A CIVIL RIGHT TO COUNSEL:
INTERNATIONAL AND NATIONAL TRENDS

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INTRODUCTION

“Equal Justice Under Law” – This concept – better yet, promise – is proudly advertised to all atop our Nation’s highest court.¹ What many fail to see however, is the fine print restricting this promise to those who can afford its application. The fact is that depending on your wealth, you may or may not receive your “equal justice under law” and be ultimately limited from adequately accessing justice. An indigent’s inability to properly access our justice system is by no means a new concept.² Although progress in certain circumstances has been made – namely in the criminal sense – we continue to fall short of our promise. What’s worse and to a degree embarrassing, is that this defining sense of equality that our justice system speaks so avidly about has become a growing standard in many western democracies. Without talking about equality at the level we do, many of our neighboring countries consistently practice what we have preached for so long. It is time – it has long been time – for us to mend the broken promise that we have made to poor and rich alike.

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As a nation, we are no strangers to fundamental change within our justice system. Change has positively occurred on the criminal front, although further progress is arguably needed before we can rightly consider our system to be “equal.” However, civil litigants – particularly poor civil litigants – still face an unjust amount of difficulties when trying to access our justice system. One major obstacle is rooted in the fact that to this day, the courts have failed to find a broad right for a civil litigant to be appointed counsel. The objective of this research paper is to explore the possibilities for a “civil right to counsel” and to focus on what has taken shape in various jurisdictions. After exploring numerous court opinions and inspiring articles, this paper will be discussing the developing courtroom trends, both successful and not, that have developed throughout certain western democracies and the United States.

RESEARCH QUESTIONS

I. What has occurred in other western democracies in regards to a civil right to counsel?

II. What patterns have developed domestically in the various states regarding a civil right to counsel?

BRIEF SUMMARY

I. Although a categorical right to counsel in civil cases has yet to be declared in other western democracies, a few defining cases have explicitly found the right in specific circumstances. The case with presumably the most notoriety and breadth of impact is Airey v. Ireland. Decided in 1979 by the European Court of Human Rights, the holding in Airey v. Ireland affects all of the almost fifty countries that are a part of the European Convention. The fundamental underpinning of Airey v. Ireland was that under article 6 of the European

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Convention, all civil litigants were afforded a “fair hearing” and that in many circumstances litigants could not receive this guarantee while they remained unrepresented by counsel.4

Likewise, Switzerland, Germany, Canada, and the United Kingdom have each had similar results that have furthered a civil right to counsel.5 And despite the distinct facts of each case, the various courts based their findings on primarily the same notions of equality and fairness expressed in our Constitution. Yet our justice system continues to face difficulty making a similar decision. Also noticed in the research is the somewhat distant timeframe that some of these international decisions were made. Seemingly, outside the U.S., many civil litigants have been living with a generalized notion of equality well before criminal defendants in the U.S. had received their right to counsel. At least in this respect, it is certainly questionable whether the United States has a progressively advanced judicial system.

II. As a nation, we are far from achieving a categorical right to counsel. Not a single state found this right broadly embedded in their Constitution. Not since the time of Powell,6 Gideon,7 Boddie,8 Douglas9 and Griffin10 have we held true to our foundational principles of justice, of

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4 Id.
5 See infra DISCUSSION, PART I: INTERNATIONAL PERSPECTIVE.
6 Powell v. Alabama, 287 U.S. 45 (1932) (“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.”).
7 Gideon v. Wainwright, 372 U.S. 335 (1963) (“From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”).
8 Boddie v. Connecticut, 401 U.S. 371 (1971) (“In short, ‘within the limits of practicability,’ a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause.”).
9 Douglas v. California, 372 U.S. 353 (1963) (“The present case, where counsel was denied . . . shows that the discrimination is not between possibly good and obviously bad cases, but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot.”) (internal quotations omitted).
10 Griffin v. Illinois, 351 U.S. 12 (1956) (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”); see also Griffin, at 20-21 (“‘Due process’ is,
equality, of the fundamental fairness that we continue to promise indigents seeking proper access in our court system. Just a few decades ago we were on our way to achieving the same sense of equality that many other countries have harnessed, but for some reason we have come to standstill; stuck, while our neighbors progressed down the road of equality that we claim to pave.

