A Civil Right to Counsel through the States Using California's Efficiency Project as a Model toward a Civil Gideon

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Introduction

On October 12, 2009, in the midst of the greatest economic crisis in its history, California became the first state in the nation to create a model program guaranteeing the right to counsel for indigent parties in civil cases.1 Titled the Sargent Shriver Civil Counsel Act, it is the latest move and most comprehensive act by a state legislature expanding the right to counsel in civil cases involving basic human needs.2 In doing so, California created what can be used as a national model to, as the state’s former Supreme Court Justice Earl Johnson put it, prevent parties without access to attorneys from being “thrown to the lions” in the confusing procedure and rules of legal proceedings.3

A national survey conducted by Harris Poll in 2009 found that 88% of respondents agreed that it is essential that non-profit legal services be available to assist those who cannot afford legal help.4

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1. CAL. GOV’T CODE § 68651(a) (West Supp. 2010); Press Release, Assembly Member Mike Feuer, Governor Signs Feuer “Right To Counsel” Legislation (Oct. 12, 2009), http://democrats.assembly.ca.gov/members/a42/newsroom/20091012AD42PR01.htm.


4. Press Release, American Bar Association, Majority of Americans Hard-Hit By
Two-thirds of respondents supported federal funding to help Americans who need that assistance.\textsuperscript{5} A recent national poll also found that 79\% of citizens believe that poor people already have a right to an attorney when sued in civil court.\textsuperscript{6} Yet despite this overwhelming support, and the confusion among the public about what help is actually available, another recent study found that 80\% of indigent civil litigants do not have their legal needs met.\textsuperscript{7}

In 2005, prior to the national and state economic collapses, California’s indigent population totaled 6.3 million people, almost 18\% of the state’s population.\textsuperscript{8} Throughout the nation, indigent people make up approximately 80\% of criminal defendants.\textsuperscript{9} The U.S. Constitution requires that these defendants be appointed an attorney for most serious offenses. Still, these defendants are handicapped by the fact that public defenders carry extremely high caseloads and by the exponentially greater resources of district attorney offices. Additionally, some states have astonishingly low thresholds for determining who can afford a lawyer.\textsuperscript{10} In Wisconsin, for example, anyone with an income greater than $3,000 per year is considered able to afford a lawyer.\textsuperscript{11}

Of course for many low-income people, their interaction with the law is not as criminal defendants, but as parties in civil cases. These cases include evictions and foreclosures, parental right termination hearings, and government benefits hearings.\textsuperscript{12} Because of the consequences of losing these types of cases and administrative hearings, there may be fundamental rights at stake worthy of a due process right to counsel. However, attempts at judicial expansion of

\textsuperscript{6} Id.
this right have consistently failed in both state and federal courts. At the federal level, the main roadblock is *Lassiter v. Department of Social Services*, where the United States Supreme Court held that there is a presumption that an indigent litigant has a right to appointed counsel only when his personal liberty is at stake.

In recognition of the issues at stake and the insufficient availability of counsel for low-income people, the American Bar Association House of Delegates unanimously approved a recommendation in 2006 that urges federal and state governments to provide legal services to low-income individuals where basic needs are at issue. The United States already lags far behind the rest of the developed world in providing this right.

A right to counsel in an array of civil matters is currently provided in the forty-nine European member countries in the Council of Europe ("COE"), Australia, Canada, India, New Zealand, Hong Kong, Japan, Zambia, South Africa, and Brazil. The United States Supreme Court is increasingly willing to examine trends in international law in expanding rights in this country both in death penalty cases and individual rights cases. The Court cited trends in international law when it prohibited the death penalty for minors in *Roper v. Simmons*, barred capital punishment for the mentally ill in *Atkins v. Virginia*, and decriminalized private, consensual, homosexual sex in *Lawrence v. Texas*.

With the movement in international law in favor of recognizing the right to civil counsel and with many indigent people facing legal issues affecting basic human needs due to the collapsed economy, the time is ripe to revisit *Lassiter* almost thirty years after the case was decided. This note will demonstrate, however, that by working toward statutory rights to counsel through state legislatures, an eventual overturning of *Lassiter* is more likely. Specifically, this note will argue that the recent civil counsel act passed in California can serve as a model for building this right through the states.

California's right to counsel act was enacted in recognition of the dire need this economy has created for counsel for indigent

16. Id.
populations. The Act requires the Judicial Council, the body responsible for improving the statewide administration of justice in the California courts, to establish at least one pilot program to test the effects and efficiency of expanding the right to counsel to civil cases. It necessitates projects authorized by the Act to provide counsel for indigent clients facing critical issues affecting basic human needs: housing-related matters, domestic violence and civil harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, or actions by a parent to obtain sole legal or physical custody of a child. The project is funded at approximately $10 million per year and lasts for six years.

