody cases.<sup>144</sup> In the area of immigration, the private pro bono project "KIND" (Kids in Need of Defense), supported by Microsoft, has collaborated with Greater Boston Legal Services to provide representation for unaccompanied minors in deportation proceedings.<sup>145</sup>

### **3. Other Experimentation**

The Massachusetts pilot projects left the gates first, but they are not the only example of states experimenting with line drawing. The landmark California legislation did not establish a right to counsel, but rather a funding stream to set up pilot projects in support of such a right. Thus, the bill provides that it:

. . . would state the intent of the Legislature to expand the availability of legal counsel in critical civil matters through locally controlled pilot programs designed to test and evaluate new methods for the fair and cost-efficient resolution of legal disputes, and the comprehensive enforcement of vital legal rights, with respect to basic human needs. The bill would state the additional intent of the Legislature to encourage the legal profession to make further efforts to meet its professional responsibilities and other obligations by providing pro bono legal services and financial support of nonprofit legal organizations that provide free legal services to underserved communities.<sup>146</sup>

The process involves a significant amount of time, planning, and establishing criteria for the pilot projects before they are launched and evaluated.<sup>147</sup> The Texas Access to Justice Foundation recently funded two pilot projects: one providing for counsel in nonjudicial foreclosure cases and the other in eviction defense cases.<sup>148</sup>

In a separate initiative, Michael Finigan, Director of Policy Research of Northwest Professional Consortium Research, presented the Civil Right to Counsel Pilot Study Preliminary Results at the Seattle University School of Law Symposium in February 2010.<sup>149</sup> Following the day-long conference entitled “Civil Legal Representation and Access to Justice,” key members of the Washington access to justice community convened in a working session “to arrive at consensus on fundamental principles of a right to civil representation by counsel in Washington” and to “identify next steps toward achieving the goals reflected in the statement of principles.”<sup>150</sup>

#### *D. Drawing the Line by Identifying Starting Points*

The preceding analysis suggests clues as to the types of scenarios that will yield promising starting points for expanding a civil right to counsel. We know that likely subjects will involve the types of basic human needs described in the ABA Resolution: shelter, sustenance, safety, health, and child custody.<sup>151</sup> This section discusses the realities of the dynamics of power, politics, the need for beachheads, and the dynamic nature of the process that might lead to an expanded right to counsel. However wise a particular strategy may seem on the drawing board, these realities will demonstrate the need for flexibility and opportunism along the way.

#### **1. Power Dynamics**

From the available studies of courts, we know that the greater the power imbalance between parties, the greater the level of intervention will be needed for assistance. That dynamic commonly occurs in a variety of cases. Eviction cases pit vulnerable tenants against powerful landlords. Victims of

domestic violence fighting their abusers in custody proceedings are vulnerable as well, particularly where counsel represents the opposing party. The results from surveys of judges demonstrate that scenarios pitting an unrepresented party against a represented one are the most difficult for judges to handle,<sup>152</sup> so solutions from Prong 1 of the comprehensive strategy are unlikely to be effective. Early reports from triage efforts of self-help centers suggest that these are the cases in most need of referrals too.<sup>153</sup>

The concept of identifying power imbalances provided one of the “common threads” that emerged in the BBA Task Force’s selection of pilot projects. As the Report explains, some of the pilots flowed from scenarios that were closely analogous to the criminal context—where physical liberty was at stake—while others “involved the potential loss of basic human needs due to a dramatic power imbalance.”<sup>154</sup> Those power imbalances often flowed from the vulnerability of a family whose basic needs are in jeopardy, as well as the comparative power of an adverse party.<sup>155</sup>

## **2. Politics and Beachheads**

While the identification of power imbalances is a promising and compelling area for expansion, the methodical process described above need not be pursued at the expense of other initiatives. At the Symposium “Civil Legal Representation and Access to Justice” in Washington State, Laura Abel discussed the dynamic nature of the process, including twelve examples of recent state statutes expanding the right to counsel in civil cases.<sup>156</sup> Statutes in the areas of termination of parental rights, child abuse and neglect, special immigrant juvenile status, child custody, and guardianship come from states such as Arkansas, Hawaii, Montana, New York, and Texas.<sup>157</sup>

Litigation has yielded some success as well. The Massachusetts Supreme Judicial Court extended the right to counsel to parents at the dispositional phase of a CHINS (children in need of services) proceeding if the judge is considering awarding custody to the Department of Social Services.<sup>158</sup> In

Alaska, litigation led to the appointment of counsel for an indigent parent in a private custody dispute.<sup>159</sup>

Decisions to pursue legislation or litigation should include a political calculation involving the chances of success and the risks of failure. Failure on the legislative front is less dangerous, since an adverse court decision could result in long-term harm because of the power of precedent. The political nature of the calculation is evident in the seven-step approach, as well, which suggests moving ahead to compelling areas where there is consensus. Political issues, such as the foreclosure crisis and immigration reform, as well as moments of change in priorities or elected officials in the political arena, might yield opportunities to press the case.<sup>160</sup> As Chief Judge Lippmann's recent efforts in New York illustrate,<sup>161</sup> the advent of strong leadership might allow for a more aggressive response to the problem than might previously have been thought feasible.

### **3. The Dynamic Nature of the Process Applied to the Comprehensive Strategy**

The dynamic nature of the process is evident in both the legislative and litigation successes, as well as the broader access to justice strategy articulated in this article. The need for a right to counsel (Prong 3) is tied directly to the effectiveness of the efforts of the court system and assistance programs short of full representation (Prongs 1 and 2). The better the job that the courts do in providing meaningful access, and the more successful limited assistance programs are in affecting case outcomes, the smaller the pool of cases needing counsel.

Yet, those initiatives are dynamic as well. As noted above, in the past decade, those in the court system have significantly changed their approach in cases involve unrepresented litigants. As more judges, court-connected mediators, and clerks accept as part of their role the need to provide meaningful access—and as their supervisors consider those goals in hiring, training, and administrative directives they promulgate—the courts may

become increasingly more effective in delivering access. Richard Zorza's recent call for transforming the courts into access to justice institutions provides one vision of the types of potential changes.<sup>162</sup> As successes are communicated from court to court and state to state, and as techniques are refined, the process will accelerate.

The experimentation, evaluation, and sharing of assistance programs is comparatively new. While legal services programs have been involved in self-help initiatives for years, the focus beyond those programs is a relatively recent event. Evaluation techniques are even less refined. Programs involving unbundling<sup>163</sup> and limited representation are among the newer forms, underscoring the dynamic nature of program evolution, but rendering an even more complicated evaluation and comparison as we analyze the differences among programs.<sup>164</sup> As with Prong 1, the successes we discover with Prong 2 in providing meaningful access with limited assistance will have a direct impact on the scenarios in which full representation seems to be the only meaningful form of assistance.