In 1981, *Lassiter v. Dep’t of Social Services* arrived at the doorsteps of the U.S. Supreme Court, forcing retreat from simple notions of fairness. Without adhering to the words of Justices who not long ago sat in their stead, the Court set a presumption that there was in fact no right to appointed counsel unless physical liberty was at stake and that a determination of whether counsel should be appointed rested on a case-by-case analysis.12

As *Lassiter* made itself felt on the states, a number of them followed the presumption and in some situations reversing their own prior holdings.14 Some however did not adhere.15

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11 *Lassiter v. Dep’t of Social Services*, 452 U.S. 18 (1981) (holding that “fundamental fairness” under Due Process places a presumption that an indigent litigant has a right to appointed counsel only when he may be deprived of his physical liberty).


13 See, e.g., New York City Housing Authority v. Johnson, 565 N.Y.S.2d 362 (N.Y.Sup. 1990) (applying the *Lassiter* presumption and finding that no right to appointed counsel existed for the indigent tenant); United States v. 1604 Oceola, 803 F.Supp. 1194 (N.D. Tex. 1992) (noting that when an action of a court clearly implicates the substantial interests of the party, *Lassiter* should be applied); Hughen v. Highland Estates, 48 P.3d 1238 (Idaho 2002) (citing *Lassiter* and holding that in civil cases there is no right to appointed counsel where physical liberty is not threatened); Joni B. v. State, 549 N.W.2d 411 (Wis. 1996) (applying the *Lassiter* presumption as part of the required analysis).

14 See *Davis v. Page*, 714 F.2d 512 (5th Cir. 1983) (holding first that there was a categorical right to appointed counsel, but after being remand applying the *Lassiter* presumption and holding that due process requires only case-by-case determination whether counsel must be appointed for indigent parents in state dependency proceedings).

15 See, e.g., In re Jay R., 197 Cal.Rptr. 672 (Cal Ct. App. 1983) (holding that California’s due process clause analysis does not include the *Lassiter* presumption that counsel is required only when physical liberty is at stake); In re K.L.J., 813 P.2d 276 (Alaska 1991) (rejecting the case by case analysis set forth in *Lassiter*); O.A.H. v. R.L.A., 712 So. 2d 4 (Fla.App. 2 Dist. 1998) (citing *Lassiter*, but noting that it is not controlling); M.E.K. v. R.L.K, 921 So.2d 787 (Fla.App. 5 Dist. 2006) (noting that *Lassiter* does not control in a privately-initiated proceeding).
Others continued to rely on their own standard. This wave of inconsistent decision-making began to set an unknown expectation as to what Lassiter actually demanded.

It was not until the new millennium that the momentum for achieving a civil right to counsel became mainstream. Of immense importance was the 2005 American Bar Association (ABA) resolution urging all jurisdictions to provide legal counsel in cases involving basic human needs. Also around this time, and partly due to the passing of the ABA resolution, was the establishment of many organizations and the publication of academic articles, all with the common ideal of acquiring a civil right to counsel. Many of those taking part in the initiative continue to contribute to the wealth of knowledge and awareness spreading throughout the states and in some instances have presented their expertise before the courts.

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16 See, e.g., Tennessee v. Min, 802 S.W.2d 625 (Tenn.App. 1990) (establishing seven factors that should be considered when using Mathews Test: “(1) whether expert medical and/or psychiatric testimony is presented at the hearing; (2) whether the parents have had uncommon difficulty in dealing with life and life situations; (3) whether the parents are thrust into a distressing and disorienting situation at the hearing; (4) the difficulty and complexity of the issues and procedures; (5) the possibility of criminal self-incrimination; (6) the educational background of the parents; and (7) the permanency of potential deprivation of the child in question.”).

