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Rationed Justice

Jennifer M. Smith*

*“Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society . . . it is fundamental that justice should be the same, in substance and availability, without regard to economic status.”*²

I. INTRODUCTION

In the United States, “equal justice under law” is at the very forefront of our American justice system.³ “Equal justice” is meant to guarantee equal access to the justice system.⁴ “Equal access to the judicial process is the *sin qua non* of a just society.”⁵ Many Americans, however, do not have any access to the

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2. Lewis Powell, Jr., U.S. Supreme Court Justice, Address to the ABA Legal Services Program, ABA Annual Meeting (Aug. 10, 1976).

3. See Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1785 (2001) [hereinafter *Access to Justice*] (arguing equal justice “is one of America’s most firmly embedded and widely violated legal principles”); Jack B. Weinstein, *The Poor’s Right to Equal Access to the Courts*, 13 *CONN. L. REV.* 651, 655 (1981) (discussing foundational value of court access). “Accessibility to the courts on equal terms is essential to equality before the law. If we cannot provide this foundational protection through the courts, most of the rest of our promises of liberty and justice for all remain a mockery for the poor and the oppressed.” Weinstein, *supra*, at 655.

4. See Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 *WASH. U. J. L. & POL’Y* 47, 48 (2003) [hereinafter *Equal Justice Under Law*] (discussing implication that equal justice grants equal access to courts).

5. Weinstein, *supra* note 3, at 655 (reiterating necessity of equal access to courts).

justice system, never mind that of equal access.⁶ “Equal justice” has not reached the nation’s indigent, or even many of our moderate-income citizens.⁷

II. WHAT ACCESS?

A. *How We Arrived Here*

The Equal Protection Clause of the Fourteenth Amendment requires equal access, for all Americans, to the courts in certain circumstances. For example, the government may be required to provide a criminal defendant with an attorney, to waive court fees for those that it may help, or to pay litigation costs for those who cannot.⁸ In cases that concern fundamental rights, the issue is whether the statute unconstitutionally restricts that fundamental right, not whether the statute is fair or unfair to indigent parties.⁹

B. *Access to Criminal Justice*

The United States Supreme Court provided more protection for equal access in the criminal context than in the civil context.¹⁰ For example, more than thirty-five years ago, the Court recognized that prisoners have a constitutional right of access to the courts.¹¹ In *Ex parte Hull*,¹² the Court said that “the state and its officers may not abridge or impair petitioner’s right to apply to a federal court for a writ of habeas corpus” by repeatedly seizing and destroying habeas corpus petitions prepared by a prison inmate.¹³ Similarly, in *Johnson v. Avery*,¹⁴ the Court declared unconstitutional a state prison regulation prohibiting prisoners from helping each other with habeas corpus and other legal is-

6. See *Access to Justice*, *supra* note 3, at 1785 (noting four-fifths of low-income individuals’ legal service needs not met).

7. See DEBORAH L. RHODE, *ACCESS TO JUSTICE* 4-5 (Oxford Univ. Press ed. 2004) [hereinafter *ACCESS TO JUSTICE*] (discussing lack of access to legal services for low- and moderate-income individuals). “It is not only the poor who are priced out of the current system. Millions of Americans, including those of moderate income, suffer untold misery because of legal protections that are available in principle are inaccessible in practice.” *Id.*

8. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (requiring state to waive fees for indigent because case implicated fundamental interest in parental relationship); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding state required to waive fees and cost because infringed on fundamental right to marry); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding criminally accused indigents have right to appointed counsel); *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding indigent prisoners must have equal appellate review as defendants with money to buy transcripts). *But see* *United States v. Kras*, 409 U.S. 434 (1973) (upholding fees for bankruptcy and denying indigents right to access to bankruptcy courts).

9. JOHN E. NOWAK & RONALD D. ROTUNDA, *PRINCIPLES OF CONSTITUTIONAL LAW* 480 (3d ed. 2007) (describing equal protection analysis involving fairness in equal justice system).

10. See *ACCESS TO JUSTICE*, *supra* note 7, at 4 (stating “[a]lthough indigent criminal defendants are . . . entitled to effective assistance of counsel, few . . . receive it”).

11. See *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977).

12. 312 U.S. 546 (1941).

13. See *id.* at 549.

14. 393 U.S. 483 (1969).

sues.¹⁵ Additionally, the Court in *Procunier v. Martinez*,¹⁶ relying upon *Johnson v. Avery*, declared a prison ban that prohibited law students and paralegals from conducting attorney-client interviews with clients unconstitutional because it constituted an unjustifiable restriction on the inmates' right of access to the courts.¹⁷

A significant case regarding a prisoner's right to access courts is *Bounds v. Smith*.¹⁸ In *Bounds*, inmates incarcerated in North Carolina's correctional facilities filed civil rights suits alleging that they were denied access to the courts, in violation of their rights, by the state's failure to provide legal research facilities.¹⁹ The Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."²⁰

