

# LIMITS ON JUSTICE: THE UNITED STATES' FAILURE TO RECOGNIZE A RIGHT TO COUNSEL IN CIVIL LITIGATION

## I. INTRODUCTION

If legal services were readily affordable and available, the vast majority of people would not go to court without the assistance of an attorney. Most people agree that in order to present and defend their rights effectively in court, they need an attorney—someone who is knowledgeable about both the law in general and possible claims and defenses unique to particular areas of the law.<sup>1</sup> Attorneys are especially unlikely to go to court as a party to an action without separate legal representation, lest they become an example of the old axiom, “the lawyer who represents himself has a fool for a client.”<sup>2</sup>

Not every litigant, however, has a choice in the matter of obtaining counsel. Until 1963, the Supreme Court held that indigent criminal defendants had no constitutional right to counsel in most circumstances.<sup>3</sup> Moreover, although a recent national survey shows that nearly four out of five Americans mistakenly believe that the Constitution guarantees free lawyers to poor people in civil cases as well as criminal cases,<sup>4</sup> civil litigants who cannot afford counsel await the day that rhetoric such as “equal justice for all” becomes a reality.

Perhaps because “equal justice is at the essential core of the American system of government,”<sup>5</sup> Americans find it difficult to believe that our legal system does not recognize a right as fundamental as the appointment of counsel to represent indigent litigants.<sup>6</sup> However, the stark reality remains

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1. See generally Roger C. Cramton, *Promise and Reality in Legal Services*, 61 CORNELL L. REV. 670 (1976).

2. Earl Johnson, Jr. & Elizabeth Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOY. L.A. L. REV. 249, 267 (1978).

3. *Gideon v. Wainwright*, 372 U.S. 335 (1963). For an in-depth discussion of *Gideon*, see *infra* notes 29-51 and accompanying text.

4. See ASSOCIATION OF TRIAL LAWYERS OF AMERICA, 1991-1992 DESK REFERENCE SUPPLEMENT: COMMEMORATING THE 200TH ANNIVERSARY OF THE SIGNING OF THE BILL OF RIGHTS (1991). Seventy-nine percent, almost four out of five Americans, hold this erroneous belief.

5. Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MD. J. CONTEMP. LEGAL ISSUES 199, 203 (1994) [hereinafter Johnson, *Toward Equal Justice*].

6. *Id.* at 202-03. In fact, Johnson describes these facts as “uncomfortable truths,” which are difficult to “penetrate the public consciousness” because they are contrary to the beliefs that most Americans “hold dear.” *Id.*

that U.S. citizens face losing their homes and other property, their compensation, and even their children in court every day without the assistance of counsel, often when they have sought and requested such assistance. To those who grew up with pride in the promise of equality under the American judicial system, it might come as a shock to learn that virtually all other mature industrialized societies<sup>7</sup> are far more progressive than the United States in their protection of the right to counsel for all members of society, regardless of income.<sup>8</sup> One begins to wonder why the United States, usually a leader in democracy and justice, places such arbitrary limits on justice afforded to its citizens.

This Note examines how and why the United States should follow the lead of these other countries and recognize a right to counsel for civil litigants. Part II discusses the evolution of a right to counsel in this country, as well as in other mature industrialized countries, with a specific emphasis on England, Germany, and Switzerland as models.<sup>9</sup> Part III explores the benefits of a right to counsel in civil litigation and the policy behind its adoption in the three “model” countries. Part IV discusses which of the three models would best suit the United States.

## II. EVOLUTION OF THE RIGHT TO COUNSEL IN THE UNITED STATES AND ELSEWHERE

### A. *The Right to Counsel in the United States*

#### 1. *History of the Right to Counsel in Criminal Proceedings*

An examination of the history behind the right to counsel for criminal defendants is essential to understanding why the Supreme Court has refused to extend that same right to indigent civil litigants.<sup>10</sup> Despite the unambiguous language in the Sixth Amendment, which states “[i]n all

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7. The term “industrialized societies” refers to societies in which half of the overall energy output relies on inanimate energy machines (as opposed to reliance on man or animal to provide energy). Mature industrialized societies, sometimes called “post-industrialized,” are also distinguished in that they no longer rely on farming or manufacturing as the basis of industry. Rather, industry in post-industrialized societies is based on “tertiary industry,” which includes economic sectors such as finance and services. See generally GERHARDT LENSKI ET AL., HUMAN SOCIETIES: AN INTRODUCTION TO MACRO SOCIOLOGY (8th ed. McGraw Hill) (1999).

8. Johnson, *Toward Equal Justice*, *supra* note 5, at 203. See also *infra* Part II.B.

9. England, Germany, and Switzerland are all considered mature industrialized societies. See LENSKI, *supra* note 7, at 78.

10. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981). See also *infra* notes 64-101 and accompanying text.

criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence,”<sup>11</sup> up until the 1930s, only people charged with crimes punishable by death had the right to counsel.<sup>12</sup> During the 1930s, however, the Supreme Court greatly expanded the understanding of one’s rights under the Sixth Amendment. For example, in the 1938 case *Johnson v. Zerbst*,<sup>13</sup> the Court held that all federal defendants must be provided an attorney under the Sixth Amendment.<sup>14</sup> Furthermore, in *Powell v. Alabama*,<sup>15</sup> the Court found the right to counsel so fundamental that the Fourteenth Amendment’s Due Process Clause required states to provide counsel for all defendants charged with capital crimes.<sup>16</sup>

In *Powell v. Alabama*, the state charged nine young illiterate black men with the rape of two white girls on a freight train passing through Tennessee and Alabama.<sup>17</sup> Although the trial judge appointed all the members of the local bar to defend the young men, no attorney appeared at trial to do so.<sup>18</sup> At the last minute, a local lawyer defended the men “with reluctance,” and the men were convicted.<sup>19</sup>

The Supreme Court agreed with the defendants’ subsequent challenge of those convictions on the basis that they were effectively denied the aid of counsel because they did not have the opportunity to consult with their lawyer in order to prepare a defense.<sup>20</sup> The Court’s rationale in *Powell*, later referred to as the “guiding hand” principle, became the underpinning for the landmark case of *Gideon v. Wainwright*.<sup>21</sup>

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon

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11. U.S. CONST. amend. VI.

12. JOAN BISKUPIC & ELDER WITT, *THE SUPREME COURT AND INDIVIDUAL RIGHTS* 207 (3d ed. 1997).

13. 304 U.S. 458 (1938).

14. BISKUPIC & WITT, *supra* note 12, at 207.

15. 287 U.S. 45 (1932).

16. *Id.* at 73.

17. *Id.* at 49.

18. *Id.*

19. *Id.*

20. *Id.* at 71.

21. *See Gideon v. Wainwright*, 372 U.S. 335 (1963), discussed *infra* at notes 29-51 and accompanying text.

incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.<sup>22</sup>

The Supreme Court did not, however, immediately extend the right to counsel to defendants charged with non-capital crimes. Rather, in the 1942 case of *Betts v. Brady*,<sup>23</sup> the Supreme Court came to the opposite conclusion, holding that for non-capital cases in state courts the appointment of counsel for indigent defendants did not constitute a fundamental right of due process guaranteed under the Sixth or Fourteenth Amendments.<sup>24</sup> A divided Court<sup>25</sup> held that states must provide a lawyer to the accused only if “a denial of fundamental fairness” would occur without one.<sup>26</sup> Thus, the Court opted for a case-by-case approach that later cases further refined.<sup>27</sup> Eventually, to prove denial of fundamental fairness, defendants had to show that they were victims of “special circumstances,” such as their illiteracy, ignorance, youth, or mental illness, the complexity of the charge against [them] or the conduct of the prosecutor or judge at the trial.”<sup>28</sup>

However, in 1963 the Supreme Court overruled *Betts* in a substantially similar case, *Gideon v. Wainwright*.<sup>29</sup> The State of Florida charged Clarence Earl Gideon, a fifty-one-year-old white man,<sup>30</sup> with the felony of breaking

22. 287 U.S. at 68-69. Justice Sutherland’s justification for a right to counsel came to be known as the “guiding hand” principle. BISKUPIC & WITT, *supra* note 12, at 207.

23. 316 U.S. 455 (1942).

24. *Id.* at 461-62.

25. The Court was divided six to three, with Justices Douglas and Murphy concurring with Justice Black’s dissent. *Betts v. Brady*, 316 U.S. 455 (1942).