17 For an in-depth look on the affect of Lassiter, see generally Clare Pastore, Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions, CLEARINGHOUSE REVIEW JOURNAL OF POVERTY LAW AND POLICY, VOLUME 40 (July-August 2006), http://civilrighttocounsel.org/pdfs/pastore_lassiter.pdf (reviewing all significant cases through 2006 that cite Lassiter and how Lassiter’s ruling affected the court’s decision).


20 A concise list of articles can be found in Paul Marvy, Thinking About a Civil Right to Counsel Since 1923, CLEARINGHOUSE REVIEW JOURNAL OF POVERTY LAW AND POLICY, VOLUME 40 (July-August 2006), http://civilrighttocounsel.org/pdfs/marvy.pdf.

Although gains have been made in some regards, research shows that overall state courts fail to expand on narrow appointments of counsel, if an appointment is made at all. And when a right to counsel is found and the proper appointment ordered, rarely does it occur outside the realm of parental rights. Other cases, involving facts remarkably easy to empathize with, fail to gain the necessary traction with many of our state court judges. Generally, courts find it necessary to limit their inherent power to instances of a right to privacy. They look for guidance from the controversial *Lassiter* decision but fail to adhere to the great justices of the past who sought equality as a measure granted for all. And they fail to look to the neighboring western democracies that seem to be able to empathize with their poor civil litigants and apply to their justice system the common sense ideals that build the foundational principles of equality. However, while our nation’s concept of access to justice is not new, the level of momentum that has aspired to achieve it is. There are a growing amount of advocates that have made it their mission to elevate this struggle.

**DISCUSSION**

I. THE INTERNATIONAL PERSPECTIVE

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22 See supra notes 6-10.

23 Please note that while extensive research has been done, the scope of this discussion mainly pertains to the patterns that have occurred within the courts, and that an insurmountable amount of information is contained in additional cases, statutes, articles, journals, and symposiums. This discussion attempts to outline the most prominent and defining cases when looking into expanding the current status of civil litigants’ right to counsel.
The concept of a right to counsel in civil proceedings has been around for quite some time. The 2006 Edward V. Sparer Symposium found the following years which represent the earliest dates that a right to civil counsel is mentioned in that country’s law:

Austria–1781; Belgium–1994; Denmark–1969; England–1495; France–1851; Germany–1877; Iceland–1976; Italy–1865; Monaco–1932; Norway–1915 (perhaps as early as the 1600s); Poland–1964; Portugal–1899; Russia–1917; Slovak Republic–1963; Spain–1835; Sweden–1919; Switzerland–1937; The Netherlands–1957; Ukraine-1978.24

Many of these countries established their first instance of a civil right to counsel through legislative means. Of particular importance is the Statute of Henry VII.25 Passed in 1495, this statute created a right to free counsel for English litigants and gave courts the power to appoint representation.26 Many states in the U.S. have since taken this statute and implemented it into their own common law; however courts fail to follow its historical precedent and appear to place little significance on its meaning.27 The decisions made behind many European courtroom doors however, explicitly discuss the issue and are filled with valuable and insightful language that will hopefully be a helpful reminder to the United States to ensure due justice. Of these cases, the