After the decision in *Bounds*, numerous inmates filed lawsuits alleging denial of access to the courts.²¹ Then, the Court decided *Lewis v. Casey*,²² which departed from *Bounds*.²³ In *Lewis*, the Arizona Department of Corrections argued that the district court exceeded its authority in imposing an injunction that mandated extensive changes in access to prison law libraries and legal assistance.²⁴ The Court found that *Bounds* stood on an established right of access to the courts, traced from earlier cases where the Court protected inmates' rights by prohibiting state prison authorities from actively interfering with inmates' preparation of legal documents.²⁵ The Court, however, held that *Bounds* did not "create an abstract, freestanding right to a law library or legal assistance."²⁶ Therefore, a violation of the right of access to the courts requires an inmate to show an actual injury; the inmate must show that his or her efforts to pursue a legal claim were hindered because of a substandard library.²⁷

15. See *id.* at 489 (holding Tennessee rule deprives inmates from constitutional right to petition).

16. 416 U.S. 396 (1974).

17. See *id.* at 421 (holding rule arbitrarily distinguished types of law students providing legal aid).

18. See *Bounds v. Smith*, 430 U.S. 817, 817-18 (1977) (affirming prisoners' constitutional right to legal library and resources).

19. See *id.* at 818 (articulating inmates' claim).

20. *Id.* at 828.

21. See Joseph L. Gerken, *Does Lewis v. Casey Spell the End to Court-Ordered Improvement of Prison Law Libraries*, 95 LAW LIBR. J. 491, 494 (2003) (explaining how adequacy of law libraries centered analysis).

22. 518 U.S. 343 (1996).

23. See *id.* at 346 (explaining fundamental rights of prisoners).

24. See *id.* (explaining inmates were declined constitutional rights).

25. *Id.* at 350 (discussing cases establishing right of access to courts); see, e.g., *Johnson v. Avery*, 393 U.S. 483, 483-84, 489-90 (1969) (precluding prison officials from interfering with inmate preparation of legal documents); *Burns v. Ohio*, 360 U.S. 252, 258 (1959) (requiring state courts to waive filing fees); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (demanding state courts to waive transcript fees); *Ex parte Hull*, 312 U.S. 546, 547-49 (1941) (prohibiting prison officials from interfering with inmate attempts to file legal documents).

26. *Lewis*, 518 U.S. at 351 (explaining limits of *Bounds*).

27. See *id.* (presenting potential harm inmates might allege). In *Lewis*, the Court stated that in order to suffice as an actual injury, the inmate had to show that the inadequate library or legal assistance program im-

The Court further explained that *Bounds* exceeded the right of access recognized in preceding cases, which was an inmate's right to bring a grievance to court.²⁸ Justice Scalia said, "*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims."²⁹ Prisoners have a right to access the court, but with limitations. Since *Lewis*, courts dismissed numerous prisoners' access to court cases for failing to meet the actual injury requirement.³⁰

The Sixth Amendment provides a right to legal counsel for indigent defendants in federal criminal prosecutions and in 1963, the Court unanimously declared in *Gideon v. Wainwright*³¹ that the right to legal counsel for indigent defendants also applied to state criminal prosecutions.³² Almost a decade after *Gideon*, the Court decided *Argersinger v. Hamlin*,³³ which extended indigents' right to counsel for all criminal prosecutions—misdemeanor or felony—where a jail sentence may be imposed.³⁴ Recently, however, in *Luis v. United States*, the Supreme Court came close to inquiring whether America's underfunded public-defender system meets the Sixth Amendment's standards for adequate legal counsel.³⁵

1. Access to Civil Justice in the United States

No civil counterpart to *Gideon* that mandates counsel for indigent civil litigants exists.³⁶ Advocates calling for a right to counsel in civil cases coined the term a "Civil *Gideon*," borrowing the term from the *Gideon* case.³⁷ Under such a civil right to counsel, indigent litigants who are facing issues involving basic human needs, such as housing, safety, health, child custody, or sustenance, would be entitled to legal representation.³⁸

In the United States, most citizens who appear in court do so without legal representation.³⁹ Many face life-changing events, such as losing custody of

peded his or her attempt to pursue legal action. *See id.*

28. *See id.* at 354 (describing misconceptions implied in *Bounds*).

29. *Id.* at 355.

30. Gerken, *supra* note 21, at 502 (pointing out numerous dismissals since *Lewis* and effects of actual injury requirement).

31. 372 U.S. 335 (1963).

32. *See id.* (stating right of indigent defendant in state court).

33. 407 U.S. 25 (1972).

34. *See id.* (holding no imprisonment without representation for any crime).

35. 136 S. Ct. 1083 (2016).

36. *See* Frederic B. Rodgers, *Court-Appointed Counsel in Civil Cases*, 40 JUDGES' J. 22, 23 (2001) (explaining lack of constitutional protection on civil side); ACCESS TO JUSTICE, *supra* note 7, at 7 (differentiating U.S. from other nations regarding right to legal aid in civil cases); *Access to Justice*, *supra* note 3, at 1787-88.