There are several major drawbacks of California’s right to counsel act. It is limited in scope: It only requires the creation of one pilot project. It is also limited in time, lasting only six years. Finally, it is limited in funds, at $11 million per year, which led to the restriction that those served under the pilot projects at or below 200% of the federal poverty law. As of March 2010, this limitation would restrict services to households making under $44,100 for a family of four. Still, it offers a model for other states to consider in addressing the need for counsel among the poor, as it was passed with overwhelming support.

There has been little written in opposition to providing access to counsel in civil cases, and what opposition there is tends to focus on the cost to taxpayers of providing such access. California’s act was
drafted to overcome this economic argument by deriving its funds' from a previously approved $10 increase on court fees when a party wins a case. More importantly, the Act was passed partly on the basis of the idea that providing counsel to indigent parties in civil cases will create a more efficient court system, which will save taxpayers money in the long term. The act requires that a report on the economic benefits of the program be completed by 2016. As this note will demonstrate, an overturning of Lassiter through the states may be the best route toward a recognized right to counsel in civil cases under the Due Process Clause. Using California as a model, state legislatures can be persuaded to pass statutes that expand access to counsel if they are shown the dire need for counsel, the effects of lack of counsel on the poor in their states, and finally, that providing access to counsel for the poor makes economic sense for state and local governments.

First, this note will address the current economic crisis and why it has exacerbated the need for legal services for the poor. Next, it will highlight reasons why the right to counsel should be expanded to civil cases by briefly outlining the stakes at issue for indigent parties in civil cases, how these issues implicate fundamental rights and disproportionately affect minority populations, and how providing a right to counsel will benefit the perception of equal justice. Third, the note will discuss the path used to gain the right to counsel in state criminal prosecutions, both in the states and in the United States Supreme Court's landmark decision in Gideon v. Wainwright. Fourth, this note will examine the attempts to pursue the right to counsel in civil cases in state and federal courts and through legislation. Finally, the note will take a closer look at the Sargent Shriver Civil Counsel Act, its efficiency component, and how it can be used as a model for other states to pursue their own right to civil counsel legislation.

I. The Economic Crisis and Its Impact on Legal Services for the Poor

As former ABA President H. Thomas Wells, Jr. noted recently, "[f]or many Americans, their financial problems are becoming legal problems. In many circumstances, legal assistance can prevent families and individuals from going into a financial free-fall that

30. Feuer Testimony, supra note 18, at 4 hrs. 18 mins.
31. CAL. GOV'T CODE § 68651(c).
could lead to homelessness, bankruptcy or dropping out of school.\textsuperscript{33} Yet, for the vast majority of low-income citizens, access to a private attorney is not an economically viable option.\textsuperscript{34} There is not a low-cost market for this population because providing legal services to low-income populations is not a profitable endeavor.\textsuperscript{35} Therefore, private nonprofit legal aid organizations are generally the only option for indigent individuals seeking counsel.\textsuperscript{36}

Historically underfunded, legal aid organizations have been hit particularly hard by the current recession because more people are seeking their services while funding has decreased.\textsuperscript{37} The economic crisis has forced states and localities to slash funding for benefits to the poor.\textsuperscript{38} In California, foreclosures have decimated the housing market and Proposition 13, which, with its imposition of limits on property taxes and its requirement of a two-thirds majority to pass new taxes, makes it incredibly difficult for the state to raise new revenues.\textsuperscript{39} Taken together, these elements have exacerbated an already dire situation for access to justice for the poor. Julia Wilson, executive director of the Legal Aid Association of California, told the \textit{Wall Street Journal} last fall that legal aid groups in the state are forced to turn away as many as two-thirds of those seeking assistance.\textsuperscript{40}

The Legal Services Corporation ("LSC"), an independent nonprofit whose members are appointed by the president, is the largest funder of legal aid organizations in the nation.\textsuperscript{41} LSC had its funding slashed by a Republican-controlled Congress in 1996 from $400 million in 1995 to just $280 million in 1996.\textsuperscript{42} Though LSC's budget has increased over the last two years to its current $420 million in fiscal year 2010, this is less than LSC requested by almost

\begin{thebibliography}{99}

\bibitem{id} \textit{Id.} at 336.
\bibitem{diller-savner} \textit{Id.} at 335-36; Rebekah Diller & Emily Savner, \textit{Restoring Legal Aid For The Poor: A Call To End Draconian And Wasteful Restrictions}, 36 FORDHAM URB. L.J. 687, 688 (2009).
\bibitem{audi} Audi, \textit{supra} note 21.
\end{thebibliography}
$100 million. Taking into account inflation, the budget still lags seriously behind what it received in appropriation in 1995. LSC would have had to receive over $500 million for fiscal year 2010 to rise to the level of funding it received in 1995 in real dollars.