26. *Id.* at 462. The critical excerpt reads:

Asserted denial [of due process law] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed.”

*Id.*; see also ANTHONY LEWIS, *GIDEON’S TRUMPET* 8 (1964).

27. LEWIS, *supra* note 26, at 8.

28. *Id.*

29. 372 U.S. 335 (1963). The Supreme Court stated that *Betts*’ case was “strikingly like the facts upon which *Gideon* here bases his federal constitutional claim.” *Id.* at 338.

30. LEWIS, *supra* note 26, at 5.

and entering a poolroom with intent to commit a misdemeanor.<sup>31</sup> Unable to obtain an attorney because of lack of funds, Gideon thus appeared in court without one.<sup>32</sup> When he requested that the court appoint an attorney, he was informed that under the laws of the State of Florida “the only time the Court can appoint counsel to represent a defendant is when that person is charged with a capital offense.”<sup>33</sup> Although Gideon insisted that he was entitled to counsel according to the United States Supreme Court, the court again denied his request.<sup>34</sup> Thus, Gideon proceeded to trial defending himself.<sup>35</sup>

Despite the fact that “Gideon conducted his defense about as well as

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31. *Gideon*, 372 U.S. at 336.

32. *Id.* at 337.

33. *Id.* The trial transcript provides a telling account of Gideon’s situation:

The Court: What says the State, are you ready to go to trial in this case?

Mr. Harris (William E. Harris, Assistant State Attorney): The State is ready, your Honor.

The Court: What says the Defendant? Are you ready to go to trial?

The Defendant: I am not ready, your Honor.

The Court: Did you plead not guilty to this charge by reason of insanity?

The Defendant: No sir.

The Court: Why aren’t you ready?

The Defendant: I have no counsel.

The Court: Why do you not have counsel? Did you not know that your case was set for trial today?

The Defendant: Yes sir, I knew that it was set for trial today.

The Court: Why, then, did you not secure counsel and be prepared to go to trial?

The Defendant answered the Court’s question, but spoke in such low tones that it was not audible.

The Court: Come closer up, Mr. Gideon, I can’t understand you, I don’t know what you said, and the Reporter didn’t understand you either.

At this point, the Defendant arose from his chair where he was seated at the Counsel Table and walked up and stood directly in front of the Bench, facing his Honor, Judge McCrary.

The Court: Now tell us what you said again, so we can understand you, please.

The Defendant: Your Honor, I said: I request this Court to appoint counsel to represent me in this trial.

The Court: Mr. Gideon, I am sorry, but I cannot appoint counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint counsel to defend you in this case.

The Defendant: The United States Supreme Court says I am entitled to be represented by counsel.

The Court: Let the record show that the defendant has asked the court to appoint counsel to represent him in this trial and the court denied the request and informed the defendant that the only time the court could appoint counsel to represent a defendant was in cases where the defendant was charged with a capital offense. The defendant stated to the court that the United States Supreme Court said he was entitled to it.

LEWIS, *supra* note 26, at 9-10.

34. *Gideon*, 372 U.S. at 337.

35. *Id.* at 337-38.

could be expected from a layman,<sup>36</sup> the jury found him guilty and sentenced him to five years in the state prison.<sup>37</sup> Gideon filed a habeas corpus petition<sup>38</sup> with the Florida Supreme Court on the grounds that the trial court improperly refused him counsel and thus denied him of his rights “as ‘guaranteed by the Constitution and Bill of Rights by the United States Government.’”<sup>39</sup> The Florida Supreme Court, without an opinion, denied all relief.<sup>40</sup> Gideon then petitioned for writ of certiorari to the United States Supreme Court on the same grounds.<sup>41</sup>

Despite the fact that it had decided *Betts* only twenty years prior,<sup>42</sup> the Supreme Court granted certiorari.<sup>43</sup> The Court explained its reasoning for granting certiorari in Gideon’s case: “the problem of a defendant’s federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts.”<sup>44</sup> Pursuant to custom,<sup>45</sup> the Supreme Court appointed an attorney to represent Gideon before the Court.<sup>46</sup> Moreover, the Court, by special leave, permitted J. Lee Rankin, of the American Civil Liberties Union, and George D. Mentz, for the state of Alabama, to argue the issue as *amicus curiae*.<sup>47</sup>

Two months after oral arguments, Justice Black, speaking for the Court, stated that the decision in *Betts* was an “abrupt break” with previous, well-considered precedents, such as *Powell v. Alabama*.<sup>48</sup> The Court quoted in full Justice Sutherland’s “guiding hand” reasoning in *Powell*,<sup>49</sup> and held that

36. *Id.* at 337.

37. *Id.*

38. Gideon proceeded *in forma pauperis*, handwriting in pencil one copy of his petition. LEWIS, *supra* note 26, at 4-5.

39. *See Gideon*, 372 U.S. at 337.

40. *Id.*

41. LEWIS, *supra* note 26, at 3-5.

42. *Betts v. Brady*, 316 U.S. 455 (1942).

43. *Gideon v. Wainwright*, 370 U.S. 908 (1962).

44. *See Gideon*, 372 U.S. at 338.

45. LEWIS, *supra* note 26, at 44-45. The Supreme Court’s “unvarying practice” is to provide a lawyer for any prisoner whose petition has been granted and who cannot afford her own attorney. *Id.* at 44. A formal written request for an attorney must be made by the prisoner, which Gideon completed: “I do desire the Court to appoint a competent attorney to represent me in this Court. Because I do not know the procedure nor do I have the ability to do so.” *Id.* at 46.

46. LEWIS, *supra* note 26, at 48. The Court appointed then-Washington attorney, Abe Fortas, to represent Gideon. Fortas, at the time, worked for the high-powered firm Arnold, Fortas and Porter, which he founded. *Id.* at 48, 49. President Johnson would later appoint Fortas to serve as a Justice on the United States Supreme Court in 1965. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* lxxxii (3rd ed. 1996).

47. LEWIS, *supra* note 26, at 174-80. Rankin argued on behalf of overruling *Betts* and providing a right to counsel for state criminal defendants, while Mentz argued to let the precedent stand. *Id.*

48. *Id.* at 344; *see also supra* note 24 and accompanying text.

49. *See supra* note 21 and accompanying text.

precedent as well as “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>50</sup> Thus, the Court held that the right to counsel for indigent criminal defendants is a constitutional right under the Sixth Amendment, which extends to the states through the Fourteenth Amendment, and, furthermore, that *Betts v. Brady* was overruled.<sup>51</sup>

The Court did not, however, discuss the scope of its decision. The Court did not mention what kinds of criminal cases outside of felonies, if any, the decision covered, nor at what stage of the proceeding counsel was required.<sup>52</sup> Thus, future cases determined these issues as they arose.<sup>53</sup> For example, *Argersinger v. Hamlin*<sup>54</sup> held that assistance of counsel was required even for a misdemeanor offense punishable by imprisonment for less than six months.<sup>55</sup> Later, in a line of cases beginning with *Miranda v. Arizona*,<sup>56</sup> the Court held that even certain suspects of a crime have the right to counsel—and must be notified of that right—before the police may begin questioning.<sup>57</sup>

## 2. Expansion of the Right to Counsel to Civil Litigants

Subsequent cases revealed that the right to counsel was not “tethered solely” to the Sixth Amendment,<sup>58</sup> and thus not limited to purely criminal proceedings. In *In re Gault*,<sup>59</sup> the Supreme Court held that the Due Process

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50. *Id.* at 344. The court went on to state: “This seems to us to be an obvious truth.” *Id.*

51. *Id.* at 345.

52. LEWIS, *supra* note 26, at 189. Neither did the Court discuss whether the decision applied to people already in prison, so those who had not had counsel would be entitled to a new trial. *See also generally* Gideon v. Wainwright, 372 U.S. 335 (1963).

53. LEWIS, *supra* note 26, at 189.

54. 407 U.S. 25 (1972).

55. *Id.* at 37.

56. 384 U.S. 436 (1966).

57. *See* United States v. Wade, 388 U.S. 218 (1967) (holding that counsel should be appointed to protect an indigent defendant during a line-up, the Court developed the “critical stage” test to determine when counsel is constitutionally required to protect defendant’s rights); Coleman v. Alabama, 399 U.S. 1 (1970) (holding that a preliminary hearing was a critical stage requiring the appointment of counsel to indigent defendants); Mempa v. Rhay, 389 U.S. 128 (1967) (holding that critical stages can also include post-trial proceedings). *But see* Kirby v. Illinois, 406 U.S. 682 (1972) (holding generally that advisory proceedings must be formally initiated against a suspect to initiate a critical stage); United States v. Ash, 413 U.S. 300 (1973) (holding that a photographic identification of a suspect did not constitute a critical stage).

58. Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL’Y REV. 503, 505 (1998).

59. 387 U.S. 1 (1967). This case involved delinquency proceedings against a minor who engaged in “lewd or indecent remarks” over the telephone. *Id.* at 4. The child and his parents could not afford

Clause of the Fourteenth Amendment requires appointment of counsel to represent a child whose family cannot afford counsel in state delinquency proceedings “which may result in commitment to an institution in which the juvenile’s freedom is curtailed.”<sup>60</sup> The Court supported its holding with the now familiar “guiding hand” reasoning cited first in *Powell* then in *Gideon*,<sup>61</sup> stating that a juvenile requires the skilled assistance of an attorney for the same reasons as an adult.<sup>62</sup> Because juvenile delinquency hearings are styled as civil and not criminal proceedings,<sup>63</sup> the *Gault* decision appeared to open the door for the Court to expand the Fourteenth Amendment due process right to counsel to civil litigants who could not provide their own.

Yet in 1981, when the Supreme Court faced this issue in *Lassiter v. Department of Social Services*,<sup>64</sup> it refused to make such an expansion. In *Lassiter*, the Durham County Department of Social Services sought to terminate the parental rights of Abby Gail Lassiter with respect to her son, William. The Department alleged Lassiter had no recent contact with William and that she had “willfully left the child in foster care for more than two consecutive years.”<sup>65</sup> During this two-year period, however, Lassiter served a prison sentence for an unrelated charge.<sup>66</sup> Lassiter’s incarceration rendered the Department’s allegation of “willfulness” questionable at best.<sup>67</sup> When the Department notified Lassiter of their petition to terminate her parental rights, she strongly objected, recommending instead that William’s grandmother care for him until Lassiter’s release.<sup>68</sup> Lassiter also informed her prison guards of the petition and her objections. However, they did nothing to assist her in obtaining counsel.<sup>69</sup>

Therefore, Lassiter proceeded to the termination hearing without

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counsel, and he was committed to a detention home for seven years. *Id.* at 7-8. The Court imposed this sentence despite the fact that a corresponding adult punishment for a criminal charge of “Lewd Phone Calls” would be a fine of \$5 to \$50 and imprisonment of not more than two months. *Id.* at 8-9.

60. *Id.* at 41.

61. *See In re Gault*, 387 U.S. at 36.

62. *Id.*

63. Sweet, *supra* note 58, at 505.

64. 452 U.S. 18 (1981).

65. *Id.* at 21-22.

66. *Id.* at 20.

67. *Id.* at 52 (Blackmun, J., dissenting). At trial, the court admitted evidence about the unrelated charge. Such evidence may have constituted impermissible character evidence that an attorney for Lassiter, if present, could have: (1) excluded through proper objections; and/or (2) limited to what was absolutely necessary; or (3) created a record of objections in order to preserve them for appellate review. Because Lassiter was untrained in the law and she did not have an attorney, none of these tactics were advanced.

68. *Id.* at 52-53 (Blackmun, J., dissenting).

69. *Id.* at 52-53 (Blackmun, J., dissenting).



counsel.<sup>70</sup> The Department's main witness was a social worker who testified regarding events prior to her assignment to the case,<sup>71</sup> as well as hearsay testimony about the grandmother's inability to care for another child.<sup>72</sup> Unfamiliar with the rules of evidence and North Carolina law, Lassiter "failed to uncover this weakness in the worker's testimony."<sup>73</sup>

The court proceeded to tell Lassiter that she could cross-examine the social worker.<sup>74</sup> However, Lassiter began to make declarative statements, unaware that in performing a cross-examination she was limited to asking questions of the witnesses.<sup>75</sup> Her subsequent attempts to cross-examine the

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70. *Id.* at 22.

71. *Id.* at 53 (Blackmun, J., dissenting).

72. *Id.*

73. *Id.*

74. *Id.* at 54. (Blackmun, J., dissenting).

75. *Id.* Lassiter clearly did not understand the function of cross-examination, and the limited guidance she received from the judge did not clarify her understanding:

THE COURT: All right. Do you want to ask her any questions?

[MS. LASSITER]: About what? About what she—

THE COURT: About this child.

[MS. LASSITER]: Oh, yes.

THE COURT: All right. Go ahead.

[MS. LASSITER]: The only thing I know is that when you say—

THE COURT: I don't want you to testify.

[MS. LASSITER]: Okay.

THE COURT: I want you to know whether you want to cross-examine her or ask any questions.

[MS. LASSITER]: Yes, I want to. Well, you know, the only thing I know about is my part that I know about it. I know—

THE COURT: I am not talking about what you know. I want to know if you want to ask her any questions or not.

[MS. LASSITER]: About that?

THE COURT: Yes. Do you understand the nature of this proceeding?

[MS. LASSITER]: Yes.

THE COURT: And that is to terminate any rights you have to the child and place it for adoption, if necessary.

[MS. LASSITER]: Yes, I know.

THE COURT: Are there any questions you want to ask her about what she has testified to?

[MS. LASSITER]: Yes.

THE COURT: All right. Go ahead.

{MS. LASSITER}: I want to know why you think that you are going to turn my child over to a foster home? He knows my mother and he knows all of us. He knows her and he knows all of us.

THE COURT: Who is he?

[MS. LASSITER]: My son, William.

[SOCIAL WORKER]: Ms. Lassiter, your son has been in foster care since May of 1975 and since that time—

[MS. LASSITER]: Yeah, yeah and I didn't know anything about it either.

witness led to noticeable impatience on the part of the judge.<sup>76</sup> Moreover, disparaging comments by opposing counsel during the course of Lassiter's attempted cross-examination remained unchecked by the court.<sup>77</sup>

Furthermore, Lassiter effectively "lost her right to present testimony on direct examinations."<sup>78</sup> This loss occurred because, in the absence of counsel, the Judge, rather than an advocate for Lassiter, questioned both Lassiter and her mother.<sup>79</sup> An independent advocate could have elicited information while acting in a manner consistent with Lassiter's best interests, thus preserving the neutrality of the judiciary and the adversarial system of justice. The court further compromised its neutrality—as well as Lassiter's case—by questioning Lassiter and her mother as if they were adverse witnesses.<sup>80</sup> When Lassiter testified, the judge expressed "open disbelief" at one of her answers.<sup>81</sup> When the judge finished questioning Lassiter, he stated "[a]ll right Mr. Odom, see what you can do."<sup>82</sup> The court engaged in additional disparaging remarks<sup>83</sup> when Lassiter's mother testified.<sup>84</sup> At the close of the

*Id.* at 54 n.22 (Blackmun, J., dissenting).

76. *See, e.g., id.*

77. For example:

[MS. LASSITER]: . . . Why you want to place him in adoption among strange people that not his family and they not got no relationship to him and his family is over here, my mother and I.

[OPPOSING COUNSEL]: I think she has already answered that question. I think it's obvious, you know, I think the answer to that question is very obvious.

Hearing Tr. at 22-23, *In re Lassiter*, 259 S.E.2d 336 (N.C. Ct. App. 1979) (No. 79-6423). Lassiter, as an indigent defendant without counsel, stood in stark contrast to the State, which was represented by counsel and which possessed far greater resources than did Lassiter. Lassiter's case illustrates this kind of "double disparity" that many indigent litigants face—the party with no attorney and no resources to call on must go up against the party who has both an attorney (or attorneys) and a wealth of resources. In Lassiter's case, she suffered from both disparities while fighting for an especially compelling interest, the right to keep her son.

78. Petitioner's Brief at 45, *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (No. 79-6423).

79. *Id.*

80. Petitioner's Brief at 44, *Lassiter* (No. 79-6423). *See also* Hearing Tr. at 23-36, 43-52, *In re Lassiter*, 259 S.E.2d 336 (N.C. Ct. App. 1979) (No. 79-6423).

81. *Lassiter*, 452 U.S. at 55 n.23. Justice Blackmun refers to this section of the transcript in his dissent:

[THE COURT]: Did you know that your mother filed a complaint on the 8th day of May, 1975, alleging that you had often left the children with her for days without providing money and food while you were gone?

A: No, 'cause she said she didn't file no complaint.

[THE COURT]: That was some ghost who came up here and filed it I suppose.