37. William Glaberson, *Top New York Judge Urges Greater Legal Rights for the Poor*, N.Y. TIMES (May 3, 2010), http://www.nytimes.com/2010/05/04/nyregion/04court.html?_r=0.

38. *See id.* (listing examples of civil cases where right to counsel should exist).

39. *See* FIVE YEAR ANNIVERSARY ACCOMPLISHMENTS, OFF. FOR ACCESS TO JUST. OF U.S. DEP'T OF JUST.

their children, their home, or the chance to live in the United States, yet they represent themselves because they cannot afford a lawyer.⁴⁰ Although over fifty million Americans qualify for federally funded legal representation, more than half who request legal assistance are turned away due to low funding.⁴¹ “There continues to be a substantial ‘justice gap’ between truly meeting the needs of low- and moderate-income people and the resources available for civil legal services.”⁴²

About twenty years after the *Gideon* decision, the Court decided *Lassiter v. Department of Social Services of Durham County, N.C.*⁴³ In *Lassiter*, the petitioner lost her parental rights, and, on appeal, argued that the Fourteenth Amendment’s Due Process Clause required North Carolina to provide her with counsel because she was indigent.⁴⁴ The Court held that the Fourteenth Amendment does not provide a right to counsel for indigent litigants in every civil case.⁴⁵ Rather, the Court held that the determination of whether the appointment of counsel in civil cases was constitutionally required should be assessed on a case-by-case basis, after considering three elements from *Mathews v. Eldridge*⁴⁶: “the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.”⁴⁷ Those elements are balanced against each other, and then weighed against the presumption that the right to appointed counsel only exists where the indigent’s personal freedom is at stake.⁴⁸

The Court, however, indicated that in some matters involving juvenile proceedings, probation and parole revocation, and the termination of parental rights, the right to counsel may extend to civil cases.⁴⁹ Although some consider *Lassiter* a roadblock to a constitutional right to counsel in civil cases, states can—and some already do—provide their residents with greater protection of Fourteenth Amendment rights.⁵⁰ Indeed, some states give judges the discre-

(OCT. 14, 2012), <http://www.justice.gov/atj/file/788166/download> [<https://perma.cc/DT6U-95XH>].

40. *See id.*

41. *See id.*

42. *Id.*

43. 452 U.S. 18 (1981).

44. *See id.* at 26-27, 33-34 (affirming lower court and stating right to counsel not always guaranteed).

45. *See id.*

46. 424 U.S. 319 (1976).

47. *Lassiter*, 452 U.S. at 27 (presenting elements needed for due process).

48. *See id.* (discussing steps of *Mathews* test).

49. Rodgers, *supra* note 36, at 23 (noting situation where right to counsel applies). “Analysis of those decisions suggests that indigent parties should be: provided counsel in cases involving incarceration (e.g. contempt proceedings), incapacity (involuntary commitment) or where fundamental rights are at stake (e.g. termination of parental rights), but denied court-appointed counsel at government expense where those conditions do not exist.” *Id.*

50. *See* Dennis A. Kaufman, *The Tipping Point on the Scales of Civil Justice*, 25 *TOURO L. REV.* 347, 358 (2009) (noting effect of *Lassiter* on right to counsel issues); Guy Loranger, *Could There Be a Right to Counsel in Civil Cases?*, N.C. *LAW. WKLY.* (Nov. 9, 2009), http://www.probono.net/nc/news/article.285851-Could_there_be_a_right_to_counsel_in_civil_cases [<https://perma.cc/CAL6-S4NH>].

tionary power to appoint lawyers free of charge for indigent parties in various civil cases.⁵¹ Judges, however, rarely appoint counsel simply on the basis of indigent status.⁵² Courts applied *Lassiter* in such a limited manner that appointment of counsel in civil cases is almost never mandated.⁵³

The Court also addressed whether the Fourteenth Amendment protects access to the court in the disability rights context. In *Tennessee v. Lane*,⁵⁴ paraplegics sued Tennessee, alleging that the state failed to provide reasonable access to court facilities in violation of Title II of the Americans with Disabilities Act of 1990 (ADA).⁵⁵ Lane was involved in a car accident that resulted in the death of a woman and left Lane unable to walk.⁵⁶ Following the accident, Lane faced misdemeanor charges of reckless driving for allegedly driving on the wrong side of the road.⁵⁷ Lane had to appear in a county court in Tennessee that had no elevator, forcing Lane to crawl up two flights of stairs to attend the hearing.⁵⁸ He refused to attend a second hearing in the same courtroom and was arrested for failing to appear.⁵⁹ Lane claimed security officers laughed at his circumstances, and he sued the state for \$100,000 in damages.⁶⁰

The Court, in a divided 5-4 decision, concluded that states were not exempt from provisions of the ADA, such as those requiring elevators or ramps in public facilities.⁶¹ Title II, said the Court, was Congress's response to evidence of "pervasive unequal treatment of disabled persons" in the administration of justice.⁶² The Court stated that Title II's affirmative obligation to accommodate disabled persons in their access to justice was consistent with the solid principle that, "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard."⁶³

The Court held that Title II, as it pertained to cases involving the right of access to the courts, was a valid exercise of Congress's authority to enforce the Fourteenth Amendment.⁶⁴ Title II was thus a "reasonable prophylactic meas-

51. See *Rodgers*, *supra* note 36, at 23 (indicating when indigent individual eligible for legal aid in civil case).

52. See *id.* at 23 (contrasting judges' power to appoint representation with infrequency such power exercised).

53. ACCESS TO JUSTICE, *supra* note 7, at 9.

54. 541 U.S. 509 (2004).