Apart from the development of new techniques and programs, the evolution of our values and political priorities will affect the expansion of the right to counsel. The language of the ABA Resolution underscores the nature in which the five listed categories are examples of basic human needs in need of protection by counsel.<sup>165</sup> Changes in the substantive law involving healthcare or foreclosure might similarly yield compelling scenarios for expanding the right to counsel. Changes in the procedures of any of our administrative agencies, whose decisions directly and indirectly impact the rights of low-income litigants, will affect the scope of the right as well. Changes that help claimants obtain their needed benefits or relief through the agency process will reduce the need for counsel. Changes that increase the procedural and substantive hurdles will add pressure for an expanded right to counsel to additional areas, scenarios, and litigants.<sup>166</sup>

## CONCLUSION

In its Executive Summary, the Massachusetts BBA Task Force confronted the most common objections to moving forward on an expanded right to counsel:

For too long, the concept of recognizing a civil Gideon has been resisted due to fears that do not comport with the reality of the concept. The concept of a civil Gideon, as understood by members of this Task Force, stands for the basic proposition that where a civil proceeding involves a basic need or right, and nothing short of representation by counsel will preserve that right, counsel must be provided. No one is calling for a lawyer for all litigants in all civil matters. No one is calling for representation by counsel when lesser forms of assistance will do. No one is calling for representation where the rights at issue do not involve basic human needs.<sup>167</sup>

With the fiftieth anniversary of *Gideon* approaching and the pool of unrepresented litigants and unmet needs expanding in the face of an economic downturn, the need to achieve progress in the quest for an expanded civil right to counsel has never been greater. As this article has explored, understanding the civil right to counsel as a component of a broader access to justice strategy—and maintaining a disciplined focus on scenarios involving power imbalances that reflect a breakdown of our adversary system’s proper functioning—are essential pieces to the puzzle. Mining existing data and creating opportunities to enhance our evaluation efforts, and in turn, enriching our understanding of the scenarios in which counsel is most needed, are key components as well. The success of an expanded right to counsel movement might turn less on the ultimate vision of that right and more on the success of finding starting points.

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<sup>2</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>3</sup> See, e.g., *A Right to a Lawyer? Momentum Grows*, 40 CLEARINGHOUSE REV. 167–293 (2006) [hereinafter *Momentum Grows*]; Russell Engler, *Civil Gideon: Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697 (2006) [hereinafter *Civil Gideon*].

<sup>4</sup> Conferences across the country included panels on Civil Gideon as part of the broader discussion of Access to Justice in civil cases. For example, The Sparer Symposium, held on March 28, 2006 and titled “Civil Gideon: Making the Case,” was co-sponsored by Rutgers, Penn, Villanova, and Widener Law Schools, available at <http://www.law.upenn.edu/pic/students/Sparer06Program.pdf>. For information on Washington State’s Access to Justice Conference in 2002, which included a panel dedicated to the topic, see Paul Marvy, “To Promote Jurisprudential Understanding of the Law”: *The Civil Right to Counsel in Washington State*, 40 CLEARINGHOUSE REV. 180 (2006).

<sup>5</sup> See, e.g., Paul Marvy & Debra Gardner, *A Civil Right to Counsel for the Poor*, 32 HUM. RTS. 8, 9 (2005).

<sup>6</sup> See, e.g., *In re Marriage of King*, 174 P.3d 659 (Wash. 2007); *Frase v. Barnhart*, 840 A.2d 144 (Md. 2003); Brief of Petitioner, *Kelly v. Warpinski*, No. 04-2999-0A (Wis. Nov. 17, 2004) (*petition denied* Apr. 6, 2005).

<sup>7</sup> See, e.g., H.B. 2124, 79th Leg. (Tex.), available at <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=79R&Bill=HB2124> (relating to appointment of counsel in appeals of certain eviction suits). Advocates in California are drafting a Model Statute. See Clare Pastore, *The California Model Statute Task Force*, 40 CLEARINGHOUSE REV. 176 (July–August 2006); The State Equal Justice Act, *infra* note 27. Advocates in New York recently expanded the reach of the statutory right to counsel in divorce cases to the Supreme Court and drafted and arranged for the filing of legislation initiatives covering the elderly in eviction and foreclosure cases. See N.Y. JUD. LAW §35(8) (amended September 2006); Manny Fernandez, *Free Legal Aid Sought for the Elderly*, N.Y. TIMES, Nov. 16, 2007, <http://www.nytimes.com/2007/11/16/nyregion/16housing.html>.

<sup>8</sup> The American Bar Association House of Delegates adopted Resolution 112A on August 7, 2006, at its Annual Meeting. See A.B.A., REP. TO THE H.D. 1 (2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>, for the text of the resolution proposed by the ABA Task Force on Access to Civil Justice, which was modified only slightly before adoption by the House of Delegates by inclusion of the final five words (“as determined by each jurisdiction”), <http://www.abanet.org/media/docs/112Arevised.pdf>.

<sup>9</sup> Legal Servs. Corp., *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Sept. 2005), <http://www.lsc.gov/justicegap.pdf> (finding in a 1994 American Bar Association study that virtually “all of the recent state studies found a level of need substantially higher than the level.” *Id.* at 13 (emphasis in original)).

<sup>10</sup> *Id.*

<sup>11</sup> See Alan W. Houseman, *The Future of Civil Legal Aid: A National Perspective*, 10 UDC/DCSL L. REV. 35, 43–46 (2007).

<sup>12</sup> Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2047–48 (1999) [hereinafter *Justice for All*]; see also John M. Greacen, *Self-Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know* (2002), <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/SRLwhatweknow.pdf>; see OFFICE OF THE DEPUTY CHIEF ADMINISTRATIVE JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES—THE RESULTS OF TWO SURVEYS (2005) [hereinafter TWO SURVEYS], for a survey of litigants in New York City finding that 75 percent of the litigants in the New York City Family Court and 90 percent of the tenants in Housing Court appeared without counsel.

<sup>13</sup> E.g., Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 41 (2010) [hereinafter *Connecting Self-Representation*].