In light of the decreased funds available from LSC since 1996, legal aid organizations, judges, attorneys, and private entities worked harder to increase funding for legal aid to the poor at the state and local level. A variety of measures were used to attempt to make up some of the gap, including surcharges on court fees, measures by local bar associations to provide volunteer legal services, and private philanthropy. In addition, funds from the Interest on Lawyers Trust Accounts ("IOLTA") have been used to fund legal organizations on the state level.

However, since the collapse of the economy in the fall of 2008, revenues for legal aid organizations have decreased dramatically. California is being hit especially hard for several reasons. First, the state faces a projected $14.4 billion budget shortfall in fiscal year 2010-2011 and services are being cut throughout numerous state agencies and programs. Second, private philanthropy has dropped significantly since the collapse of the economy especially in California, due to unemployment. Third, the state’s IOLTA funds have taken an extreme hit because of lowered interest rates. IOLTA revenue in the state decreased from over $20 million in 2007-2008 to just $3.5 million in the past year. Without the Sargent Shriver Civil Counsel Act, indigent parties would head into court with fewer opportunities to consult with an attorney than they had in the past when more funding for legal aid organizations was

44. Id.
45. Id.
47. Id.
49. Brennan Center For Justice, The Economy and Civil Legal Services Analysis, (Feb. 1, 2009), http://www.brennancenter.org/content/resource/the_economy_and_civil_legal_services/.
53. Id.
available. With legal aid organizations facing these funding challenges, it is crucial to keep in mind how important the services these organizations provide. Precisely because California is facing such extreme economic hardship, the state’s Right to Counsel Act is a particularly useful model for other states seeking to expand access to attorneys for the poor.

II. Stakes in Civil Trials for the Poor

In extending the Sixth Amendment’s right to counsel to defendants in state criminal prosecutions through the Fourteenth Amendment, the majority in *Gideon* stated, “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled [sic] into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.” It is clear that the obvious truth the court spoke of, that a poor person who cannot afford a lawyer cannot be assured a fair trial, would apply equally in civil matters. And though not usually threatened with the loss of personal liberty, the stakes at issue for parties in civil trials can have devastating impacts on the lives of those involved because of their inability to get a fair trial.

A. Housing

Stable housing and uninhabitable living conditions are pressing problems in the everyday lives of the poor. In most jurisdictions, evictions feature expedited proceedings, and tenants can be forced out of their homes in only a few days time. The loss of stable housing through evictions also has an impact on employment, children’s education, ability to obtain credit, and many other aspects of people’s lives. Additionally, according to one study, two of five homeless persons became homeless due to involuntary displacement such as evictions. With such high stakes and these negative impacts on people’s lives, tenants would benefit greatly from having

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legal representation.

In 2007 though, surveys of New York City Housing courts found that less than 24% of tenants brought to court by landlords had legal representation. A 2005 study in Maricopa County, Arizona, found that in 87% of court proceedings, the landlord had attorney representation. However, in the 626 cases observed for the study, not a single tenant had attorney representation.

The foreclosure crisis has also highlighted the massive inadequacies in representation. A recent study in New York showed that 84% of defendants in proceedings involving foreclosures on subprime, high-cost, and/or nontraditional mortgages did not have legal representation.

B. Child Custody and Parental Rights

Another area where the poor would benefit greatly from representation is in child custody and parental rights proceedings. In Stanley v. Illinois, the United States Supreme Court recognized that a parent’s desire for and right to “the companionship, care, custody and management of his or her children” is an important interest that “undeniably warrants deference and, absent a powerful countervailing interest, protection.” In another case, the Court recognized that if the state prevails in terminating parental rights, it will have worked a unique kind of deprivation. Even in Lassiter, where the court rejected the idea of a right to counsel, it did acknowledge that, “a parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore a commanding one.” In recognition of this commanding interest, forty states currently require, either statutorily or judicially, that counsel be appointed for indigent parties in certain parental rights

58. Kira Krenichyn & Nicole Schaeffer-McDaniel, Results from Three Surveys in New York City Housing Courts, Ctr. for Human Environments, Graduate Ctr. of the City University of New York 1, 7 (2007), available at http://brennan.3cdn.net/fe2a4234ce30fdaf3_8rm6v2aup.pdf.