25 Statute of Henry VII, 1495, 11 Hen. 7, c.12 (“An Act to admit such persons as are poor to sue in forma paupis: [T]he Justices there shall assign to the same poor person or persons, Counsel learned by their discretions which shall give their Counsels nothing taking for the same, and in likewise the same Justices shall appoint attorney and attorneys for the same poor person and persons and all other officers requisite and necessary to be had for the speed of the said suits to be had and made which shall do their duties without any rewards for their Counsels, help and business in the same.”) (spelling modernized), reprinted in 2 Statutes of the Realm 578 1377-1504.
26 See John Mahoney, Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States, 17 SAINT LOUIS UNIVERSITY PUBLIC LAW REVIEW 223 (1998) (outlining the history of the Statute of Henry VII, including when it was repealed in 1883).
27 See, e.g., Quail v. Municipal Court, 171 Cal. App. 3d 572, 581-82 (1985) (Johnson, J. dissenting in part) (“It is difficult to escape the conclusion that in the field of civil litigation California’s indigents are entitled to the same in forma pauperis right as English Serfs have enjoyed since medieval times and this right includes appointment of free counsel.”) (internal footnote omitted).
most noteworthy involve Switzerland, Germany, Canada and the European Convention, all of which have unquestionably expanded the right to civil counsel.

A. Switzerland

In 1937, the Supreme Court of Switzerland examined their Constitution’s guarantee that “[e]veryone shall be equal before the law.” Applying an equal protection analysis to this guarantee, the highest court in Switzerland declared that indigent citizens in serious civil cases could not be equal before the law unless they had lawyers like their wealthy counterparts. In addition to believing that all citizens whether poor or rich should have “access to the court,” the Supreme Court held that the Swiss Cantons were required to provide lawyers at no cost to poor litigants in civil cases requiring “knowledge of the law.”

B. Germany

Although Germany’s civil right to counsel has been provided by statute since 1877, the Constitutional Court held in 1953 that the “fair hearing” clause found in their constitution may provide for free counsel in civil proceedings when the statute did not. The German Constitutional Court implemented their corollary of a U.S. due process analysis, stating that “[a]
party who is unable to defray the costs of the litigation without jeopardy to the means necessary for his and his family’s sustenance shall be granted legal aid upon application therefore.”

C. Canada

More recently, in 1999 the Supreme Court of Canada faced a child custody hearing where an indigent mother of three children faced-off against the province of New Brunswick after a court order removed the children from her custody. After being denied legal aid, the mother continued her struggle alone while all other parties were represented by counsel. Before a decision was made, she regained custody of her children. However, the Supreme Court of Canada considered it prudent to issue a decision on the issue of civil counsel, declaring the matter to be one of national importance. In their decision, the court looked to whether there was a violation of section seven of the Canadian Charter of Rights and Freedoms. Section seven states, “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

In their analysis the court first stated that for a violation against “security” to have occurred, the “state action must have a serious and profound effect on a person’s psychological integrity” and that the effect must be one that is “greater than ordinary stress or anxiety.”

35 Id. ¶ 79.
36 Once a charter right is found to be violated, section 1 can serve to “save” the offending state action if a balancing test demonstrates that the public interest at stake justifies the violation. See supra Schellenber, at 284, n.7.
37 New Brunswick, ¶ 13.
38 Id. ¶ 60.
Relying on *Mills v. The Queen*, the court reiterated the meaning of security as used in section seven:

> [S]ecurity of the person is not restricted to physical integrity; rather it encompasses protection against overlong subjection to the vexations and vicissitudes of a pending criminal accusation. . . These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, [and] uncertainty as to the outcome and sanction.

The court specifically noted that despite the reference to “criminal accusation,” “section seven is not limited solely to purely criminal or penal matters.” Considering the fundamental protections afforded by section seven, “the seriousness of the interests at stake, the complexity of the proceedings, and the [mother’s capacity],” the court concluded that the “right to a fair hearing required that she be represented by counsel.” Additionally, the court’s analysis included a citation to authority outside their borders, an act which we fail to see in similar American cases. Specifically, the Supreme Court of Canada relied in part on the United States Supreme Court case *Santosky v. Kramer* to help define the notion of equality.