55. See *id.* at 513-14.

56. Bill Mears, *Court Hears Wheelchair Access Case*, CNN (Jan. 12, 2004), <http://www.cnn.com/2004/LAW/01/12/scotus.wheelchair.access/> [<https://perma.cc/XN6N-QP7C>] (discussing factual background of *Lane*).

57. See *id.*

58. *Lane*, 541 U.S. at 513-14 (explaining Lane's difficulty accessing courtroom without accommodations).

59. See *id.* at 514 (reviewing facts leading to Lane's claim).

60. See Mears, *supra* note 56.

61. See *Tennessee v. Lane*, 541 U.S. 509, 524-25 (2004).

62. *Id.*

63. *Id.* at 532 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

64. See *id.* at 533-34 (holding Title II of ADA applicable).

ure, targeted to a legitimate end.”⁶⁵ The fundamental right of access to the courts required that the State reasonably accommodate disabled persons to ensure they receive access to justice.

More recently, the Court decided *Turner v. Rogers*.⁶⁶ *Turner* was yet another opportunity for the Court to decide that the U.S. Constitution provides access to justice for indigents in civil cases.⁶⁷ The Court had to determine whether the indigent defendant had “a right to state-appointed counsel at a civil contempt proceeding, which may lead to his incarceration.”⁶⁸ The Court cited *Gideon*, acknowledging that the Sixth Amendment grants an indigent a right to state-appointed counsel in criminal cases, but no parallel right in civil cases existed.⁶⁹ Although the Court found that a state must ensure that indigent defendants are not wrongfully deprived of liberty in civil contempt cases (such as child support cases), the Court did not require that a state provide counsel to indigent defendants in these kinds of cases.⁷⁰

2. Access to Civil Justice in Foreign Countries

In *Airey v. Ireland*,⁷¹ the European Court of Human Rights (European Court) considered the same issue the Court faced in *Lassiter* two years later. The European Court held that “the European Convention on Human Rights and Fundamental Freedoms (European Convention) and its guarantee of a ‘fair hearing’ in civil cases required the government to provide free counsel to indigent civil litigants, even though Ms. Airey’s case ‘only’ involved her marital status and right to financial support and other property rights.”⁷² The United States Constitution guarantees due process to civil litigants, and the European Convention guarantees civil litigants a fair hearing.⁷³ Nevertheless, the *Lassiter* decision did not mention *Airey* and reached the opposite conclusion.⁷⁴ In addition to the European Court, the Supreme Courts of Switzerland, Germany and Canada, as well as South Africa’s Land Claims Court, all reached the same conclusion: their governing documents required the government to provide free legal coun-

65. *Lane*, 541 U.S. at 533.

66. 564 U.S. 431 (2011).

67. *See id.* at 441 (presenting decision before Court).

68. *Id.*

69. *See id.*

70. *See Turner*, 564 U.S. at 448-49 (holding Due Process clause does not automatically grant counsel to indigent party).

71. 32 Eur. Ct. H.R. (Ser. A) (1979).

72. Earl Johnson Jr., *Will Gideon’s Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. SOC. JUST. 201, 202 (2003) (discussing European Court’s definition of “fair hearing”).

73. U.S. CONST. amend. V; Convention for the Protection for Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 222 (entitling all to fair and public hearing).

74. *See Johnson*, *supra* note 72, at 223 (noting Supreme Court ignored European Court’s decision).

sel to poor litigants.⁷⁵

Other countries also provide its poor with legal counsel in civil cases, and at much greater rates than the United States. Germany, Finland, and Ireland each provide over three times the amount of public funding for civil legal aid as the United States; Canada about four times the amount; New Zealand five times the amount; Scotland seven times the amount; the Netherlands about ten times the amount; and England twelve times the amount.⁷⁶ Simply put, most industrialized democracies provide a legal right to civil lawyers for its poor citizens.⁷⁷ The United States, however, falls far behind other countries in providing equal justice to its poor.⁷⁸

C. *Where We Are Now*

Electronic discovery has significantly altered litigation and access for many, yet many Americans are still left in need.⁷⁹ Attorney's fees and other costs associated with litigation are huge, often insurmountable, barriers that lower income Americans battle when trying to get into the courtroom.⁸⁰ About eighty percent of American civil legal needs are not met.⁸¹

In the past, Congress paid considerable attention to the civil legal needs of the poor in America.⁸² Since then, however, the popularity of discussing "access to justice" waned considerably, but for a handful of scholars trying to keep

75. See *id.* at 229 (highlighting other national courts requiring free legal counsel). See generally James R. Maxeiner, *A Right to Legal Aid: The ABA Model Access Act in International Perspective*, 13 LOY. J. PUB. INT. L. 61 (2011) (noting almost all European countries provide right to aid in civil litigation).