60. Id.


62. Id.


cases. Access to an attorney also makes a significant difference in child custody decisions in divorce proceedings. A 1988 study examined the effects of representation and lack of representation on these custody decisions in California. While joint legal custody (parental power to decide matters related to a child's religion, education, and medical treatment) was the arrangement chosen in 92% of cases in which both parents were represented by an attorney, in cases in which neither parent was represented, joint custody was only chosen only 50% of the time. When the mother was the only party represented by an attorney, joint legal custody was the outcome in 73% of the cases, while when the father was the only party represented by an attorney, it was the outcome in 89% of the cases.

For physical custody, mothers retaining sole custody was the most likely outcome in all four scenarios (neither parent had an attorney, only the mother had an attorney, both parents had an attorney, and only the father had an attorney), but there was still great variance depending on representation. When neither parent had an attorney, the mother received sole custody almost 80% of the time. When only the mother had an attorney, she received sole custody 86% of the time. When both parents had an attorney, the mother received custody about 64% of the time. When only the father had an attorney, the mother received sole custody only 49% of the time and the father received sole custody almost a third of the time. In the other three scenarios, the fathers never received custody more than 10% of the time. These statistics show the great impact that representation has on not only parental rights, but the raising of children in the United States. Recognizing these disparities, California's civil counsel act makes projects that provide counsel in child custody cases, particularly where one side is represented and the other is not, one of the highest priorities for funding under the pilot program.

68. *Id.*
69. *Id.* at 64.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Cal. Gov't Code § 68651(b)(2)(A).*
C. Domestic Violence

Access to counsel is an extremely significant factor for victims of domestic violence. A recent study attributed a reported 21% drop in incidents of domestic violence from 1993-1998 primarily to increased access to legal services for victims of domestic abuse.\textsuperscript{76} Another study found that when seeking protective orders, those with attorneys succeeded over 80% of the time, while only 31% of those without attorneys received protective orders.\textsuperscript{77}

Unfortunately, many victims of domestic violence cannot afford to retain counsel, and legal aid organizations face daunting challenges in meeting the needs of their indigent clients.\textsuperscript{78} Despite the decrease in domestic violence incidents attributed to increased access to legal service for victims, there still remains an epidemic of domestic abuse in the nation.\textsuperscript{79} In San Francisco alone, during the 2007-2008 fiscal year, 9-1-1 emergency dispatchers fielded over 6,500 domestic violence calls.\textsuperscript{80}

Access to counsel is vital for victims of domestic abuse. These victims are faced with great challenges not only from their abusers, but from a justice system that can be effectively un navigable. With resources limited, states must step in to protect the interest of victims of domestic abuse and must work to end the cycle of violence in these relationships.

III. Perception of Equal Justice

The United States justice system is built on the adversarial process, the original ideology of which says the best way to arrive at the truth is through adversarial presentation and argument.\textsuperscript{81} Of course, for those who cannot afford to retain counsel, this adversarial system consists of a daunting amount of procedure and rules,

\textsuperscript{76} Amy Farmer & Jill Tiefenthaler, \textit{Explaining the Recent Decline In Domestic Violence, CONTEMPORARY ECONOMIC POLICY}, Apr. 1, 2003, 158, at 158-59.
\textsuperscript{78} Blue Ridge Legal Services, \textit{Valley's Legal Aid Society Faces Loss of Domestic Violence Funding}, available at http://www.brls.org/ProgramNewsArticle.cfm?articleID=598.
\textsuperscript{79} Farmer & Tiefenthaler, \textit{supra} note 73 at 158.
especially for those with little education or whose first language is not English. For these people, navigating these procedures and rules and understanding legal arguments is an extremely difficult, if not nearly impossible, challenge. As George Hausen, the executive director of Legal Aid of North Carolina put it, when one party is not represented by counsel, "[y]ou can call it justice because someone in a robe decides the case, but really, there’s no adversarial process taking place." The United States Supreme Court recognized that the fairness of the adversarial process was a fiction in regard to unrepresented defendants in criminal trials; accordingly, it extended the Sixth Amendment right to a jury trial to state criminal prosecutions through the Fourteenth Amendment in Gideon.

A. The Path to Gideon: A Right to Counsel in State Criminal Prosecutions

In 1932, the United States Supreme Court in Powell v. Alabama faced the issue of whether a court’s failure to assign counsel in a capital case was a violation of due process. In Powell, without legal representation, seven defendants were convicted of rape and sentenced to death. The Court held that "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." The Court left open the question of whether this applied to other criminal proceedings, a question which it would answer ten years later in Betts v. Brady.