Hearing Tr. at 30, *In re Lassiter* (No. 79-6423); *see also Lassiter*, 453 U.S. at 55 n.23.

82. Hearing Tr. at 36, *In re Lassiter* (No. 79-6423).

83. For example, while the elder Ms. Lassiter was testifying on "direct," the court interrupted and stated "I tell you what, let's just stop all this. You question her, please. Just answer his questions. We'll be here all day at this rate. I mean we are just wasting time, we're skipping from one subject to another." Hearing Tr. at 52, *In re Lassiter* (No. 79-6423). During her cross-examination, the elder Ms. Lassiter vehemently denied stating that she complained about her daughter's ability to take care of her

hearing, the court terminated Lassiter's parental rights.<sup>85</sup>

Lassiter appealed the court's decision on the ground that as an indigent, she was entitled to an attorney under the Due Process Clause of the Fourteenth Amendment.<sup>86</sup> The North Carolina Court of Appeals held that the Constitution did not mandate a right to counsel in a termination of parental rights proceeding.<sup>87</sup> Although the Supreme Court of North Carolina denied review,<sup>88</sup> the United States Supreme Court granted certiorari to consider the question.<sup>89</sup>

In a 5-4 decision, the Court held that in state proceedings to terminate parental rights, trial courts must evaluate requests for appointed counsel on a case-by-case basis using the due process analysis described in *Matthews v. Eldridge*.<sup>90</sup> Under this analysis, courts evaluate three factors to determine what due process requires in each case: (1) the litigant's private interests at stake; (2) the government's interest; and (3) the risk that the procedures used will lead to erroneous decisions.<sup>91</sup> In *Lassiter*, the Court stated that a

children. The court reacted as follows:

[OPPOSING COUNSEL]: Did you tell Ms. Mangum on the 8th day of May, 1975, that when your daughter was in the hospital having William that she left the children in a cold house with no heat?

A: No, sir, no sir, unh unh, no sir.

MS. LASSITER: That's a lie.

A: No, sir, no, sir. God knows, I'll raise my right hand to God and die saying that. Somebody else told that.

THE COURT: I wish you wouldn't talk like that it scares me to be in the same room with you.

Hearing Tr. at 55, *In re Lassiter* (No. 79-6423).

84. Lassiter's mother, Lucille, the grandmother of William and caretaker of Lassiter's four other children. Hearing Tr. at 52, *In re Lassiter* (No. 79-6423).

85. *Lassiter*, 452 U.S. at 23-24.

86. *Id.* at 24.

87. *Id.*

88. *Id.*

89. *Lassiter v. Dep't of Soc. Servs.*, 449 U.S. 819 (1980). The Court also granted leave to the following organizations to file briefs as *amicus curiae*: Brief of Amicus Curiae American Bar Association, *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (No. 79-6423) (writing in favor of right to counsel in parental rights termination proceedings); Brief of Amici Curiae National Center on Women and Family Law, Inc. et al., *Lassiter* (No. 79-6423) (writing in favor of right to counsel in parental rights termination proceedings); Brief of Amici Curiae National Legal Aid and Defender Association, *Lassiter* (No. 79-6423) (writing in favor of right to counsel in parental rights termination proceedings); Brief of Amicus Curiae State of North Carolina, joined by the Attorney General of Delaware et al., *Lassiter* (No. 79-6423) (writing in opposition to granting a right to counsel in parental rights termination proceedings); and Brief of Amici Curiae North Carolina Civil Liberties Union, *Lassiter* (No. 79-6423) (writing in favor of right to counsel in parental rights termination proceedings).

90. 452 U.S. at 27. See also *Matthews v. Eldridge*, 424 U.S. 319 (1976) (detailing the due process test).

91. 452 U.S. at 27.

rebuttable presumption exists that an indigent litigant has a right to appointed counsel “only when, if he loses, he may be deprived of his physical liberty.”<sup>92</sup> Stated another way, unless loss of the case may result in incarceration or some other form of deprived physical liberty, the court presumes appointment of counsel is unnecessary for indigent parties. In order to determine whether the circumstances of the *Lassiter* case rebutted this presumption, the Court then employed the *Matthews* analysis.<sup>93</sup> Despite the admittedly high interest a parent has in retaining parental rights for her children,<sup>94</sup> and the arguably high possibility for error absent legal representation, the Court found that these factors did not rebut the presumption that right to counsel is not ordinarily provided in parental rights termination proceedings.<sup>95</sup>

Justice Blackmun, joined by Justice Brennan and Justice Marshall, dissented, arguing that due process requires the appointment of counsel in parental rights termination proceedings.<sup>96</sup> The dissent pointed out that the type of “ad-hoc approach” adopted by the majority was “thoroughly discredited nearly 20 years [prior] in *Gideon v. Wainwright*.”<sup>97</sup> Furthermore, the dissent argued that the majority applied the right analysis, but came to an illogical conclusion.<sup>98</sup> Under the *Matthews* factors, the dissent found the interest of a parent to be a unique and special one that clearly outweighed the weak pecuniary interests of the state.<sup>99</sup> Moreover, the dissent determined that the absence of counsel created an extraordinarily high possibility of

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92. *Id.* at 26-27.

93. *Id.* at 27.

94. The Court stated that “the parent’s interest is an extremely important one” that may, in some circumstances, be tainted by “criminal liability inherent in some termination proceedings.” *Id.* at 31. Justice Blackmun’s dissenting opinion addressed the fact that *Lassiter*’s separate criminal proceeding also seemed to play a part in the majority’s decision. Justice Blackmun noted that, although confined to the issue of appointment of counsel, the majority recited details of *Lassiter*’s second degree murder conviction set forth in an unpublished opinion. *Id.* at 57 n.26 (Blackmun, J., dissenting). Justice Blackmun stated: “reliance on such evidence is likely to encourage the kind of subjective value judgments that an adversarial judicial proceeding is meant to avoid.” *Id.* at 58. For a discussion of impermissible character evidence allowed at the trial level in the absence of counsel, see *supra* notes 71-73 and accompanying text.

95. *Id.* at 31. The Court also admitted the government’s interests were “relatively weak.” *Id.*

96. *Id.* at 35 (Blackmun, J., dissenting).

97. *Id.*

98. *Id.* at 48-49 (Blackmun, J., dissenting).

99. *Id.* at 48 (Blackmun, J., dissenting). The state’s interest to save money is weak in comparison with *Lassiter*’s interest in keeping her parental rights. *Id.* The third *Matthews* factor, the likelihood of an erroneous decision resulting from the procedures used, also weighed in favor of *Lassiter*. *Id.* at 44. The dissent questioned why these factors did not outweigh the state’s interest in saving money and thereby rebut the presumption that counsel is not ordinarily provided, especially considering that the majority conceded that the state’s interest was weak. *Id.* at 49. One possible answer is the Court’s reluctance to grant any positive rights. For a discussion of this inquiry, see *infra* note 195.

erroneous decisions.<sup>100</sup> Lastly, the dissent discussed the greater cost and judicial inefficiency involved in the ad-hoc approach the majority had adopted.<sup>101</sup>

### 3. *Extra-Legal Attempts to Provide Counsel*

Despite the Supreme Court's refusal to expand the reasoning of cases like *Powell* or *Gault* to "find" a constitutional due process guarantee of counsel in civil litigation, other forces in American society have recognized such a need and have attempted to provide redress. Right to counsel promoters recognize that low-income Americans face a wide range of legal problems including: Social Security, housing, consumer matters, insurance, welfare benefits, family crises, grinding financial problems, bankruptcies, repossessions, unemployment compensation, and many more.<sup>102</sup> A recent American Bar Association study reported that forty percent of low-income households surveyed had civil legal problems in the last twelve months but could not obtain counsel.<sup>103</sup> In the early nineties, "two of five Americans surveyed could not afford legal help with everyday legal problems like contracts, housing, or domestic relations."<sup>104</sup>

These staggering unmet legal needs exist despite the systems put in place to address them.<sup>105</sup> Currently, the three highest contributors to legal services funding are direct pro bono services, federal funding through the Legal Services Corporation ("LSC"), and Income on Lawyer's Trust Accounts ("IOLTA") programs.<sup>106</sup> The LSC,<sup>107</sup> however, has suffered a serious decline

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100. *Id.* at 50-51 (Blackmun, J., dissenting).

101. *Id.* at 51.