<sup>14</sup> See, e.g., *id.*; JONA GOLDSCHMIDT ET AL., AMERICAN JUDICATURE SOC'Y & STATE JUSTICE INST., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS (1998) [hereinafter MEETING THE CHALLENGE]; Greacen, *supra* note 12; TWO SURVEYS, *supra* note 12 (finding that, in New York City, 79 percent of the self-represented litigants in Family and Housing Courts were African American or Hispanic. *Id.* at 3. Regarding income, 21 percent had incomes below \$10,000, an additional 36 percent had incomes between \$10,000 and \$20,000, and another 26 percent had incomes between \$21,000 and \$30,000; thus 83 percent of the self-represented litigants had incomes below \$30,000. *Id.* at 4. Spanish-speaking litigants had less formal education than English-speaking litigants. *Id.*).

<sup>15</sup> See, e.g., TWO SURVEYS, *supra* note 12, at 7 (60 percent of the litigants reported that they could not afford counsel); *Connecting Self-Representation*, *supra* note 13, at 41; Boston Bar Ass'n, *Boston Bar Association Task Force on Unrepresented Litigants Report*, 17 (1998), <http://www.bostonbar.org/prs/reports/unrepresented0898.pdf> ("Most of the unrepresented litigants [in the Boston Housing Court] reported that they wanted an attorney but felt they could not afford one."); N.H. Sup. Ct. Task Force on Self-Representation, *Challenge to Justice: A Report on Self-Represented Litigants in New Hampshire*, 2 (Jan. 2004), available at <http://www.ajs.org/prose/pdfs/NH%20report.pdf> ("A sample of self-represented litigants in New Hampshire showed that most of them were in court on their own because they could not afford to hire or continue to pay a lawyer.").

<sup>16</sup> For a discussion and analysis of many of the studies showing the impact of counsel on case outcomes, see generally *Connecting Self-Representation*, *supra* note 13.

<sup>17</sup> *Id.*; MEETING THE CHALLENGE, *supra* note 14, at 8.

<sup>18</sup> For examples of conferences addressing the issue of unrepresented litigants, see THE NATIONAL CONFERENCE ON SELF-REPRESENTED LITIGANTS APPEARING IN COURT (Scottsdale, AZ, 1999); THE CHANGING FACE OF LEGAL PRACTICE: A NATIONAL CONFERENCE ON UNBUNDLED LEGAL SERVICES (Baltimore, MD, 2000); THE MASSACHUSETTS STATEWIDE CONFERENCE ON UNREPRESENTED LITIGANTS

(Worcester, MA, 2001); NEW YORK STATE UNIFIED COURT SYSTEM ACCESS TO JUSTICE CONFERENCE (Albany, NY, 2001); THE EASTERN REGIONAL CONFERENCE ON ACCESS TO JUSTICE FOR THE SELF-REPRESENTED LITIGANT (White Plains, NY, 2006).

For examples of publications by the American Judicature Society and State Justice Institute, see MEETING THE CHALLENGE, *supra* note 14, at 15; Rebecca A. Albrecht, John M. Greacen, Bonnie Rose Hough & Richard Zorza, *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGES' J. 16 (Winter 2003); CYNTHIA GRAY, AMERICAN JUDICATURE SOC'Y & STATE JUSTICE INST., REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS (2005), <http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf>. For other examples of publications, see Richard Zorza, *The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers*, The Nat'l Ctr. for St. Cts. (2002), available at [http://www.lri.lsc.gov/pdf/03/030111\\_selfhelpct.pdf](http://www.lri.lsc.gov/pdf/03/030111_selfhelpct.pdf).

For information on the web, see *AJS [American Judicature Society] – Publications and Resources*, AMERICAN JUDICATURE SOCIETY, [http://www.ajs.org/prose/pro\\_resources.asp](http://www.ajs.org/prose/pro_resources.asp) (last visited Oct. 8, 2010) (providing pro se resources); *Self Help Support*, SELFHELPSUPPORT.ORG, <http://www.selfhelpsupport.org> (last visited Oct. 8, 2010) (serving as a network for practitioners of self-help programs, and is funded by the State Justice Institute); *SRLN*, SELF-REPRESENTED LITIGATION NETWORK, <http://www.srln.org> (last visited Oct. 8, 2010).

<sup>19</sup> See, e.g., Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L., ETHICS & PUB. POL'Y 367 (2008) [hereinafter *Ethics in Transition*]; *Justice for All*, *supra* note 12; MEETING THE CHALLENGE, *supra* note 18, at 4; *Reaching Out or Overreaching*, *supra* note 18; see John M. Greacen, *Legal Information vs. Legal Advice—Developments During the Last Five Years*, 84 JUDICATURE 198 (Jan.–Feb. 2001), available at [http://www.ajs.org/prose/pro\\_greacen.asp](http://www.ajs.org/prose/pro_greacen.asp); Albrecht, *supra* note 18.

<sup>20</sup> See, e.g., Houseman, *supra* note 11, at 40–43; *Justice for All*, *supra* note 12, at 2000–1. See *supra* note 18, for resources available on the web.

<sup>21</sup> See, e.g., NAT'L CONF. OF STATE COURT ADM'RS, POSITION PAPER ON SELF-REPRESENTED LITIGATION (Aug. 2000), available at <http://costa.ncsc.dni.us/WhitePapers/selfrepresentation.pdf> (calling on the courts to provide access to justice for those without counsel); See CONF. OF CHIEF JUSTICES, RES. 23: LEADERSHIP TO PROMOTE EQUAL JUSTICE (January 21, 2001), available at <http://ccj.ncsc.dni.us/AccessToJusticeResolutions/resol23Leadership.html> (resolving in part to “[r]emove impediments to access to the justice system, including physical, economic, psychological and language barriers.”); see CONF. OF CHIEF JUSTICES, RES. 31: IN SUPPORT OF A LEADERSHIP ROLE FOR CCJ AND COSCA IN THE DEVELOPMENT, IMPLEMENTATION AND COORDINATION OF ASSISTANCE PROGRAMS FOR SELF-REPRESENTED LITIGANTS (Aug. 1, 2002), available at [http://www.ncsconline.org/WC/Publications/Res\\_ProSe\\_CCJCOSCAResolution31Pub.pdf](http://www.ncsconline.org/WC/Publications/Res_ProSe_CCJCOSCAResolution31Pub.pdf) (jointly resolving that “courts have an affirmative obligation to ensure that all litigants have meaningful access to the courts, regardless of representation status.”).

<sup>22</sup> See, e.g., EASTERN REGIONAL CONFERENCE, *supra* note 18; NEW YORK STATE UNIFIED COURT SYSTEM, *supra* note 18.