76. See Earl Johnson, Jr., *Justice for America's Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 DEPAUL L. REV. 393, 398 (2009) (comparing amount U.S. spends on civil legal aid with other countries' expenditures on same).

77. Lauren Hallinan, *What Judges Can Do To Increase Equal Access to the Courts*, 40 JUDGES' J. 6, 6 n.2 (2001) (listing other nations where indigent have right to legal assistance). "Most industrial democracies maintain the legal right to civil lawyers for low-income citizens, including England, Wales, Switzerland, Germany, France, Canada, Italy, Spain, Austria, Greece, Australia, New Zealand, and the Scandinavian countries." *Id.*

78. See Johnson, *supra* note 76, at 394 (arguing United States lags behind nations regarding commitment to equal justice).

79. See Jennifer M. Smith, *Electronic Discovery and the Constitution: Inaccessible Justice*, 6 J. LEGAL TECH. RISK MGMT. 122, 129 (2012) (discussing impact of electronic discovery on access to justice). "[O]ur legal system is increasingly serving only the wealthiest interests or the very poorest ones: those who have great resources and those who are lucky enough to get help through legal aid, despite the serious underfunding of that system." Jeff Bleich, *The Neglected Middle Class*, CAL. B. J. (June 2008), <http://archive.calbar.ca.gov/%5CArchive.aspx?articleId=92107&categoryId=91968&month=6&year=2008> [https://perma.cc/V78T-FX6M].

80. See Smith, *supra* note 79, at 129 (discussing other barriers, such as language, mobility issues, and scarcity of lawyers in rural communities).

81. Robert Hirshon, *Providing All Americans with a Key to the Courthouse*, 40 JUDGES' J. 5, 5 (2001) (discussing faults of American justice system); see also *Welcome*, N.C. EQUAL ACCESS TO JUST. COMMISSION, <http://www.ncequalaccesstojustice.com/> [https://perma.cc/W5B3-ZNC6] (last visited Mar. 25, 2016) (highlighting needs of low-income gone unmet).

82. See Shepherd S. Tate, *Access to Justice*, 65 A.B.A. J. 904, 905 (1979) (discussing programs enacted in late 1970s).

this topic alive with law review articles and books.⁸³

Although there is little public acceptance of free legal counsel in criminal cases, most Americans support legal assistance for the poor in civil matters.⁸⁴ Americans, however, believe this assistance should come from volunteer attorneys, not from government funding, and Americans' support of legal assistance in civil matters varies based on the types of matters and clients.⁸⁵ Further, Americans are unaware of the support presently available: four-fifths believe that the poor are already entitled to free legal help in civil cases, one-third believe the poor would have a difficult time receiving assistance, and one-quarter believe it would be easy to get legal assistance.⁸⁶ These figures reveal that many Americans are uninformed about legal aid in civil matters. In actuality, civil legal aid programs reflect less than one percent of America's legal expenditures, and pro bono service is less than one percent of lawyers' working hours.⁸⁷ Statistics reveal that there is one lawyer for every 429 people in the general population, but one lawyer for every 6,415 poor people.⁸⁸

In 2006, the American Bar Association (ABA) House of Delegates unanimously passed an historic resolution, endorsing a civil right to an attorney in cases involving basic human needs.⁸⁹ This resolution reads:

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.⁹⁰

Passage of this resolution spawned the "Civil *Gideon* Movement," which

83. *Access to Justice*, *supra* note 3, at 1808 (describing access to justice "favorite theme in bar rhetoric" but "low priority in reform agendas").

84. *See id.* at 1791 (comparing public support for free counsel in civil and criminal cases).

85. *See id.* at 1791-92 (noting matters involving elderly, child custody, domestic violence, and divorce garner widest support).

86. *See id.* at 1792 (emphasizing statistics of Americans' thoughts and misconceptions regarding available legal assistance).

87. *See Access to Justice*, *supra* note 3, at 1819 (emphasizing problem creating unavailable legal assistance for indigent people).

88. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW INCOME AMERICANS 21 (Sept. 2009), <http://www.lsc.gov/media-center/press-releases/2011/lsc-releases-updated-report-justice-gap-america> [<https://perma.cc/Z8UD-EW4C>] (analyzing ratio of attorneys to various types of clients).

89. Laura K. Abel & Judge Lora J. Livingston, *The Existing Civil Right to Counsel Infrastructure*, 47 JUDGES' J. 24, 24 (2008) (noting former ABA President Michael Greco called resolution "historic").