102. Cramton, *supra* note 1, at 673.

103. Patricia M. Wald, *Becoming a Player: A Credo for Young Lawyers in the 1990s*, 51 MD. L. REV. 422, 428 (1992).

104. *Id.*

105. The American Bar Association (ABA) states: "The need for legal services by the eligible client community is far greater than the resources available to meet that need." STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS 139 (1996). The ABA urges legal aid programs to develop standardized priorities to determine which applicants will receive help. *Id.* at 139-140. This proposal is akin to the "triage" method in the medical profession, except that unlike in medicine, the legal profession will still turn away a large number of needy applicants due to lack of resources to serve them. Moreover, it is important to note that the public is commonly left out of the drafting of these standards and is effectively left out of the overall debate regarding right to counsel in general. See Peter A. Joy, *What We Talk About When We Talk About Professionalism: A Review of Lawyer's Ideals/Lawyer's Practices: Transformations in the American Legal Profession*, 7 GEO. J. LEGAL ETHICS 987, 1004 (1994).

106. Talbot D'Alemberte, *Tributaries of Justice: The Search for Full Access*, FLA. B.J., Apr. 1999, at 12, 25. A study on sources of legal services in 1997 listed the LSC as contributing \$12.6 million, IOLTA \$12.3 million, and direct pro bono as \$130 million. *Id.* As a solution to the problem of unmet legal needs, D'Alemberte proposes a state model that combines and improves existing and new

in revenue generation since its inception.

Direct lawyer pro bono service “remains a vital component of any plan for legal access.”<sup>108</sup> Nonetheless, the Model Rules of Professional Conduct merely contain an aspirational rule that addresses support for legal services for persons with limited means.<sup>109</sup> Although some states have strengthened their oversight of pro bono activities, these efforts have failed to yield uniformity in participation or higher participation rates and have instead sparked intense debate and hostility within the legal community.<sup>110</sup>

The LSC provides a central site from which it distributes federal funds to legal aid clinics across the nation.<sup>111</sup> Efforts vary greatly from state to state, however, and different states have different standards for distributing aid.<sup>112</sup> The reporting requirements also vary greatly, which impedes a general understanding of how much is actually accomplished.<sup>113</sup> Furthermore, the

programs. *Id. passim*. D’Alemberte lists eight “tributaries” or sources of legal services. *Id.* at 14-15. In addition to increased federal funding for LSC, see *id.* at 14; higher interest rates for IOLTA programs, see *id.* at 16; and comprehensive lawyer pro bono plans that have mandatory reporting requirements, see *id.* at 19-20; D’Alemberte’s model contains the following sources: the addition of a surcharge of \$10 that would be assessed on state filing fees, see *id.* at 18; a “Civil Gideon Fund” developed by a sales tax on legal services, as well as by revenue generated from punitive damages awards and unclaimed class action awards, see *id.* at 19; a fee-shifting statute for low-income litigants “who must challenge government agencies to establish entitlement,” see *id.*; and local plans for access to justice that are narrowly tailored to fulfill community needs, see *id.* at 25.

However, even if a state used each source D’Alemberte suggests, lack of uniformity among states would remain a significant obstacle to assuring equal access to the justice system for America’s low-income population. Until a uniform federal system is in place, however, innovative suggestions like D’Alemberte’s play an increasingly important role in assuring current unmet legal needs addressed. Moreover, if the Supreme Court or Congress developed a constitutional or statutory right to counsel for low-income civil litigants, D’Alemberte’s model could be adopted in full or part on a federal level. Funding and services would then be uniform throughout the United States without rendering current efforts to solve the problem obsolete.

107. See generally LEGAL SERVICES FOR THE POOR (Douglas J. Besharov ed., 1990).

108. D’Alemberte, *supra* note 106, at 19.

109. Model Rule 6.1, “Voluntary *Pro Bono Publico* Service,” suggests each lawyer render 50 hours of *pro bono publico* legal services per year as well as contribute financial support to organizations that provide such services to persons of limited means. MODEL RULES OF PROF’L CONDUCT R. 6.1 (1998). Although the Model Code has no direct counterpart to Model Rule 6.1, Ethical Consideration 2-25 of the Model Code states that providing legal services to those who are unable to afford them is a responsibility that rests upon each individual lawyer. MODEL CODE OF PROF’L RESPONSIBILITY EC 2-25 (1998).

110. D’Alemberte, *supra* note 106, at 24. Some states have unsuccessfully moved toward mandatory pro bono requirements, while others have merely sought to require mandatory reporting of pro bono services—also unsuccessfully. *Id.*

111. Created through the Legal Services Corporations Act, 42 U.S.C. §§ 2996-2996 L (1994). For general information regarding the LSC and its current services, see <http://www.lsc.gov>.

112. American Bar Association, *supra* note 105, at 139-40.

113. D’Alemberte, *supra* note 106, at 19-23. D’Alemberte notes that a mandatory reporting system also greatly increases lawyer participation in pro bono programs, despite the fact that the participation itself is purely voluntary. *Id.* For examples of mandatory and voluntary state reporting systems, see generally *id.* (citing LEGAL SERVICES CORPORATION APPROPRIATION HISTORY 2 (1997);

LSC has met substantial government hostility in recent years.<sup>114</sup>

All fifty states, the District of Columbia, and the U.S. Virgin Islands have adopted the creative legal services funding program called IOLTA.<sup>115</sup> This program was based on a Florida Supreme Court justice's "observation of a similar program in British Columbia."<sup>116</sup> In short, the program uses interest from short- or long-term trust accounts, created by lawyers with client payments, to fund legal services.<sup>117</sup> Previously, the interest created profit for the banks because lawyers are ethically prohibited from receiving any benefit from the trust accounts.<sup>118</sup> Currently, IOLTA programs have become a significant source of funding for public service projects, particularly for legal services to the poor.<sup>119</sup>

Again, however, the states' versions of the IOLTA programs lack uniformity. For example, some states' programs are voluntary.<sup>120</sup> Thus, there are large discrepancies in how much revenue the programs generate from state to state.<sup>121</sup>

## *B. The Right to Counsel Outside of the United States*

### *1. In General*

Countries such as England,<sup>122</sup> France,<sup>123</sup> Germany,<sup>124</sup> Norway,<sup>125</sup>

In re Rules Regulating the Florida Bar, 573 So. 2d 800 (Fla. 1990); FLA. BAR & THE FLA. BAR FOUND., THE STANDING COMMITTEE ON PRO BONO SERVICES' REPORT TO THE SUPREME COURT OF FLORIDA (1998); HAW. STATE BAR ASS'N, ATTORNEY REGISTRATION STATEMENT 3 (1997); STATE BAR OF TEX., PRO BONO REPORTING: JUNE 1996 THROUGH MAY 1997 (1998)).

114. Wald, *supra* note 103, at 428. See also D'Alemberte, *supra* note 106, at 14-16 (discussing the 12 percent drop in Congressional funding for LSC in 1995 from its highest funding in 1981); *cf.* LEGAL SERVICES FOR THE POOR: TIME FOR REFORM (Douglas J. Besharov ed., 1990) (discussing the lawyer dominated nature of the LSC and related inability to focus on true needs of the poor).

115. Arthur J. England & Russell E. Carlisle, *History of Interest on Trust Accounts Program*, 56 FLA. B.J. 101 (1982).

116. D'Alemberte, *supra* note 106, at 16.

117. *Id.* at 16-17.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Earl Johnson, Jr., *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341, 342 (1985) [hereinafter Johnson, *An International Perspective*]. For a detailed discussion of England's right to counsel, see *infra* notes 141-48 and accompanying text.

123. Johnson, *An International Perspective*, *supra* note 122, at 343.

124. *Id.* at 343-44. For a detailed discussion of Germany's right to counsel appears, see *infra* notes 149-58 and accompanying text.