Betts held that states are not obligated under the Fourteenth Amendment to furnish counsel to indigent defendants in criminal prosecutions outside of capital cases. In Betts, the Court, in determining whether the Fourteenth Amendment compelled the states to provide counsel in criminal trials, looked at whether appointment of counsel was a fundamental right, essential to a fair trial, but determined it was not. The Court considered the

82. Feuer Testimony, supra note 18, at 4 hrs. 20 mins.
86. Id. at 50-51.
87. Id. at 71.
88. Id. at 71; Betts v. Brady, 316 U.S. 455 (1942).
89. Betts, 316 U.S. 455 at 471.
90. Betts, 316 U.S. 455 at 571.
constitutional, legislative, and judicial history of the states, and determined that there was neither a historical right nor had enough states recognized the right to an attorney in criminal prosecutions to date.91

It was not until 1963 that the United States Supreme Court held in Gideon that state courts must provide counsel to indigent defendants in criminal trials that carry the possibility of a substantial prison sentence.92 The Court later extended its holding to include even minor prison sentences.93 In looking for a path toward a recognized right to civil counsel at the federal level it is useful to look at how the Court arrived at its decision in Gideon.

Gideon expressly overruled Betts,94 a mere twenty-one years after that decision. More than just the makeup of the Court had changed in the twenty-one years between the two cases. After Betts, states continued to expand the right to counsel to indigent defendants in criminal prosecutions.95 By the time Gideon came before the Court, all but five southern states guaranteed the right to counsel in criminal prosecutions through state constitutions, statutes, or judicial decisions and practice.96 In Gideon, remarkably, twenty-three states urged the Court to overturn Betts.97

As demonstrated by the Court’s rulings in Betts and in Gideon, the states’ overwhelming recognition of a due process right can sway the Court, but the fight for a right to counsel in civil cases solely through the judiciary may be a very difficult path. As detailed below, the victories have been few, and those successful cases have seen courts define the right narrowly. One example is the recent Washington state Court of Appeals decision in Bellevue School District v. E.S., currently under review at that state’s supreme court.98 That court held that minors have a due process right to counsel in truancy proceedings.99 Another is the Supreme Court’s holding that juveniles have a right to counsel in civil delinquency proceedings because of the possibility of deprivation of personal liberty.100 The United States Supreme Court, in Application of Gault, held that because of its similarity to a criminal proceeding, a juvenile facing

91. Id. at 465-66.
95. Yale Kamisar, et al., Gideon At 40: Facing The Crisis, Fulfilling The Promise, 41 AM.
96. Id.
97. Laura K. Abel, A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright,
100. Application of Gault, 387 U.S. 1, 41 (1967); Bellevue Sch. Dist., 199 P.3d at 1011.
the "awesome prospect of incarceration" until the age of twenty-one needed to have assistance of counsel.101

**B. Attempts at Securing a Right to Counsel in Civil Cases**

**i. Federal Courts**

As mentioned previously, the Supreme Court created a major roadblock to the recognition of a right to counsel in civil cases with its ruling in *Lassiter v. Dept. of Social Services*.102 In *Lassiter*, an indigent, imprisoned mother, without an attorney, had her parental rights terminated at a parental termination hearing.103 The Court held that there is a presumption that an indigent litigant has a right to appointed counsel only when her personal liberty is at stake.104 The Court said that against that presumption it will weigh three factors developed previously in *Mathews v. Eldridge* to determine whether a procedural safeguard is required to satisfy due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.105 The Court then determined that the factors did not weigh in favor of a due process right in the parental rights proceedings at issue in the case.106

The Court in *Lassiter*, however, held open the possibility that in some parental rights proceedings there could be a right to an attorney: "If, in a given case, the parent’s interests were at their strongest, the State’s interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel."107 The Court also rejected the state’s argument that it has the same interests in the outcome of the proceeding as the parent, recognizing that "the State wishes the termination decision to be made as economically as possible.....

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103. *Id.* at 21-22.
104. *Id.* at 26-27.
But... the State’s pecuniary interest... is hardly significant enough to overcome private interests as important as [these], particularly... that the ‘potential costs of appointed counsel... is [sic]... de minimis compared to the costs in all criminal actions.’