<sup>23</sup> Karla M. Gray & Robert Echols, *Mobilizing Lawyers, Judges and Communities: State Access to Justice Commissions*, 47 No. 3 JUDGES J. 33 (2008). Although only five states had access to justice commissions in 1999, the number had increased to twenty-three by June, 2006. More than a dozen additional states had an active committee of the state bar or bar association that is charged with the broad access to justice function. See *Access to Justice Partnerships, State by State*, SPAN Access to Justice Support Project, at 1 (May 2005), [http://www.nlada.org/Civil/Civil\\_SPAN/SPAN\\_Report](http://www.nlada.org/Civil/Civil_SPAN/SPAN_Report); Press Release and Order of the Mississippi Supreme Court (June 29, 2006), <http://www.nlada.org/DMS/Documents/1153319338.13/MS%20%20ATJ%20Commission%20order%20and%20press%20rel.pdf>.

<sup>24</sup> Robert Echols, *The Rapid Expansion of "State Access to Justice Commissions,"* MGMT. INFO. EXCHANGE J., 42 (Special Feature: 20th Anniversary Insights 2005). The Commissions are created by order of the state supreme courts, and the stakeholders typically include the courts, organized bar, civil legal aid providers, and law schools. See *id.*

<sup>25</sup> *Id.*

<sup>26</sup> Bos. Bar Ass'n, *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts* (2008) [hereinafter *Gideon's New Trumpet*], available at [http://www.bostonbar.org/prs/nr\\_0809/GideonsNewTrumpet.pdf](http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf). See Kelsey Sadoff, *Civil Gideon Symposium Mobilizes Legal Community*, 15 MASS. BAR. ASSOC. LAW. J. 3, at 6 (Nov. 2007), available at <http://www.massbar.org/media/228975/nov%2007.pdf>, for a description of the joint Boston Bar Association (BBA) and Massachusetts Bar Association conference to begin implementing the resolution.

<sup>27</sup> See Pastore, *supra* note 7. The two model statutes are The State Equal Justice Act (2006), available at [http://www.brennancenter.org/page/-/d/download\\_file\\_38656.pdf](http://www.brennancenter.org/page/-/d/download_file_38656.pdf); and The State Basic Access Act (2008), available at [http://brennan.3cdn.net/c8d7c0be3acc133d7a\\_s8m6ii3y0.pdf](http://brennan.3cdn.net/c8d7c0be3acc133d7a_s8m6ii3y0.pdf).

<sup>28</sup> See Carol J. Williams, *California gives the poor a new legal right*, L.A. TIMES, Oct. 17, 2009, available at <http://www.latimes.com/news/local/la-me-civil-gideon17-2009oct17,0,7682738.story>. Assembly Bill 590, creating the pilot projects, was signed into law by Governor Schwarzenegger on October 11, 2009. A.B. 590, 2009-10 Leg., Reg. Sess. (Cal. 2009), available at [http://leginfo.ca.gov/pub/09-10/bill/asm/ab\\_0551-0600/ab\\_590\\_bill\\_20091011\\_chaptered.pdf](http://leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_590_bill_20091011_chaptered.pdf). See also Note, *California Establishes Pilot Programs to Expand Access to Counsel for Low-Income Parties*, 123 HARV. L. REV. 1532 (2010). See generally The State Equal Justice Act, *supra* note 27; The State Basic Act, *supra* note 27.

<sup>29</sup> See Stephen H. Sachs, *Keynoted Address: Seeking a Right to Counsel in Appointed Civil Cases in Maryland*, 37 U. BALT. L. REV. 21 (2007).

<sup>30</sup> Phila. Bar Ass'n, *Resolution Calling for the Provisions of Legal Counsel for Indigent Persons in Civil Matters Where Basic Human Needs Are at Stake* (Apr. 30, 2009), available at <http://www.pabar.org/public/probono/PhiladelphiaBarCivil%20Gideon%20Resolution4-30-09.pdf>.

<sup>31</sup> The proceedings and related articles are published in the Symposium volume, *An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State*, 25 TOURO L. REV. 1 (2009).

<sup>32</sup> See Jonathan Lippman, Chief Judge, N. Y. Ct. App., Address before the Central Synagogue of New York: Justice Shall You Pursue: The Chief Judge's Perspective on Justice and Jewish Values (Feb. 5, 2010) (on file with author) ("The time has come for New York State to make good on its promise of Gideon and ensure that there is a right to counsel at public expense in at least those cases where basic human needs are at stake, like shelter, sustenance, safety, health and children."); see Daniel Wise, *Lippman Names 28 to Task Force to Expand Access to Legal Services*, N.Y. L.J., June 10, 2010, available at [http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202462459386&Lippman\\_Names\\_\\_to\\_Task\\_Force\\_to\\_Expand\\_Access\\_to\\_Legal\\_Services&slreturn=1&hbxlogin=1](http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202462459386&Lippman_Names__to_Task_Force_to_Expand_Access_to_Legal_Services&slreturn=1&hbxlogin=1), regarding the creation of the task force.

<sup>33</sup> See, e.g., New York State Unified Court System, *supra* note 18; see *An Obvious Truth*, *supra* note 31, for a summary of the proceedings at the New York conference; Symposium, *Civil Legal Representation and Access to Justice: Breaking Point or Opportunity to Change* (Feb. 19, 2010), [http://www.law.seattleu.edu/Continuing\\_Legal\\_Education/Event\\_Archives/2010/Korematstu.xml](http://www.law.seattleu.edu/Continuing_Legal_Education/Event_Archives/2010/Korematstu.xml) (last visited Oct. 8, 2010) (The symposium was jointly sponsored by the Korematsu Center for Law and Equality at Seattle University School of Law, University of Washington School of Law, and Gonzaga University School of Law.); Justice Earl Johnson, Jr., Three Phases of Justice for the Poor: From Charity to Discretion to Right, Address Before the Pathways to Justice Conference (June 7, 2008), in 42 CLEARINGHOUSE REV. 486 (Jan.–Feb. 2009); see also Robert J. Derocher, *Access to Justice: Is Civil Gideon a Piece of the Puzzle?*, B. LEADER 11 (A.B.A., July–Aug. 2008).

<sup>34</sup> See, e.g., Debra Garnder, *Pursuing a Right to Counsel in Civil Cases: Introduction and Overview*, 40 CLEARINGHOUSE REV. 167, 169 (2006).