90. AM. BAR ASS'N HOUSE OF DELEGATES, RESOLUTION 112A, A.B.A. (Aug. 7, 2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf [<https://perma.cc/7FQW-E58T>].

garnered some criticism from policy institutions.⁹¹ While state legislatures enacted limited rights to counsel, academics penned scholarly law reviews on a civil right to counsel, bar associations issued resolutions and held conferences on a civil right to counsel, and lawyers advanced persuasive legal arguments on a civil right to counsel, the courts, unfortunately, lagged behind in recognizing a civil right to counsel.⁹² Quite frankly, while the ABA leaders and state bar association leaders spew rhetoric that lawyers must help the poor, surveys reveal that few lawyers actually provide pro bono assistance to the poor. On average, lawyers contribute less than thirty minutes a week and fifty cents a day to pro bono work.⁹³

In 2010, the ABA adopted the Model Access Act to further the 2006 ABA resolution's policy and ensure meaningful access to justice for all persons.⁹⁴ This Act sought to revive the rhetoric of a *Civil Gideon* and create a statutory remedy—an actual mechanism—for equal access to justice, regardless of the Court's consistent denial of a constitutional right to civil legal aid. Even with the ABA Model Access Act, however, details and implementation are left with the bodies and institutions charged with its implementation.⁹⁵

In 2010, under the leadership of Attorney General Eric Holder, the Department of Justice established the Office for Access to Justice (OAJ).⁹⁶ The OAJ seeks to improve access to both criminal and civil legal services.⁹⁷ The three aims are: to promote accessibility by removing obstacles that prohibit people from comprehending and using their rights, to ensure fairness by administering just outcomes for all parties, including the disadvantaged, and to increase efficiency by successfully administering just outcomes without waste.⁹⁸ This may be the impetus for change needed from the Court and the Legislature.

The right-wing often attacked the Legal Services Corporation (LSC), which

91. See Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 15 TEMP. POL. & C.R. L. REV. 527, 537 (2006) (noting critics argue litigants more successful when unrepresented due to lenient treatment); Ted Frank, *The Trouble with the Civil Gideon Movement*, AM. ENTERPRISE INST. (Aug. 7, 2008), <https://www.aei.org/publication/the-trouble-with-the-civil-gideon-movement/> [<https://perma.cc/8AVM-YXUB>] (suggesting Civil Gideon movement windfall for lawyers rather than legitimate help for the poor).

92. Kaufman, *supra* note 50, at 350 (explaining civil right to counsel gaining traction).

93. See *Access to Justice*, *supra* note 3, at 1809 (detailing surveys showing low percentage of pro bono work in many states).

94. See Maxeiner, *supra* note 75, at 64-65.

95. See *id.* (introducing basic tenants of ABA Model Access Act).

96. See *About the Office*, U.S. DEP'T JUST., <https://www.justice.gov/atj/about-office> (last updated Feb. 26, 2016) [<https://perma.cc/NR27-QTAM>].

97. See Ari Shapiro, *Justice Dept. To Launch Indigent Defense Program*, NPR (Feb. 26, 2010), <http://www.npr.org/templates/story/story.php?storyId=124094017> (noting department's search for both criminal and civil justice); see also Phyllis E. Mann, *Department of Justice Launches "Access to Justice" Initiative*, NAT'L LEGAL AID & DEFENDER ASS'N (Feb. 26, 2010), <http://www.nlada.net/library/article/dojlaunchesaccesstojusticeinitiative02-26-2010> [<https://perma.cc/48BJ-VWV4>] (stating initiative's purpose to provide legal services to indigent).

98. See *Office for Access to Justice*, U.S. DEP'T JUST., <http://www.justice.gov/atj> (last visited Mar. 26, 2016) [<https://perma.cc/2KXX-K7UQ>] (summarizing Access to Justice's mission).

manages federal civil legal aid grants, as a “reckless and irresponsible agency.”⁹⁹ Oddly enough, Congress and President Nixon, a member of the Republican Party, created the LSC in 1974 prompted by riots in urban areas about thirty years earlier.¹⁰⁰ But the federal government systematically underfunded the LSC since its inception, and the underfunding has only increased.¹⁰¹ Nonetheless, the LSC is effective.

The problem some have with the Legal Services Corporation is that it [sic] has worked too well to temper the arrogance of our governmental and private bureaucracies. It has created too many effective ombudspersons. It has been too effective in obtaining substantial rights for the poor, the aged, the educationally deprived, and the discarded segments of our society. It has been too powerful a friend to those on welfare, in mental institutions, in prisons, and to those leading a marginal existence throughout our land.¹⁰²

California, often the leading jurisdiction on behalf of consumers in other contexts, became the leading state to recognize a right to counsel for poor litigants in civil matters, such as foreclosure actions and custody proceedings.¹⁰³ In 2009, Governor Arnold Schwarzenegger signed into law the Sergeant Shriver Civil Counsel Act, California AB 590, which established a civil right to counsel and funding for a multi-year pilot project that provides indigents with lawyers in certain cases, such as child custody cases, domestic violence claims, and housing issues.¹⁰⁴ The pilot project began in 2011 with a yearly budget of \$9.5 million, and funding came from a \$10 fee already charged for various court services.¹⁰⁵ Under the pilot project, legal services agencies would have more funding to provide help for indigent parties in cases involving basic legal needs, such as housing, custody, guardianship, and conservatorship.¹⁰⁶ The Administrative Office of the Courts oversees the pilot projects and must conduct a study by 2016 to determine the Act’s effectiveness.¹⁰⁷