**ii. State Courts**

Increasingly, the movement to expand the right to counsel has also been fought in state courts, but without wide-ranging success.\(^{109}\) In 2003, the Maryland Court of Appeals, the highest court in the state, came close to guaranteeing a right to counsel in all civil trials in *Frase v. Barnhart*.\(^{110}\) The majority did not reach the issue, but in a concurring opinion in the case, three of seven justices argued for a right to counsel in parental custody cases, especially for defendants, because these cases address parental rights, “the most fundamental of rights... what can be more important?”\(^{111}\)

The Washington Supreme Court is currently considering, in *Bellevue School District v. E.S.*, whether due process requires a child be provided counsel at an initial truancy hearing.\(^{112}\) The Court of Appeals held that it does, because declaring a child truant affects the child’s right to privacy, liberty, and education and “she is unable to protect these interests herself.”\(^{113}\) That court, though, stressed that it was distinguishing a minor from adults, because, “adults can take advantage of multiple resources for learning about the court system, its procedures, and the applicable law. Adults can also seek help at legal clinics.”\(^{114}\)

The Alaska Supreme Court recently declined to make a decision on the request for appointed counsel by an indigent mother in a child custody hearing where her opponent is a private person represented by an attorney.\(^{115}\) Alaska recognizes a right to counsel when the parent’s opponent is a public agency, but not when the opponent is a private party.\(^{116}\) Of course, the outcome for a losing party is the same, the loss of their child, whether the opponent is a public agency or private party. By moving toward a civil right to counsel at a national level, parental rights will be better protected regardless of

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108. *Id.* at 28.
111. *Id.* at 141.
113. *Id.* at 1017.
114. *Id.* at 1014.
who the opponent is.

These cases illustrate both the challenges and the possibilities in seeking a right to counsel in cases through state litigation. While state judiciaries are hesitant to extend constitutional rights that were previously rejected by the United States Supreme Court in Lassiter, the importance of parental rights have been recognized even in cases where the right to counsel was not expanded. New legal theories should continue to be tested at the state judicial level, but state legislatures offer another path toward a civil right to counsel.

C. Recent State Statutory Measures Expanding a Civil Right to Counsel

With victories not forthcoming in federal or state courts, state legislatures are increasingly expanding the right to counsel in civil cases.\textsuperscript{117} Recently, Alabama and Louisiana both passed measures that expand the right to counsel in termination of parental rights cases brought by private individuals.\textsuperscript{118} Louisiana’s law requires the state to provide counsel at no cost to indigent parents in adoption proceedings that seek to terminate parental rights.\textsuperscript{119} Alabama’s law guarantees the right of counsel to parents in dependency and termination of parental rights cases.\textsuperscript{120} This law applies even if the indigent parent does not seek appointment of counsel.\textsuperscript{121} Interestingly, this subsection of Alabama’s Juvenile Justice Act was a codification of an Alabama court decision, \textit{W.C. v. State Dept. of Human Resources}, in which the court held that a due process right to appointed counsel exists for an indigent parent in termination-of-parental-rights proceedings.\textsuperscript{122}

In 2006, New York extended the right to counsel in child custody cases from those in family court to include those in courts of general jurisdiction.\textsuperscript{123} Additionally, Arkansas, Texas, Montana, Connecticut, Florida, and Massachusetts all passed laws in the last ten years which have expanded the right to counsel in certain civil cases.\textsuperscript{124} These victories are evidence of a movement toward recognition of right to civil counsel through state legislation and

\textsuperscript{117} Abel, supra note 2.


\textsuperscript{120} Alabama Juvenile Justice Act of 2008 § 12-15-305(b).

\textsuperscript{121} \textit{Id.}


\textsuperscript{123} S.B. 8096, 2006 Leg., 229th Sess. (N.Y. 2006); CORRECTED N.Y. JUD. LAW § 35 (2010).

\textsuperscript{124} Abel, supra note 2.
combined with legal arguments in favor of recognition of this right, can be used as a basis for a win at the national level.

IV. Positive Economic Consequences of a Right to Counsel in Civil Cases

Measuring the cost benefits of providing legal services to those would otherwise not have access has been an elusive endeavor. There are, of course, the direct economic benefits received by clients, such as Social Security Disability ("SSDI"), Supplemental Security Income ("SSI"), child support, unemployment compensation, and food stamps. There are also long-ranging cost savings from preventing homelessness, maintaining employment, and creating efficiency in the court system that can be harder to quantify.

A report from the Pennsylvania IOLTA Board found that the state’s Access to Justice Act, which imposed a two-dollar surcharge on court filing fees to provide funding to legal aid organizations created many positive efficacy and economic impacts. The Pennsylvania Act supports legal aid to poor people facing critical issues such as foreclosure, eviction, utility shutoffs, and loss of custody of their children. The report found that there was a positive economic impact of at least $154 million in five years through legal assistance supported by the Access to Justice funds, or over four times the amount invested. The figures include the direct dollar benefit for clients secured by advocates, the multiplier effect of those dollars on local economies, cost saving to local agencies through reductions in the need for emergency services such as subsidies for evicted families, and the decreased necessity of emergency room treatment for victims of domestic violence.