125. *Id.* at 344. Norway's right to counsel for indigent civil litigants was created in 1915 by statute. *Id.*

Sweden,<sup>126</sup> Denmark,<sup>127</sup> Belgium,<sup>128</sup> Netherlands,<sup>129</sup> Austria,<sup>130</sup> Spain,<sup>131</sup> Italy,<sup>132</sup> Portugal,<sup>133</sup> Switzerland,<sup>134</sup> New Zealand,<sup>135</sup> the Australian States,<sup>136</sup> and Canada<sup>137</sup> furnish counsel for those who cannot afford their own in civil litigation. This right to counsel in civil litigation for the poor originated in these countries through statute, through their respective constitutions, or through both.<sup>138</sup> In fact, “the United States is the only major Western nation that does not provide a right to counsel in civil matters.”<sup>139</sup>

Furthermore, the European Convention of Human Rights guarantees the right to counsel in civil cases, recognizing it as a fundamental human right.<sup>140</sup> The United States’ position on this issue becomes even more difficult to

126. *Id.* Sweden created its right to counsel for indigent civil litigants in 1919 by statute. *Id.* The statute mandated that appointed lawyers receive government compensation. *Id.*

127. *Id.* at 344-45. Denmark’s right to counsel was also established by statutory authority and is extended to some members of the middle class as well as the poor. *Id.*

128. *Id.* Belgium created the right to counsel for poor civil litigants as part of its Code of Civil Procedure, and appointed attorneys remain uncompensated for their services. *Id.*

129. *Id.* at 345. The Netherlands enacted a legal aid system in 1957 that uses a compensated private counsel model. *Id.*

130. *Id.* at 346. Since 1895, Austria has provided a right to counsel for indigent civil litigants whose cases appear to show some merit. *Id.* Austria’s Legal Aid Act, passed in 1973, improved the “process of demonstrating indigency.” *Id.*

131. *Id.* Spain enacted a statutory right to counsel for indigent civil litigants in 1855 as part of its Law of Spanish Civil Procedure. *Id.* In 1975, the Spanish government began to provide compensation for attorneys appointed to represent indigent litigants. *Id.*

132. *Id.* Italy’s right to counsel for indigent civil litigants is both statutory and constitutional in nature. *Id.* The duty to provide legal services to the poor originated with “the birth of th[e] nation” in 1865 and was further refined by a legal aid law passed in 1923. *Id.*

133. *Id.* Portugal enacted a statutory right to counsel in civil cases in 1899. *Id.* Extensive amendments to the statute occurred in both 1944 and 1970. *Id.*

134. *Id.* See also Francis William O’Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L.J. 1 *passim* (1967). For a detailed discussion of Switzerland’s right to counsel appears *see infra* notes 159-68 and accompanying text.

135. See Johnson, *An International Perspective*, *supra* note 122, at 347. New Zealand’s Legal Aid Act of 1969 created an entitlement to representation for low-income civil litigants by private counsel. *Id.*

136. *Id.* at 347-48. Although legal aid in Australia is administered through individual states rather than on a federal scheme, “as a practical matter any poor person receive[s] legal assistance if he or she ha[s]” reasonable grounds for involvement in litigation. *Id.* at 348 n.30. Most states began legal assistance programs in the 1960s and 1970s. *Id.*

137. *Id.* at 348. Canada has a “province by province” arrangement for legal assistance that began in 1966. *Id.* By 1979, all but two provinces had enacted comprehensive legal aid programs in civil cases. *Id.*

138. See *id.*; see also *supra* notes 133-37 and accompanying text. For a detailed analysis of the legal aid programs provided across the globe, see MAURO CAPELLETTI ET AL., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1975) and PERSPECTIVES ON LEGAL AID (F. Zemans ed., 1974).

139. See Johnson, *An International Perspective*, *supra* note 122, at 352-353.

140. Airey v. Ireland, 1979 Y.B. EUR. CONV. ON H.R. (Eur. Comm’n on H.R.) 420, 422 (summary of result).



understand in light of the fact that our system of justice is based on the English system, where a legally enforceable right to counsel was incorporated into the common law by statute over 500 years ago.<sup>141</sup> The English, German and Swiss models provide useful points of comparison with the American approach.

## 2. *England, Germany, and Switzerland*

England, a post-industrialized society,<sup>142</sup> has had a comprehensive legal services program linked to a statutory right to counsel for indigent English litigants since 1495.<sup>143</sup> Thus, England serves as “the statutory model” for consideration in the United States. Today, English legal aid legislation, passed in the latter half of the twentieth century,<sup>144</sup> comprises an extremely thorough system of legal services, including representation for civil and criminal cases, as well as a broad range of transactional services.<sup>145</sup> The philosophy of the program is “to ensure that no one needing the protection of an English Court should be denied this for lack of means and that the courts can fulfil their function of administering the law effectively, through the parties coming before them on equal terms, irrespective of their financial resources.”<sup>146</sup>

Under the present-day English system, lawyers are fully compensated out

141. Johnson, *An International Perspective*, *supra* note 122, at 342.

142. See *supra* note 7 for a definition of this term.

143. Johnson, *Toward Equal Justice*, *supra* note 5, at 204. The English Parliament enacted this statute during the reign of Henry VII. *Id.* Translated into current vernacular, this law stated:

And after the said writ or writs be returned . . . the justices shall assign to the same poor person or persons counsel learned by their discretions which shall give counsels nothing taking for the same, and in likewise the same justices shall appoint an attorney and attorneys for the same poor persons . . . which shall do their duties without any rewards.

Johnson, *An International Perspective*, *supra* note 122, at 342 (citing a statute of Henry VII).

144. This legislation included: The Legal Aid and Advice Act passed in 1949 (which was the precipitating legislation for the current scheme); the Legal Aid Act of 1960 (increasing financial limits); the Legal Aid Act of 1964 (providing costs to successful opponents paid from the Legal Aid Fund); and the Legal Aid and Assistance Act of 1972 (which “corrects a serious imbalance in the Scheme”). Seton Pollock, *The English Legal Aid System*, in *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* 343, 344 (Vincenzo Varano ed., 1975).

145. *Id.* at 343. Transactional matters covered under the system include: “the perusal or drawing of documents, tenancy agreements, wills, transfers of real property, documents for effecting a change of name, and, indeed, any service which an English solicitor provides for those able to pay for them.” *Id.*

146. *Id.* Although this objective has not yet been fully realized, there have been substantial strides toward achieving it in recent years. *Id.* Pollock also notes that although the general population regards legal aid legislation as part of the welfare programs in England, lawyers themselves regard it as “as . . . [a] major step in the acceptance by the State of its responsibility to ensure that justice is available to the people.” *Id.* at 344.

of government funds for the services they provide.<sup>147</sup> England also provides services to members of the population who are well above the poverty level,<sup>148</sup> which illustrates the system's belief that other factors, such as expenses, childcare costs, and the like indicate the necessity of legal need, in addition to income.

Germany's statutory right to counsel in civil cases was incorporated into the German Code of Civil Procedure in 1877.<sup>149</sup> Moreover, the German Constitutional Court has reinforced and supplemented the statutory right to counsel for the poor by declaring the right to counsel a constitutional guarantee of a fair hearing in civil cases.<sup>150</sup> The right to counsel is a constitutional guarantee, even where the legal aid statute does not so require.<sup>151</sup> Thus, Germany represents "the constitutional plus statutory model" for consideration by the United States.

Since 1923, the German State has compensated for legal services provided by private attorneys.<sup>152</sup> Like in England, there are no full-time, salaried legal aid attorneys.<sup>153</sup> Rather, private attorneys supply all of the services for the poor.<sup>154</sup> Attorneys are not permitted to refuse appointment to represent indigent clients.<sup>155</sup> Two benefits arise from having only private attorneys available for legal aid cases. First, low-income litigants can "select their lawyer from a large group of" practitioners.<sup>156</sup> Second, clients can visit their attorneys at private offices, a process devoid of any stigmatization.<sup>157</sup>

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147. *Id.* at 348; see also Russell Wallman, *Legal Service in England*, in LEGAL SERVICES FOR THE POOR 194-97 (1990) (discussing the history of salaried legal services in England).

148. See D'Alemberte, *supra* note 106, at 26 n.3.

149. Karl August Klausner & Robert A. Riegert, *Legal Assistance in the Federal Republic of Germany*, 20 BUFF. L. REV. 583, 585 (1971).

150. Johnson, *Toward Equal Justice*, *supra* note 5, at 206.

151. *Id.*

152. See Klausner & Riegert, *supra* note 149, at 591 n.45. The lawyers' fees are fixed by the state. *Id.*

153. *Id.* at 591.

154. *Id.* at 591-92. Klausner and Riegert observed that "more than half of the German attorneys accept at least some legal aid cases regularly." *Id.* at 591. However, they note that no statistics are available to track exact numbers. *Id.*

155. *Id.* at 590-91. However, in *Mallard v. U.S. District Court*, 490 U.S. 296 (1989), the U.S. Supreme Court held that an attorney was able to refuse appointment to such a case under the statute. *Id.* at 309. However, the Court in *Mallard* left undecided the question whether an attorney could refuse a court's appointment to a case when the court was operating under its "inherent powers" to appoint rather than under the statute. *Id.* at 310.