99. See ACCESS TO JUSTICE, *supra* note 7.

100. See Abel, *supra* note 91, at 527 (noting impetus leading to LSC enactment).

101. See *id.* (discussing history of inadequate LSC funding).

102. Weinstein, *supra* note 3, at 657.

103. See Kathryn Alfisi, *Access to Justice: Helping Litigants Help Themselves*, WASH. LAW. (Jan. 2010), <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/january-2010-access-justice.cfm> [<https://perma.cc/Q89D-TJ4F>] (discussing Californians’ right to counsel in civil matters).

104. See *California Recognizes Civil Right to Counsel in Pilot Program*, BRENNAN CTR. FOR JUST. (Oct. 13, 2009), <http://www.brennancenter.org/content/resource/californiaab590/> [<https://perma.cc/ZLP7-UBWR>] (highlighting effects of Sergeant Shriver Civil Counsel Act).

105. See *id.* (noting pilot project came three years after ABA adopted resolution regarding civil cases); see also *Closing the Loop - Sergeant Shriver Civil Counsel Act*, JUD. COUNCIL OF CAL., <http://www.courts.ca.gov/15583.htm> (last visited Mar. 25, 2016) [<https://perma.cc/ZG93-GSUL>] [hereinafter *Sergeant Shriver Civil Counsel Act*] (discussing seven pilot projects Judicial Council chose to provide legal aid to low-income residents).

106. See *Sergeant Shriver Civil Counsel Act*, *supra* note 105 (noting each pilot project establishes partnership with different nonprofit).

107. See *id.* (noting study focuses on analyzing effectiveness and efficiency of projects).

Representation by counsel in civil litigation is critically important. These matters often involve basic human needs, and when a lawyer only represents one side of the aisle, advantage could be taken of the unrepresented party.¹⁰⁸ “Counsel for more powerful litigants in landlord-tenant, consumer, and family law disputes have often misled weaker unrepresented parties into waiving important rights and accepting inadequate settlements.”¹⁰⁹ Without the knowledge of counsel, the unrepresented party is often unfamiliar with the practice and that this conduct is abusive, and therefore lawyers engaging in such conduct are not normally penalized.¹¹⁰

For various economic reasons, there has been an increase in self-represented, or pro se, litigants.¹¹¹ Litigants often self-represent due to their choice not to hire counsel, but self-representation can also be a reflection of an inability to afford actual representation.¹¹² “There were always a lot of self-represented litigants in the courts, but they tended to be in areas like family law, small claims, or landlord/tenant.”¹¹³ Most of the time in these small civil claims, it is not economically feasible to retain counsel.¹¹⁴ The daily implications of losing a civil case, however, fall upon those basic needs of what that money provides: food, health, shelter, safety, and child care.¹¹⁵ Thus, there have been recent calls by court leadership to ensure that indigent civil litigants have access to justice.¹¹⁶

108. See Smith, *supra* note 79, at 135 (describing civil litigation involving unrepresented, indigent parties).

109. ACCESS TO JUSTICE, *supra* note 7, at 16 (highlighting unrepresented parties susceptible to predatory practices by opposing counsel).

110. See *id.* (noting lack of penalties for predatory behavior); see also Smith, *supra* note 79, at 135 (explaining party norms in unrepresented civil litigation).

111. See Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 983 (2009) (noting increase in self-represented litigation for both low- and middle-income individuals).

112. See *id.* at 985-86 (discussing impact of litigants' financial situation on proper representation).

113. Alfisi, *supra* note 103.

114. See Smith, *supra* note 79, at 135-36 (explaining self-representation in civil cases).

115. See Glaberson, *supra* note 37; Chief Justice Wallace B. Jefferson & Harry M. Reasoner, *Helping the Poor in Civil Court Cases*, CHRON (Apr. 5, 2010), <http://www.chron.com/opinion/outlook/article/Helping-the-poor-in-civil-court-cases-1619657.php> (last visited Mar. 26, 2016) [<https://perma.cc/RH73-SGLV>] (noting some basic human needs unaddressed because lack of right to counsel in civil cases). Examples include: illegal landlord lockout of your home, spousal abuse in which a protective order is needed, or insurance denial for medical coverage for a sick child. See *id.*; see also Bradley A. Vauter, *Unbundling: Filling the Gap*, 79 MICH. B.J. 1688, 1688 (2000) (discussing ABA report on areas where low and moderate-income people had most civil legal needs). Such areas include: family and domestic issues, housing and property rights, personal finance and consumer law, community and regional needs; and to a lesser extent, wills and estates, health care, personal and economic injury, employment, public benefits, small business and farm needs, child schooling issues and civil liberties. See Vauter, *supra*.