The Pennsylvania report also highlights how legal aid greatly benefits states and local communities because of the work it does in securing federal benefits for indigent clients. Legal aid organizations in Pennsylvania assisted almost 11,000 people in obtaining federal benefits for which they were eligible, but had been denied. This resulted in over $37 million in money coming into the state through

125. Prescott, supra note 31, at 313 n.29.
127. Id. at 1.
128. Id. at 1-2.
129. Id. at 7.
130. Id.
SSDI, SSI, and other federal benefits in a four-year period. The report stresses the positive impact these funds have on local economies as they are spent locally on rent, food, prescriptions, utilities, and transportation.

A Virginia study of its legal aid organizations found that in 2008-2009, the total economic impact of legal assistance provided by Virginia legal aid programs was $67 million, a return of $2.62 for every dollar of local, state, and federal funds invested. The Virginia study also highlighted benefits to the state that were not quantified.

Other states have found similar economic benefits relating to civil legal aid. A 2009 study in Texas found that for every dollar spent for indigent civil legal services, the yearly gains to the state economy amounted to an increase of $7.42 in total spending. It has been estimated that in Missouri in 2008, legal aid provided a $24.9 million economic stimulus effect.

Additionally, vindicating the rights of one individual has value that extends to others, which can be difficult to quantify, as when a landlord is forced to remedy unsafe housing conditions or is hesitant to violate fair housing or eviction laws against other tenants prospectively. Low-income workers benefit from the enforcement of wage laws, which also promotes fair competition for a thriving business market.

California, with a comprehensive model program that will provide the right to counsel in numerous critical areas of civil law, should be able to offer the best report on the efficiency and cost

132. Id.
133. Id.
135. Id. at 4. These benefits included: “savings from crime prevention and law enforcement assistance, savings from keeping children in school whose attendance would otherwise have been interrupted by homelessness and/or domestic abuse, efficiencies in Virginia courts made possible by legal aid assistance to clients and self-represented litigants, such as materials and training on how to follow court procedures, and additional tax revenues from jobs preserved as a result of legal aid employment cases.” Id.
benefits of this right in the next few years. With part of its focus on creating efficiency in the court system, the concrete economic benefits should be clearer at the end of the pilot project.

V. The Path to a Civil Right to Counsel in California

How was the Sargent Shriver Civil Counsel Act passed in California during in the worst economic crisis in the state's history? Advocates of the Act worked to build a diverse coalition of legal aid organizations, the state bar, the defense bar, individuals, and the California Chamber of Commerce. The author of the legislation, Assemblyman Mike Feuer, knew first hand that the poor had inadequate access to counsel because he is the former Executive Director of Bet Tzedek, one of Los Angeles's largest legal aid organizations. In testimony before the New York State legislature, he stressed the importance of building a broad coalition and gaining support outside of the legal aid organization community and highlighted the importance of reaching out to the business community, the very conservative California Chamber of Commerce, attorneys, and the judiciary.

Assemblyman Feuer was assisted in his effort to pass the legislation by Kevin G. Baker, the chief deputy of the Assembly Judiciary Committee, who worked to gain support inside the committee. In order to gain support from the governor, partners at large firms, such as Thomas R. McMorrow of Manatt, Phelps & Phillips lobbied on behalf of the Act. With this broad-based support, the bill easily passed the Assembly by a vote of fifty-two to twenty-six, while the Senate passed it twenty-three to thirteen.

A. Efficiency Component

One of the main purposes of California's Act is to increase efficiency in the court system. California's civil court system has had difficulties handling its caseload for decades. In Riverside

140. Feuer Testimony, supra note 18, at 4 hrs. 18 mins.
142. Feuer Testimony, supra note 18, at 4 hrs. 18 mins.
144. Id.
145. Pordum & Ho, supra note 25.
146. Feuer Testimony, supra note 18, at 4 hrs. 20 mins.
County, civil cases languish in the court system for years.\textsuperscript{148} Contributing to this inefficiency is the fact that California’s growing indigent population is often forced to handle its own legal issues and gets bogged down in the system.\textsuperscript{149} This creates delays as rules must be explained to them and judges and court staff must train them on complex court procedures.\textsuperscript{150}