156. See Klausner & Riegert, *supra* note 149, at 601.

157. *Id.* This includes stigmatization suffered by the client, who would otherwise be known as indigent by partaking in legal services set aside for the poor, and stigmatization of legal services attorneys, who are sometimes regarded as not as competent as higher paid private attorneys. *Id.* Thus, low-income litigants are not made to feel as if they are "beneficiaries of an act of charity," and are more likely to bring their causes to justice. *Id.* In systems in which low-income litigants are stigmatized or feel as if they are receiving charity, they may be less likely to bring valid claims at all.

Germany's legal aid programs have also had remarkable success in their cost-effectiveness.<sup>158</sup>

The highest Swiss court<sup>159</sup> established Switzerland's constitutional right to counsel in civil litigation in the 1937 case *Schefer gegen Appenzell A. Rh. Regierungsrat*.<sup>160</sup> In this case, a poor person asked the Swiss court to rule on the question of whether indigent Swiss citizens have a right to appointed counsel under the Swiss Constitution in civil cases.<sup>161</sup> The court had to interpret Article Four of the Swiss Constitution, which contains a guarantee that "[a]ll Swiss are equal before the Law," similar to the Equal Protection Clause in the United States Constitution.<sup>162</sup>

The court held that for citizens to be equal under the law, as guaranteed by Article Four of the constitution, indigent litigants must be appointed counsel in civil cases.<sup>163</sup> The court reasoned:

[t]he principle of [equality] before the law does not impose upon the cantons the obligation to provide a lawyer except in those cases, where, lacking one, a party could not normally assert his rights in proceedings. Thus free judicial assistance ought to be granted liberally in a civil matter where the handling of the trial demands knowledge of the law . . . .<sup>164</sup>

The court distinguished civil cases from criminal cases, where there is typically no right to counsel in Switzerland, stating that while criminal cases move along a structured path, administered by the government, civil actions can move along only by the will of the parties involved.<sup>165</sup> Therefore, a potential litigant unfamiliar with the rules of civil procedure such as jurisdiction or venue, which are "frequently complicated," might easily fail merely to bring the action out of ignorance or intimidation of the law.<sup>166</sup> After this landmark case, the Swiss created a legal aid system in which

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In order to prevent the creation of unwarranted incentives to litigate, Klauser and Reigart suggest plans that emphasize and create incentives for the attorneys who reach settlement. *Id.* at 606.

158. *Id.* at 603.

159. The Federal Court of Switzerland is the highest Swiss court.

160. Judgment of Oct. 8, 1937, BGE 63 I 209 (Switz.). See also O'Brien, *supra* note 134, at 5 (where this case is partially translated and discussed).

161. O'Brien, *supra* note 134, at 5.

162. *Id.*

163. *Id.* Criminal cases in Switzerland, however, are a different story. Criminal defendants are not provided counsel for numerous reasons including the active participation and differing responsibilities of Swiss judges in the trial. *Id.*

164. *Id.* (translating the Swiss Court's decision). "Cantons" are a loosely based system of states that make up the Swiss Confederation. *Id.* at 2 n.2.

165. *Id.* at 7.

166. *Id.*

“lawyer’s fees, witnesses’ expenses, funds for inspections of property involved in the suit, and funds for the hiring of specialists” are provided for indigent litigants.<sup>167</sup> Lawyers are appointed through a rotation system and service is mandated.<sup>168</sup>

### III. THE IRRECONCILABLE DOCTRINES OF *GIDEON* AND *LISSITER*

In *Lassiter*, the United States Supreme Court established a presumption that counsel is not ordinarily provided in civil cases in which a loss of physical liberty is not at stake.<sup>169</sup> To justify the appointment of counsel, a civil litigant must satisfy the *Matthews* analysis—show that the litigant’s private interests and the risk of error outweigh the government’s interest—to rebut the presumption that counsel is not ordinarily provided.<sup>170</sup> As illustrated by *Lassiter*, the interest in keeping one’s child plus the extraordinarily high risk of error in a hearing conducted without counsel did not outweigh the government’s pecuniary interest in *not* appointing counsel in that parental rights termination proceeding.<sup>171</sup> Thus, even under the most compelling circumstances, indigent defendants will find it virtually impossible to rebut the presumption against appointing counsel. Yet the loss of physical liberty for one day, or merely the perceived threat of loss of liberty, mandates the appointment of counsel for those who cannot otherwise afford it.<sup>172</sup>

In more ways than one, these two analyses are simply irreconcilable. First, the reasoning behind adoption of a right to counsel for indigent criminal defendants mirrors that of the reasoning behind adoption of such a right for low-income civil litigants. Second, civil litigants are arguably at a greater disadvantage without counsel than are criminal defendants without counsel. Third, discrepancies in actual fundamental fairness aside, the appearance of fundamental fairness is also essential to the preservation of our system of justice.<sup>173</sup> Finally, right to counsel for the poor is a recognized fundamental human right,<sup>174</sup> and it should be given such weight in the United States.

In the United States, the rationale behind adopting a right to counsel for

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167. *Id.* at 8. Exact provisions vary from canton to canton. *Id.* at 9.

168. *Id.* at 8-9.

169. For a discussion of the Court’s opinion in *Lassiter*, see *supra* notes 64-101 and accompanying text.

170. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26-27 (1981).

171. See *supra* notes 64-101 and accompanying text.

172. See *supra* notes 48-57 and accompanying text.

173. See *infra* notes 182-85 and accompanying text.

174. See *supra* notes 122-41 and accompanying text.

criminal defendants and civil litigants is essentially the same. The reasons the Supreme Court espoused in *Powell* for providing counsel to criminal defendants do not change for civil litigants. Civil litigants are also typically unequipped for what is essential to a fair trial—namely, knowledge of the law. This knowledge includes mastery of the rules of evidence, so that inadmissible evidence such as hearsay, or testimony pertaining to settlement negotiations, will not be admitted to the detriment of the civil litigant. This essential knowledge also increases awareness of possible affirmative defenses, which would shift the burden of proof or mandate dismissal of the case entirely. Untrained civil litigants also lack specialized knowledge of statutory or common law causes of action, relief, or exemptions from suit. Civil litigants are typically ignorant of the law because they lack training, experience, and licensing. They also are not privy to the same resources and networking opportunities that are available to members of the Bar. For example, imagine the amount of time it would take an unfamiliar eye to understand a statute compared to a lawyer who, because of education, training, experience, or aid from other attorneys, could interpret it more swiftly.<sup>175</sup> It defies reason to require civil litigants to educate themselves about the law in time to file or respond to a complaint, all the while maintaining their “day” jobs, when attorneys are not permitted to file or defend suit for a client until completion of at least four years of undergraduate education, three years of legal education, and becoming successfully licensed in the state by applying to the bar and passing the state’s bar exam.

Neutrality and impartiality of the judiciary is also compromised when attorneys do not represent civil litigants. When a litigant is without counsel, an undue and unethical<sup>176</sup> responsibility rests on judges to take the place of counsel.<sup>177</sup> Judges are forced to play dual roles in order to compensate for the absent attorney.<sup>178</sup> The *Lassiter* case aptly illustrates the need for judges to

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175. For example, suppose a civil litigant needed to know the law in Missouri on divorce and child custody. To the trained eye, this does not seem like such an incredible feat. However, most first-day law students—people who have completed at least a bachelor’s degree and the law school entrance exam—would not know where to begin such a search. Assuming our civil litigant could even find the appropriate provisions, entitled “Chapter 452: Dissolution of Marriage, Divorce, Alimony and Separate Maintenance,” she faces well over 125 sections of the statute with titles like “Child support, how allocated—factors to be considered—abatment or termination of support, when—support after age eighteen, when—public policy of state—payments may be made directly to child, when—child support guidelines, rebuttable presumption, use of guidelines, when—retroactivity—obligation terminated, how.” MO. REV. ST. § 452.340 (1999)

176. Cramton, *supra* note 1, at 677

177. *Id.*

178. For an example of the difficult role of judges in this situation, see *supra* notes 78-83 and accompanying text.

remain impartial in our adversarial system.<sup>179</sup>

Moreover, there are indications that some civil litigants are at a greater disadvantage for not having counsel than certain criminal defendants. “Imposition of unrealistic alimony or child support requirements, loss of custody of children, civil commitment as an incompetent, and eviction” are consequences that can far outweigh short periods of deprivation of physical liberty.<sup>180</sup> Empirical studies illustrate that a lawyer’s assistance in a civil case often makes the difference between success and failure.<sup>181</sup>

Furthermore, the burden of proof in most civil cases, “a preponderance of the evidence,” is a much easier standard than the “beyond a reasonable doubt” standard in the typical criminal case. Because “beyond the reasonable doubt” requires more of the prosecution than a civil litigant’s burden of proof, it may have the effect of providing the criminal defendant with more protections than the civil litigant. This discrepancy becomes especially poignant in the case where the unrepresented civil litigant faces an opposing party who has counsel, as the state of North Carolina did in the *Lassiter* case.