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40 *New Brunswick*, ¶ 62 (internal quotations omitted).
41 *Id.* ¶ 65
42 *Id.* ¶ 75; The court also noted that “[i]n proceedings as serious and complex as these, an unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case.” *Id.* ¶ 80
43 Although infrequent, the U.S. Supreme Court has looked to outside nations for guidance in limited circumstances. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing to the European Court of Human Rights for support in the conclusion that a U.S. case should be overruled).
45 *New Brunswick* ¶ 114 (“As well as affecting women in particular, issues of fairness in child protection hearings also have particular importance for the interests of women and men who are members of other disadvantaged groups, particularly visible minorities, Aboriginal people, and the disabled. As noted by the United States Supreme Court in *Santosky v. Kramer*: ‘Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups . . . such proceedings are often vulnerable to judgments based on cultural or class bias.’” (quoting *Santosky*, at 763).
D. European Convention

The decision with the farthest-reaching impact was made by the European Court of Human Rights in 1979. Not only did *Airey v. Ireland* expand a civil right to counsel, but it set the standard for the almost 50 countries under the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”).

*Airey* involved an indigent woman seeking legal separation from her husband as well as child custody after years of alleged abuse. After her request for counsel was denied by the Irish court, Mrs. Airey petitioned the European Commission for Human Rights and ultimately gained a hearing before the European Court of Human Rights. The Human Rights court held that Mrs. Airey’s denial of counsel was a violation of article 6, paragraph 1 of the European Convention – a provision promising civil litigants a “fair hearing.” In pertinent part, the clause provides that “[i]n the determination of [their] civil rights and obligations or of any criminal charge against [them], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Seeking first to define “fair hearing,” the court rejected Ireland’s claim that they had not denied physical access to the court and therefore had not denied Mrs. Airey a fair hearing. The Irish government asserted that since Mrs. Airey’s financial problems were due to her personal circumstances, and not an impediment produced by Ireland, the government was absolved of responsibility. However, in holding that a “fair hearing” essentially means “effective access” to the court, the court declared:

47 *Council of Europe*, http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp (listing the 47 states that are a part of the European Convention).
49 *Id.*
50 *Airey v. Ireland*, ¶ 24 (Ireland’s government contended that Mrs. Airey did “enjoy access . . . since she is free to go before [the] court without the assistance of lawyer.”).
The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs. Airey’s appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.\textsuperscript{51}

And in regards to the Irish Government’s claim on lacking a duty, the court wholly disagreed:

[H]indrance in fact can contravene the Convention just like a legal impediment. Furthermore, fulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and ‘there is . . . no room to distinguish between acts and omissions.’ The obligation to secure an effective right of access to the courts falls into this category of duty.\textsuperscript{52}

The European Court of Human Rights continued, holding that it was certain that an applicant “would be at a disadvantage” if their adversary was “represented by a lawyer and [they] were not.”\textsuperscript{53} \textit{Airey v. Ireland} set a standard in almost 50 countries that counsel may be required in order to effectively access the court and receive a fair hearing.

While \textit{Airey v. Ireland} did not include a specific test for determining the circumstances that require counsel, the European Court on Human Rights assembled again in 2005 to further discuss “fair hearing” rights under the European Convention. This time the court expanded the right to effective counsel for defendants of defamation lawsuits. In \textit{Steel and Morris v. The United Kingdom},\textsuperscript{54} the court looked at the “equality of arms” between the opposing litigants and held that the indigent defendants were at such a disadvantage without counsel that they could not

\textsuperscript{51} \textit{Airey}, ¶ 24 (internal citations omitted).
\textsuperscript{52} \textit{Id.}, ¶ 25 (internal citations omitted).
\textsuperscript{53} \textit{Id.}, ¶ 24.
receive a fair hearing.\textsuperscript{55} Reiterating the importance of an opportunity to effectively present a case, the court stated:

\begin{quote}
It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side.\textsuperscript{56}
\end{quote}

The court further mentioned that “the provision of legal aid . . . must be determined . . . [by] the particular facts and circumstances . . . and will depend . . . upon the importance of what is at stake, . . . the complexity of the [case], . . . and the applicant’s capacity to represent him or herself effectively.”\textsuperscript{57} The court proceeded to address the possible financial concerns when an appointment of counsel becomes mandated:

\begin{quote}
[I]t is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage \textit{vis-à-vis} the adversary.\textsuperscript{58}
\end{quote}