116. See Glaberson, *supra* note 37 (discussing Judge Lippman's push for civil representation); Jefferson & Reasoner, *supra* note 115 (pushing for additional rights for indigent parties).

D. *Where We Must Be*

Although a great start, arguing for a parallel *Gideon* in civil cases is not required to achieve the desired end of ensuring legal representation for indigent litigants in civil cases. The United States does not need to require state-appointed counsel for every indigent litigant in civil cases. Rather, it would be more useful if America properly and fully funded the legal aid societies that seek to help indigent litigants in civil cases that involve basic human needs. These legal aid societies can partner with law school clinics and other such organizations. With the help of these societies, there would be more control and screening to assist those in need. Leaving this responsibility to private attorneys—as is done now—is inadequate.

If *Lassiter* was overturned and legal coverage was expanded in the United States, it would come at a great cost. Historically, the United States has spent a lot less on our justice system than other comparable nations.¹¹⁷ Unfortunately, not much has changed.¹¹⁸ Funding concerns are not novel, and some thoughtful recommendations have been advanced and implemented. Possible sources of funding may include: a minor tax on law-related revenues, a surcharge on court filing fees related to the amount in controversy, increased availability for fee awards to winning parties, and increased bar association pro bono requirements or a financial equivalent.¹¹⁹ Even a small increase in states' sales tax should be studied and considered to ensure that all citizens have access to justice in civil cases.

If nothing else, America should be shamed into action. With the plethora of resources in this country, denying the indigent basic access to justice, which America advances as an important foundational tenet in its Pledge of Allegiance of “justice for all,” is unconscionable. Most Americans claim to be Christians, espouse Christian religious beliefs, and argue that Christianity is the foundation of this country since its beginning, but doing so while denying basic rights is untenable and should inspire constructive debate on what actually are America's foundational principles. Stephen Colbert, an American television host, said it best:

If this is going to be a Christian nation that doesn't help the poor, either we have to pretend that Jesus was just as selfish as we are, or we've got to acknowledge that He commanded us to love the poor and serve the needy with-

117. See Earl Johnson, Jr. & Ann Barthelmes Drew, *This Nation Has Money for Everything-Except Its Courts*, 17 JUDGES' J. 8, 9-10 (1978) (discussing U.S. spending on justice system).

118. See Abel, *supra* note 91, at 527-28 (noting other industrialized nations spend far more on access to legal assistance for citizens).

119. See ACCESS TO JUSTICE, *supra* note 7, at 22 (listing possible alternative solutions to increase legal aid for poor).

out condition and then admit that we just don't want to do it.¹²⁰

The Supreme Court of the United States is changing. With the recent passing of Supreme Court Justice Antonin Scalia, a Roman Catholic and conservative justice who consistently fought efforts to provide civil and equal rights, President Barack Obama has an opportunity to change the direction of the Court with the nomination to fill the seat on the Court. Scholars, practitioners, academics, and others framed the problem of inaccessible justice to the poor in civil cases and identified funding as the main hurdle.¹²¹ Action is required now.

III. CONCLUSION

Unlike other problems in America, civil legal aid is not a difficult one to fix. It remains unequivocal that Americans need legal representation in both civil and criminal cases. In many civil cases, life-altering events are at stake that could jeopardize basic human needs. Funding is the greatest hurdle to a Civil *Gideon*.

Even if America is not willing to require state-appointed counsel to indigent litigants, there is another option, perhaps an even better one—fund legal aid societies. Legal Aid and state bar legal services organizations—the vehicles for the implementation and expansion of a Civil *Gideon*—have existed for decades. Many articles, books, and other publications were written to keep the idea of a Civil *Gideon* current, but as one of the wealthiest nations in the world, America, must no longer merely speak about this problem when money stands in the way. Other countries—even poorer ones—do not use the lack of funding as a barrier to civil access to justice for the poor. These countries are acting, while America is still considering options.

Beginning as young Americans, we stand, put our hand over our hearts, and pledge allegiance to the flag and to republic for “justice for all.” This is an empty promise not yet realized—not because it cannot be, but rather, because not enough Americans believe it should be. Learned Hand’s wisdom of old is still applicable today: “If we are to keep our democracy there must be one commandment: thou shall not ration justice.”¹²²

120. Stephen Colbert, *Quotable Quote*, GOOD READS, <http://www.goodreads.com/quotes/327220-if-this-is-going-to-be-a-christian-nation-that> (last visited Mar. 25, 2016) [<https://perma.cc/YU6D-C7WK>].

121. Deborah L. Rhode, *Access to Justice: A Roadmap to Reform*, 41 FORHDAM URB. L. J. 1227, 1228-40 (2013-14) (noting other barriers to the civil justice system in addition to financial as political, doctrinal and structural).

122. Geoffrey C. Hazard, Jr., *Rationing Justice*, 8 J. L. & ECON. 1, 1 (1965).