<sup>35</sup> See John Pollack, *Getting Off the Ground: Addressing Implementation of a Right to Counsel in Civil Cases*, XIV(2) MGMT. INFO. EXCH. 6 (2010) (describing the struggle in the drafting and approval process of the Model Act to provide for lesser forms of assistance than full representation, but then to insert both a requirement that the impact be equivalent and a presumption that the lesser forms are insufficient).

<sup>36</sup> See e.g., Lonnie Powers et al., *Key Questions and Considerations Involved in State Deliberations Concerning an Expanded Civil Right to Counsel*, XXIV(2) MGMT. INFO. EXCH. 16 (2010).

<sup>37</sup> The current economic crisis, with its attendant problems of high unemployment, home foreclosures and family stress, has resulted in legal problems relating to consumer credit, housing, employment, bankruptcies, domestic violence and child support, and has pushed many families into poverty for the first time. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, AN UPDATED REPORT OF THE LEGAL SERVICES CORPORATION 5 (Sept. 2009) [hereinafter THE JUSTICE GAP, UPDATED REPORT], available at [http://www.lsc.gov/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf).

<sup>38</sup> See, e.g., David Riley, *Free Legal Services Suffering as Demand Rises*, METROWEST DAILY NEWS, June 28, 2009 (describing increased demand for legal services, combined

with cutbacks affecting legal services offices in Massachusetts, including MetroWest Legal Services), available at <http://www.metrowestdailynews.com/news/x768070132/Free-legal-services-suffering-as-demand-rises>; Jimmie E. Gates, *Legal Program for Poor May See Layoffs, Cutbacks*, THE CLAIRION-LEDGER, June 29, 2009, at A5 (describing increased demand for and cutbacks to legal services in Mississippi.).

<sup>39</sup> While a long-term trend of increased state funding for civil legal aid has continued, budget crises have put this funding at risk in some states. Revenues from state Interest on Lawyers' Trust Accounts (IOLTA) programs rose in some states with new revenue enhancement techniques, but have recently fallen precipitously in many states as a result of low interest rates and the declining economy, reducing trust account deposits. See THE JUSTICE GAP, UPDATED REPORT, *supra* note 37.

<sup>40</sup> *Id.*

<sup>41</sup> See generally Marvy, *supra* note 4.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 182.

<sup>44</sup> *Id.* at 185. Paul Marvy began working in this position in February, 2005. Paul Marvy, *Working for a Sort-of Gideon, on the Civil Side*, 20 DE NOVO, THE OFFICIAL PUBL'N OF THE WASH. ST. B. ASS'N YOUNG LAW. DIVISION 4 (2006), available at <http://www.wsba.org/media/publications/denovo/0406denovo.pdf>.

<sup>45</sup> See, e.g., Marvy, *supra* note 4; Deborah Perluss, *Keeping the Eyes on the Prize: Visualizing the Civil Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 719 (2006); James A. Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 SEATTLE J. FOR SOC. JUST. 383 (2005); Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 SEATTLE J. FOR SOC. JUST. 571 (2004).

<sup>46</sup> See, e.g., *Bellevue Sch. Dist. v. E.S.*, 199 P.3d 1010 (Wash. Ct. App. 2009); *In re Custody of Halls*, 109 P.3d 15 (Wash. Ct. App. 2005); *City of Moses Lake v. Smith*, No. 01-2-00766-8 (Wash. Superior Ct., Grant Cty.); *King v. King*, 174 P.3d 659 (Wash. 2007); *Machado v. Ashcroft*, No. CS-02-0066-FVS (E. D. Wash., filed June 18, 2002); Marvy, *supra* note 4, at 182–85.

<sup>47</sup> WASH. GEN. APPLICATION CT. R. 33(a)(1)(c) (Requests for Accommodation by Persons with Disabilities).

<sup>48</sup> Kellye Y. Testy, *Civil Legal Representation and Access to Justice in Washington—An Invitation to an Important Conversation*, WASH. STATE BAR NEWS, Feb. 2010, available at <http://www.wsba.org/media/publications/barnews/feb10-civillegalrepresentation.htm>. EXECUTIVE SUMMARY, THE WASHINGTON STATE CIVIL LEGAL NEEDS STUDY (Sept. 2003), [http://allianceforequaljustice.org/downloads/civil\\_legal\\_needs\\_study.pdf](http://allianceforequaljustice.org/downloads/civil_legal_needs_study.pdf)

<sup>49</sup> Testy, *supra* note 48.

<sup>50</sup> See Symposium, *supra* note 33 (Chief Justice Barbara Madsen delivered the keynote address). The Conference materials are available online at [http://civilrighttocounsel.org/news/recent\\_developments/38](http://civilrighttocounsel.org/news/recent_developments/38).

<sup>51</sup> *Gideon*, 372 U.S. at 342 (incorporating the Sixth Amendment into the Due Process Clause in felony cases), *overruling* *Betts v. Brady*, 316 U.S. 455 (1942) (concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights).

<sup>52</sup> See generally *Lassiter v. Dept. of Soc. Services*, 452 U.S. 18 (1981) (holding that the due process clause does not require appointment of counsel for indigent parents in all termination of parental rights cases).

<sup>53</sup> Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967). Although the note itself does not reflect Professor Grey's authorship, Justice Fuchsberg made the connection in his dissent in the landmark New York case, *In re Smiley*, referring to this article as the "now classic Note [of] Stanford University Law Professor Thomas Grey." *In re Smiley*, 36 N.Y.2d 433, n.6 (1975) (Fuchsberg, J., dissenting).

<sup>54</sup> *The Indigent's Right to Counsel in Civil Cases*, supra note 53, at 549.

<sup>55</sup> *Id.* at 547–51.

<sup>56</sup> See generally *Betts v. Brady*, 316 U.S. 455 (1942).

<sup>57</sup> *The Indigent's Right to Counsel in Civil Cases*, supra note 53, at 553.

<sup>58</sup> *Id.* at 553–54.

<sup>59</sup> *Id.* at 555.

<sup>60</sup> *Id.* at 556.

<sup>61</sup> *Id.* at 556–58.

<sup>62</sup> *Id.* at 552.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See generally *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>66</sup> See generally *Betts*, supra note 56.

<sup>67</sup> See generally *Douglas v. California*, 372 U.S. 363 (1963).

<sup>68</sup> Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLORIDA L REV. 1227 (2010).

<sup>69</sup> *Id.* at 1238–41.

<sup>70</sup> *Id.* at 1251–62.

<sup>71</sup> Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (July–August 2006).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 245–46.

<sup>75</sup> *Id.* at 247–48.

<sup>76</sup> Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186 (2006).

<sup>77</sup> *Id.* at 190.

<sup>78</sup> *Id.* at 190–91.