As stated, the Act requires the Judicial Council to select one or more pilot projects beginning fiscal year 2011-2012.\textsuperscript{151} To increase efficiency, these pilot projects will be coordinated by a lead legal services nonprofit organization, in collaboration with its local superior court.\textsuperscript{152} Also, under the Act, the lead legal services agency is required to identify and use pro bono services where possible.\textsuperscript{153} The Act also requires that the lead agency create procedures to encourage fair and expeditious voluntary dispute resolution.\textsuperscript{154}

The Act compels the Judicial Council to conduct a study and report its findings on the effectiveness and continued need for the pilot program by January 2016.\textsuperscript{155} The study is required to report on the percentage of funding by case type.\textsuperscript{156} It must include data on the impact of counsel on equal access to justice and its effect on court administration and efficiency.\textsuperscript{157} In addition, the report will describe the benefits of providing representation to those who were previously not represented.\textsuperscript{158} Possibly more important for persuading legislatures, it will report on any cost savings gained through a more efficient court system.\textsuperscript{159} The report will also contain strategies and recommendations for maximizing the benefit of representation, the impact of the pilot program on families and children, and an assessment on continuing unmet needs.\textsuperscript{160}

\textbf{B. The Efficiency Component and Economic Benefits}

Adding on court fees to victors in civil trials to fund this program alleviates the burden from general taxpayers. It also creates

\begin{itemize}
\item \textsuperscript{148} Id.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} Feuer Testimony, supra note 18, at 4 hrs. 20 mins.
\item \textsuperscript{151} CAL. GOV'T CODE § 68651.
\item \textsuperscript{153} CAL. GOV'T CODE § 68651(b)(4).
\item \textsuperscript{154} Id.
\item \textsuperscript{155} CAL. GOV'T CODE § 68651(c).
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} CAL. GOV'T CODE § 68651(c).
\item \textsuperscript{160} Id.
\end{itemize}
a steady stream of revenue for legal aid organizations even in times of economic downturns, such as when falling interest rates make IOLTA funds decrease or appropriations are cut to LSC based on the whims of Congress.

Addressing the economic impact of creating a right to counsel in civil cases is necessary in working toward a civil right to counsel at the state and federal levels. Given the limited resources of the state and the need to gain support of fiscal moderates and conservatives, showing that such a right can actually have economic benefits can help persuade those concerned with the cost this right might create for taxpayers. The United States Supreme Court is likely to give weight to the economic impact on the states of guaranteeing a right to counsel should it decide to reconsider its decision in Lassiter.

As Justice Harlan pointed out in his concurring opinion in Gideon, the Supreme Court will be hesitant to impose a duty on the states, and “[a]ny such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions.” The United States Supreme Court, especially with its current conservative majority, may be hesitant to impose additional costs on state and local governments, which is why the efficiency component of the California pilot project is so important.

Assemblyman Feuer said that the Chamber of Commerce’s support of the bill was not solely based on the efficiency component, yet it was a strong argument as part of the overall picture in gaining the group’s backing. Inefficiencies in the court system cost money, and getting businesses to recognize this fact is key in moving forward on increasing statutory rights for a civil right to counsel.

Conclusion

The Court recognized as early as 1932, in Powell v. Alabama, that a person’s right to be heard “would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” Though that case only applied to criminal defendants facing capital sentences, the Court used sweeping language in speaking of the extreme difficulties faced by those in court without representation. It concluded, “if in any case, civil or criminal, a... court were arbitrarily to refuse to hear a party by counsel, employed by and

161. Feuer Testimony at, supra note 18, 4 hrs. 22 mins.
163. Id.
165. Id.
appearing for him, . . . such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.\textsuperscript{166} Recognizing that a court could not refuse to hear a party through his attorney, because that would be a denial of due process, how can one argue that a person unable to afford an attorney receives a hearing and is not denied due process as well?

California Supreme Court Chief Justice Ronald M. George recently spoke on the necessity of maintaining a court system with integrity, "one that is fair and objective, that hears and resolves disputes in a timely fashion, that is open and truly accessible to all, and finally that is worthy of the respect and confidence of the public we strive to serve."\textsuperscript{167} Ensuring that all parties have the opportunity to a fair hearing in a true adversarial system by providing the right to counsel in civil cases would go a long way toward creating respect and securing the confidence of the public.

Using California's pilot program as a model, the time is now for states to act to expand the right to counsel for indigent populations in civil cases. Supporters of a right to civil counsel need to work in their states to stress the legal needs of indigent populations, especially in difficult economic times. A broad support coalition of academics, attorneys, and legal aid organizations must be built to work toward a right to civil counsel. Just as importantly, they need to include business leaders and fiscal moderates and conservatives in this coalition by showing not only the need that the indigent population has, but also by showing the economic benefits of providing a right to counsel in civil cases.

\textsuperscript{166} Id.