Lastly, actual occurrences of unfairness aside, the appearance of impropriety and lack of uniform application of the law can damage our system of justice. Some commentators argue that in an era when confidence in the justice system in general is waning,<sup>182</sup> we simply cannot endure further “erosion of faith in the judicial system.”<sup>183</sup> This may particularly be the case in light of the stratification of economic classes in the United States—often with disparate impact on minorities.<sup>184</sup> The unwillingness of the United States to acknowledge the right to counsel as a fundamental human right, no matter where its legal origins, also calls into question the United States’ commitment to human rights, both domestically and internationally.<sup>185</sup>

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179. *Id.* at 677.

180. *Id.* at 676.

181. *Id.*

182. See Joy, *supra* note 105, at 1009 n.123 (discussing the indirect voice of the public’s opinion as heard through opinion polls and the “proliferation of lawyer jokes”).

183. Sweet, *supra* note 58, at 506.

184. See generally Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353 (1995); Brian Mikulak, *Classism and Equal Opportunity: A Proposal for Affirmative Action Based on Social Class*, 33 HOW. L.J. 113 (1990); Patricia Hill Collins, *African American Women and Economic Justice: A Preliminary Analysis of Wealth, Family, and African-American Social Class*, 65 U. CIN. L. REV. 825 (1997); Thomas D. Barton, *Legal Anthropology and Economic Analysis*, 80 NW. U. L. REV. 476 (1985) (reviewing KATHERINE NEWMAN, *LAW & ECONOMIC ORGANIZATION: A COMPARATIVE STUDY OF PREINDUSTRIALIZED SOCIETIES* (1983) and RICHARD POSNER, *A THEORY OF PRIMITIVE SOCIETY, IN THE ECONOMICS OF JUSTICE* (1981)).

185. See Johnson, *An International Perspective*, *supra* note 122, at 352-53. The European Convention on the Protection of Human Rights and Fundamental Freedoms requires that fair and public hearing be provided in civil matters within a reasonable time and by an impartial tribunal. *Id.* at

#### IV. RIGHT TO COUNSEL IN CIVIL LITIGATION AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION

The rule espoused in *Lassiter* is untenable. The Court's application of the *Matthews* due process analysis to rebut a "no counsel" presumption led to an erroneous decision in *Lassiter*. If even the private interest of retaining one's child, combined with an extremely high chance of error, cannot overcome a presumption that counsel is not ordinarily provided,<sup>186</sup> what will? The dissent in *Lassiter* would keep this balancing test, but would arrive at the opposite result.<sup>187</sup> However, if judicial discretion can result in such discrepancies, perhaps the ad-hoc approach applied in *Lassiter* should be put to rest.

The United States should consider the right to counsel as it exists in other post-industrialized countries. Because many of these countries have guaranteed such a right for hundreds of years,<sup>188</sup> the United States has the benefit of learning lessons from their long toil, and can pick and choose the most viable options for its own application here.

Despite the fact that the Equal Protection Clause in the United States Constitution<sup>189</sup> contains language similar to its Swiss<sup>190</sup> and German<sup>191</sup> counterparts, the United States has not recognized a right to counsel in civil cases when European nations have already done so.<sup>192</sup> Although some commentators have suggested an addition to the Seventh Amendment to explicitly include the right to counsel for those unable to obtain it otherwise,<sup>193</sup> the simplest solution would be for the Court to overrule *Lassiter*,<sup>194</sup> as *Gideon* overruled *Betts*, and hold that our Constitution guarantees a due process right to counsel for indigent civil litigants.<sup>195</sup>

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352. The European Court of Human Rights, the body that officially interprets the convention, has held that this requirement means that member states must either supply free lawyers or create a system of justice in which lawyers are not necessary. *Id.* at 353-54. See also *supra* note 140 and accompanying text (discussing *Airey v. Ireland*).

186. *Lassiter v. Dep't Soc. Servs.*, 452 U.S. 18, 26-27 (1981).

187. *Id.* at 57 (Blackmun, J., dissenting).

188. See *supra* Part II.B.2.

189. U.S. CONST. amend. XIV, § 1.

190. See *supra* text accompanying note 162.

191. See *supra* text accompanying notes 149-51.

192. Johnson, *Toward Equal Justice*, *supra* note 5, at 206.

193. See, e.g., CHESTER JAMES ANTIEAU, A U.S. CONSTITUTION FOR THE YEAR 2000 (1995).

194. As was recommended by Justice Sweet, *supra* note 58, at 506.

195. The largest barrier to establishing a right to counsel is the current Court's insistence that the constitution provides for negative rights and not positive rights. Many scholars, however, have criticized this unbending practice as not only inadequate, but simply false. See, e.g., David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53; Cass R. Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1 (1992). In many cases, the Constitution does create positive rights: "The contracts clause protects a 'positive' right—the right to available courts, to

In working toward providing this expanded right to counsel, the model from which the United States can learn the most is the German “constitutional plus statutory” model. Whereas the English system was based purely on a statutory right,<sup>196</sup> and the Swiss system on equal protection grounds in the Swiss constitution,<sup>197</sup> the German system is based on a constitutional guarantee of a fair hearing.<sup>198</sup> The Code of Civil Procedure provides the statutory right in Germany.<sup>199</sup> Because an American constitutional right to counsel in civil litigation most likely lies within due process analysis rather than equal protection,<sup>200</sup> Germany’s system provides the most similar model. Moreover, a statutory right alone in the United States circumscribes the fundamental nature of the right.

Thoughtful federal statutory provisions, however, would be necessary to implement any due process right to counsel in civil cases. Here, the United States can learn much about the implementation and expansion of the basic right to counsel from England’s statutory model, which takes into account many factors beyond mere poverty.<sup>201</sup> Without immediate federal statutory aid, the present difficulties in lack of uniformity and application<sup>202</sup> would still exist.

The Legislature could simply enlarge and enhance existing programs in an effort to provide a uniform system of services. Germany’s reliance solely on private practice attorneys may be unrealistic in the United States, though some component of the system could be similar in order to provide the benefits enjoyed by such a system, such as lack of client stigma and more uniform services. Perhaps the one benefit of being one of the last countries to recognize a right to counsel in civil cases for indigent people is that the United States may pick and choose methods from the many existing international programs to create a system that expands the opportunities for justice.<sup>203</sup>

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enforce contractual agreements. The eminent domain clause protects a ‘positive’ right—the right to governmental help to protect private property from invasions by others, including private persons.” GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 977 (3d ed. 1996).

196. See *supra* note 143 and accompanying text.

197. See *supra* note 162 and accompanying text.

198. See *supra* notes 150-51 and accompanying text.

199. See *supra* note 149 and accompanying text.

200. The Court’s refusal to establish the poor as a suspect class effectively eliminates many equal protection challenges.

201. See *supra* note 146 and accompanying text.

202. See *supra* Part II.A.3.

203. One strong attraction to such a system is the lack of stigma a client experiences, because he or she simply meets a private lawyer like any other citizen with legal business. Klausner & Riegert, *supra* note 149, at 603.



## V. CONCLUSION

Justice Black stated that he thought he would not live to see *Betts v. Brady* overruled.<sup>204</sup> Little did he know that some twenty years after it was decided, he would write the opinion of *Gideon* and open the door for American ideology to come closer to living up to what it promises. It is now some twenty years since the *Lassiter* decision, which effectively foreclosed a guaranteed right to counsel for civil litigants. Now is the time to fulfill the promise of equal justice that began with the rhetoric of the Constitution and became a glimmer of reality in *Gideon*. Many other countries have proven that effective legal aid can be provided in a cost-effective manner. The United States lags behind as the only major post-industrialized country that has not provided a right to counsel for its indigent citizens. Now is the time for the United States to stop placing limits on justice and catch up.

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204. LEWIS, *supra* note 26, at 192.

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