<sup>79</sup> *Id.* at 190.

<sup>80</sup> See, e.g., Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS 699 (2006); Rachel Kleinman, Comment, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507 (2004); see also 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 (1988); Frances E. Werner, *Toward a Right to Counsel for Indigent Tenants in Eviction Proceedings*, NAT'L HOUS. LAW PROJECT HOUSING L. BULL. (Sept.–Oct. 1987).

<sup>81</sup> See, e.g., William S. McAninch, *A Constitutional Right to Counsel for Divorce Litigants*, 14 J. FAM. L. 509 (1975–76); In re Smiley, *supra* note 53.

<sup>82</sup> See, e.g., Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 TOURO L. REV. 247 (1997).

<sup>83</sup> See, e.g., Sharon Finkel, *Voices of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105 (2001).

<sup>84</sup> REP. TO THE H.D., *supra* note 8.

<sup>85</sup> N.Y. City Council, INT. NO. 648, *Provision of Legal Services in Eviction, Ejectment and Foreclosure Proceedings* (Oct. 24, 2007), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=451623&GUID=CAD2F1A6-C518-49E1-BB7540C8B2CC1624&Options=ID|Text|Attachments|&Search=648>; See also Manny Fernandez, *Free Legal Aid Sought for the Elderly*, N.Y. TIMES, Nov. 16, 2007, <http://www.nytimes.com/2007/11/16/nyregion/16housing.html>.

<sup>86</sup> For example, in Massachusetts, the private pro bono project “KIND” (Kids in Need of Defense), supported by Microsoft, has collaborated with Greater Boston Legal Services to provide representation for unaccompanied minors in deportation proceedings. Articles describing the KIND project are available on the project’s website at <http://www.supportkind.org/>. The project involves a collaboration between Microsoft and Angelina Jolie, among others. See, e.g., *'Kids in Need of Defense' (KIND) Launched by Microsoft, Angelina Jolie, Major Law Firms and Corporate Legal Departments* HISPANIC BUS. (Oct. 17, 2008), available at [http://www.hispanicbusiness.com/pr\\_newswire/2008/10/17/kids\\_in\\_need\\_of\\_defense\\_kind.htm](http://www.hispanicbusiness.com/pr_newswire/2008/10/17/kids_in_need_of_defense_kind.htm) [hereinafter *Kids in Need of Defense*].

<sup>87</sup> WASH. GEN. APPLICATION CT. R., *supra* note 47.

<sup>88</sup> See MASS. GEN. LAWS ch. 109B, § 5-106 (2009):

After filing of a petition for appointment of a guardian, conservator or other protective order, if the ward, incapacitated person or person to be protected or someone on his behalf requests appointment of counsel; or if the court determines at any time in the proceeding that the interests of the ward, incapacitated person or person to be protected are or may be inadequately represented, the court shall appoint an attorney to represent the person, giving consideration to the choice of the person if 14 or more years of age. *Id.*

<sup>89</sup> The State Equal Justice Act, *supra* note 27.

<sup>90</sup> *The Indigent’s Right to Counsel in Civil Cases*, *supra* note 53.

<sup>91</sup> See generally Pastore, *supra* note 7.

<sup>92</sup> See Pastore, *supra* note 7, at 178; The State Equal Justice Act, *supra* note 27, at §§301, 305 (regarding Full Public Legal Representation, and Non-lawyer Representation, respectively, both using the term “forum” to include context beyond the courts.).

<sup>93</sup> See Pastore, *supra* note 7, at 178; The State Model Act, *supra* note 27, at §§ 301.1, 301.2.

<sup>94</sup> See Pastore, *supra* note 7, at 178–79; The State Equal Justice Act, *supra* note 27, at §301.4.

<sup>95</sup> See Pastore, *supra* note 7, at 178; THE State Equal Justice Act, *supra* note 27, at §§302–06.

<sup>96</sup> See e.g., Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1236–38 (2002).

<sup>97</sup> The State Basic Access Act, *supra* note 27.

<sup>98</sup> *Id.* at § 205.

<sup>99</sup> *Id.* at § 300–04.

<sup>100</sup> AMERICAN BAR ASS'N, ABA MODEL ACCESS ACT & ABA BASIC PRINCIPLES OF A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS (2010), available at <http://www.abanet.org/legalservices/sclaid/> (visited Oct. 8, 2010). As John Pollack explains, the draft Act is intended as a companion piece to the ABA's Standing Committee on Legal Aid and Indigent Defense (SCLAID)'s document entitled, "Basic Principles of a Right to Counsel in Civil Legal Matters." The Basic Principles document follows up on the "ABA Principles of a State System for the Delivery of Civil Legal Aid" document that was adopted by the ABA House of Delegates in 2006. See Pollack, *supra* note 35.

<sup>101</sup> *Id.* The exclusions include situations such as those where parties are not allowed to be represented by licensed professionals, if legal representation is already provided, and if, under standards established by the State Access Board, limited legal assistance is sufficient to preserve the basic human needs at stake. See ABA MODEL ACCESS ACT, *supra* note 100, at §3.B.iii.

<sup>102</sup> See *American Bar Association adopts Criminal Justice, Preemption and Civil Gideon Policies* (Aug. 9, 2010), available at <http://www.abanow.org/2010/08/american-bar-association-adopts-criminal-justice-preemption-and-civil-gideon-policies/> ("Revisions to the recommendation centered on child custody cases, and the needs of such cases from jurisdiction to jurisdiction."). The revisions are available online at <http://www.abanow.org/2010/07/am-2010-104/> (last visited Aug. 11, 2010).

While opposition emerged during the drafting process of the Model Act, the primary opposition was framed primarily in terms of opposition to the Model Act approach itself, rather than to particular lines being drawn. See, e.g. Letter of Jo Ann Wallace and Don Saunders, NLADA (June 30, 2010) ("... we continue to maintain one overriding concern with the current approach to the resolutions . . . [w]e strongly support the basic concept underscoring the entire movement toward a civil right to counsel—that each state and jurisdiction needs to decide on its own regarding the particular strategies . . . this critical principle is substantially undercut by the current characterization of the draft legislation as a 'Model Act.'"). See also Powers et al., *supra* note 36, at 16.

<sup>103</sup> See Memorandum in Support of Petition Requesting that the Supreme Court Take Jurisdiction of an Original Class Action for Declaratory Judgment, Kelly, *supra* note 6, at 23. A summary of the case is reported at 39 CLEARINGHOUSE REV. 769 (2005).

<sup>104</sup> *Frase v. Barnhart* 840 A.3d 114 (2003).

<sup>105</sup> Brief of Appellant, *Frase*, *supra* note 6, at 54, available at <http://www.povertylaw.org/poverty-law-library/case/55300/55347>.

<sup>106</sup> This is the context of litigation in Washington State seeking to establish such a right. See *Machado v. Ashcroft*, No. CS-02-0066-FVS (E.D. Wash. Mar. 14, 2002). According to counsel involved in the efforts to obtain class-wide relief, the *Machado* Court granted the temporary restraining order, ordering that counsel be assigned, before the plaintiff elected to return voluntarily; the court subsequently granted the government's motion to

dismiss. E-mail from Matt Adams, Legal Director, Northwest Immigrant Rights Project, to author (June 18, 2007, 14:07:07 EST) (on file with author). See also Finkel, *supra* note 83;

Even immigration judges recognize the need for appointment of counsel for unaccompanied minors: “What is necessary, then, to insure fairness for the unaccompanied juvenile who appears in Immigration Court charged with being removable from the United States? . . . Because Immigration Court proceedings are essentially legal in nature, the first and most obvious answer to that question seems to be that legal representation be made available for the juvenile alien.”

Machado, No. CS-02-0066-FVS, at 11 (quoting Michael F. Rahill, OFFICE OF THE CHIEF IMMIGRATION JUDGE, WHAT CHILD IS THIS? HOW IMMIGRATION COURTS RESPOND TO UNACCOMPANIED MINORS 11 (2000)).

<sup>107</sup> *Id.*

<sup>108</sup> Brief of Amici Curiae, *Frase v. Barnhart*, *supra* note 6, at 29, available at <http://www.povertylaw.org/poverty-law-library/case/55300/55347>.

<sup>109</sup> King, *supra* note 6.

<sup>110</sup> *Id.* at 672–76.

<sup>111</sup> *Id.* at 673.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 674.

<sup>114</sup> *Id.* at 661.

<sup>115</sup> *Id.*; Brief of Appellant, *King v. King*, *supra* note 6, at 17–50, available at <http://www.povertylaw.org/poverty-law-library/case/56000/56032>.

<sup>116</sup> Motion for Leave to File Amicus Curiae Brief on Behalf of National Coalition for a Civil Right to Counsel, *King v. King*, *supra* note 6, at 13, available at <http://www.povertylaw.org/poverty-law-library/case/56000/56032>.

<sup>117</sup> Brief of Appellant, *King v. King*, *supra* note 6, at 25, available at <http://www.povertylaw.org/poverty-law-library/case/56000/56032>. The brief added that where the opposing party is represented by counsel, that is a “factor to consider under the fourth prong of the test.” *Id.* at 25, n.8.

<sup>118</sup> *Id.* at 50.

<sup>119</sup> *The Indigent’s Right to Counsel in Civil Cases*, *supra* note 53, at 552.

<sup>120</sup> See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (Alfred A. Knopf 1976).

<sup>121</sup> See e.g., Russell Engler, *Towards a Context-Based Civil Gideon Through “Access to Justice” Initiatives*, 40 CLEARINGHOUSE REV. 196, 198 (July-Aug. 2006) [hereinafter *Towards a Context*]; Houseman, *supra* note 11, at 62–67; see generally *Momentum Grows*, *supra* note 3.

<sup>122</sup> *Towards a Context*, *supra* note 121, at 198–202. For a discussion of the importance of understanding the civil Gideon initiative as an exercise in effectuating social change rather than framing legal claims, see generally *Civil Gideon*, *supra* note 3.

<sup>123</sup> See generally *Justice for All*, *supra* note 12.

<sup>124</sup> See generally *Ethics in Transition*, *supra* note 19.

<sup>125</sup> *Id.* at 367–68, nn. 1 & 5. For a compilation of recent data across the country, see THE JUSTICE GAP, UPDATED REPORT, *supra* note 37, at 23–26.

<sup>126</sup> See, e.g., MEETING THE CHALLENGE, *supra* note 14, at 28–29.

<sup>127</sup> *Justice for All*, *supra* note 12, at 1992–98, 2007–40.

<sup>128</sup> See RES. 23, *supra* note 21.

<sup>129</sup> See RES. 31, *supra* note 21. The joint resolution also endorsed COSCA’s Position Paper on Self-Represented Litigation. *Id.*

<sup>130</sup> See *Justice for All*, *supra* note 12, at 1998–2007.

<sup>131</sup> For a discussion and analysis of the studies, see *Connecting Self-Representation*, *supra* note 13, at 66–73.

<sup>132</sup> *Id.*

<sup>133</sup> Rebecca Sandefur, Elements of Expertise: Lawyers’ Impact on Civil Trial and Hearing Outcomes 24 (Mar. 26, 2008) (unpublished manuscript, under review) (on file with author).

<sup>134</sup> See generally *Connecting Self-Representation*, *supra* note 13.

<sup>135</sup> I discuss these factors in my article, *Pursuing Access to Justice and Civil Right to Counsel in a Time of Economic Crisis*, 15 ROGER WILLIAMS U. L. REV. 472 (2010) [hereinafter *Pursuing Access*]. This approach is similar to the one I suggested at the Joint MBA/BBA Civil Gideon Symposium, held in October 2007. For a description of the Symposium, see *Civil Gideon Symposium mobilizes legal community behind equal justice in law*, MASS. L. J. available at <http://www.massbar.org/for-attorneys/publications/lawyers-journal/2007/november/civil-gideon-symposium-mobilizes-legal-community-behind-equal-justice-in-law>.

<sup>136</sup> *Gideon’s New Trumpet*, *supra* note 26. The Task Force’s Report describes the Justice Gap in Massachusetts, the Task Force’s process, work of the Committees, Committee reports and recommendations, and an explanation of the background and creation of the Task Force. *Id.* at 3–7.

<sup>137</sup> For a more detailed description of the process undertaken by the Housing Committee, see *Id.* at 9–10.

<sup>138</sup> News Release, Boston Bar Ass’n, Boston Bar Proposal to Prevent Homelessness Gets Grant from Boston Foundation (Jan. 7, 2009), available at [http://www.bostonbar.org/prs/nr\\_0809/BostonFoundationGrant010709.htm](http://www.bostonbar.org/prs/nr_0809/BostonFoundationGrant010709.htm).

The precise wording of the proposed pilot projects is as follows:

“Pilot Project for A Right to Counsel in Certain Eviction Cases”

I. Representation Proposal

A. Legal counsel shall be provided for indigent tenants in the following eviction cases:

1. Cases involving household members with mental disabilities where the disability is directly related to the reason for eviction; or
2. Cases involving criminal conduct (including cases brought pursuant to M.G.L. c. 139, sec. 19 and those brought as summary process cases); or
3. Cases in which, in the discretion of the judge, the absence of representation for the tenant will lead to a substantial denial of

justice. In the exercise of judicial discretion, judges shall consider the following factors:

- i. Factors relating to a tenant's vulnerability, such as disability, domestic violence, education, language, culture or age;
  - ii. Factors relating to the landlord, such as whether the landlord controls a large or small number of units, whether the landlord is legally sophisticated, whether the landlord is represented by counsel, and whether the landlord lives in the building;
  - iii. The affordability of the unit for the tenant, including whether the unit is in public or subsidized housing;
  - iv. Whether there appear to be cognizable defenses or counterclaims in the proceeding;
  - v. Whether the loss of shelter might jeopardize other basic needs of the tenant, such as safety, sustenance, health or child custody;
  - vi. Other indicia of power imbalances between the parties.
- B. Legal counsel shall be provided for indigent landlords where:
1. The landlord resides in the building that is the subject of the eviction proceeding;
  2. The landlord owns no other interest in real property;
  3. The tenant is represented by counsel; and
  4. The landlord's shelter is at stake in the proceeding.

II. Proposals complementing the Representation Proposal

- A. We will further recommend that the proposal above be supplemented with the expansion of assistance programs, such as lawyer of the day programs for both tenants and landlords in all Housing and District Courts, to reach all eligible litigants seeking assistance.”

*Gideon's New Trumpet*, *supra* note 26, at 9–10.

<sup>139</sup> Although the proposal was framed in terms of the exercise of “judicial” discretion, since the pilots that received funding were staff-based models within legal services programs, the programs exercised the discretion. *Id.*

<sup>140</sup> *Id.* at 10–11.

<sup>141</sup> See Boston Bar Proposal, *supra* note 138.

<sup>142</sup> *MA. Launches Civil Right to Counsel Pilot Projects*, CIV. RIGHT TO COUNS. UPDATE (Nat'l Coal. for a Civil Right to Counsel), June 2009, at 2–3, available at <http://www.civilrighttocounsel.org/pdfs/June%202009%20CRC%20Update%20no.4.pdf>.

<sup>143</sup> See MASS. GEN. LAWS, *supra* note 88.

<sup>144</sup> The author is a member of the Task Force discussing the initiatives. The request for custody proposals was released to the public in October 2010 (on file with author).

<sup>145</sup> See *Kids in Need of Defense*, *supra* note 86. Articles describing the KIND project are available on the project's website, at <http://www.supportkind.org/>.

<sup>146</sup> A.B. 590, *supra* note 28. The bill was signed into law by Governor Schwarzenegger on October 11, 2009.

<sup>147</sup> *Pilot Program*, *supra* note 28, at 1537.

- <sup>148</sup> See *Advances, Pilots*, Nat'l Coal. for a Civil Right to Counsel, <http://www.civilrighttocounsel.org/advances/pilots/> (last visited Oct. 16, 2010).
- <sup>149</sup> The Conference materials, including Mr. Finigan's PowerPoint slides, are available online at <http://www.law.seattleu.edu/Documents/cle/archive/2010/Session%202.pdf>.
- <sup>150</sup> Invitation from Mr. Finigan to Working Session (Feb. 2010) (Symposium, *supra* note 33) (on file with author).
- <sup>151</sup> REP. TO THE H.D., *supra* note 8.
- <sup>152</sup> *Ethics in Transition*, *supra* note 19, at 372.
- <sup>153</sup> E.g., Telephone Interview with Bonnie Rose Hough, Judicial Council of California, Administrative Office of the Courts, San Francisco (June 12, 2006). In identifying the scenarios in which referral to an attorney might be most important, Hough has identified the following triggers: the complexity of the legal issues, language barriers, characteristics of the litigant, and characteristics of the judge. *Id.*
- <sup>154</sup> *Gideon's New Trumpet*, *supra* note 26 at 7.
- <sup>155</sup> *Id.* ("Examples of these scenarios include the Housing Law Committee's proposal for representation in eviction cases involving household members with mental disabilities, the Family Committee's proposals in the custody and adult guardianship areas, the Immigration Committee's proposal for representation for asylum seekers and the Juvenile Law Committee's proposal for counsel in school exclusion cases and for access to counsel for youth in DYS facilities.")
- <sup>156</sup> See generally Symposium, *supra* note 33.
- <sup>157</sup> *Id.*
- <sup>158</sup> *In re Hilary*, 880 N.E.2d 343 (Mass. 2008). Under the statute, children involved in CHINS proceedings are entitled to counsel, but for parents, while they are entitled to notification, "there is no explicit concomitant right to counsel. . . ." *Id.* at 348.
- <sup>159</sup> *Gordanier v. Jonsson*, No. 3AN-06-8887 CI (Alaska Sup. Ct. Aug. 14, 2007), available at [http://civilrighttocounsel.org/news/recent\\_developments/16/](http://civilrighttocounsel.org/news/recent_developments/16/). The case became moot before resolution by the Alaska Supreme Court. *Id.*
- <sup>160</sup> For an exploration of these ideas, see *Pursuing Access*, *supra* note 135, at 495–97.
- <sup>161</sup> See *supra* note 32 and accompanying text.
- <sup>162</sup> Richard Zorza, *Courts in the 21<sup>st</sup> Century: The Access to Justice Transformation*, 49 JUDGES' J. 14 (2010).
- <sup>163</sup> See *Changing the Face of Legal Practice; "Unbundled" Legal Services*, UNBUNDLED LAW (Jan. 2004), <http://www.unbundledlaw.org/old/index.htm> (The term "Unbundled . . . refers to a broad range of discrete tasks that an attorney might undertake such as: advice, negotiation, document review, document preparation, and limited representation."). See also *Justice for All*, *supra* note 12, at 2042, n.246, and accompanying text.
- <sup>164</sup> *Connecting Self-Representation*, *supra* note 13, at 66–73.
- <sup>165</sup> A movement in our legal doctrine that provides a greater role for international norms in our jurisprudence would impact the assessment of the right to counsel as well.
- <sup>166</sup> For a discussion of this dynamic in the context of the BBA Task Force's analysis, see *Gideon's New Trumpet*, *supra* note 26, at 25–27.
- <sup>167</sup> *Gideon's New Trumpet*, *supra* note 26, at 2.