\textbf{E. The Overall International Patterns}

Examining the patterns that are occurring beyond U.S. shores and in particular, other western democracies with similar justice systems, provides an inspiring glimpse at successful strides towards equality. It is difficult to find a fundamental difference between the issues arising overseas and those presently occurring in the U.S. The same principles of justice and equality, of effective opportunities to be heard, of the disadvantages that indigents face, and of fair hearings are all rooted not only in our justice system, but in the very ideals of the American principles that make up the nation’s foundation. However, as will be discussed below, as a

\begin{itemize}
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Steel and Morris, ¶ 59
\item \textsuperscript{57} Id. ¶ 61
\item \textsuperscript{58} Id. ¶ 62
\end{itemize}
nation we have not been true to these ideals. Justice Earl Johnson, Jr., a passionate advocate for a civil right to counsel once wrote, “Somehow legal representation is essential to fundamental fairness in Western Europe but not in the United States.” It is not suggested that we as a nation follow the exact footsteps that countries have set before us, but we should at least acknowledge them and, in their wake, seek the similar goals.

I. THE UNITED STATES PERSPECTIVE

Fortunately, there is a plentiful stream of information available on a civil right to counsel in the U.S. From an abundance of cases, to a lengthening list of statutes, to an increasing number of advocates, commissions and organizations, to publications in academic articles, journals and symposiums, materials are abundant. Examining as much of the relevant information as time permitted, a few general themes consistently emerge:

(1) There is no general right to state-funded counsel for civil litigants.
(2) The majority of situations where a right to counsel is established in civil proceedings arises out of either a statutory right or a judicial holding encompassing a due process analysis.

60 For a thorough article listing a table of statutes as of 2006, see Laura K. Abel and Max Rettig, State Statutes Providing for a Right to Counsel in Civil Cases, CLEARINGHOUSE REVIEW JOURNAL OF POVERTY LAW AND POLICY (July-August 2006), http://civilrighttocounsel.org/pdfs/abel.pdf.
62 See infra notes 80-85 and accompanying text.
63 There are also an abundance of Equal Protection claims, however most cases deal with appointed civil counsel as a due process right. See, e.g., M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) (“[T]he Court’s decisions concerning access to judicial processes, commencing with Griffin [351 U.S. 12] and running through Mayer, [404 U.S. 189] reflect both equal protection and due process concerns.”).
(3) The right is primarily afforded in circumstances involving various aspects of family law.64

(4) Members pledging to fight for a civil right to counsel include law students, law faculty, academic scholars, private firm litigators, legal aid board members, bar association presidents, legislatures and current as well as retired members of the state and federal judiciary.

(5) Although support continues to grow, judicial decisions tend to show that most courts are reluctant to grant to counsel to indigent civil litigants.65 This is especially true in recent times, where opinions appear to greatly differ in their reasoning and essentially refuse to follow past U.S. Supreme Court decisions.

(6) Lassiter v. Dep’t of Social Services of Durham County66 has set a shaky precedent, causing controversy and inconsistent rulings from state to state.

It is important to note that while this memo focuses on the prominent judicial opinions throughout state and national courts, a wealth of articles have also been written outlining other prospective and current strategies for achieving a civil right to counsel.67

A. Lassiter v. Dep’t of Social Services

64 Most common are termination of parental right proceedings, custody disputes and civil commitment in response to failure to pay child support. See infra discussion.


67 See, e.g., Clare Pastore, The California Model Statute Task Force, CLEARINGHOUSE REVIEW JOURNAL OF POVERTY LAW AND POLICY (July-August 2006), http://civilrighttocounsel.org/pdfs/pastore.pdf (looking at problems and strategies for implementing different statutes that affording counsel for civil litigants); Lisa Brodoff, The ADA: One Avenue to Appointed Counsel Before A full Civil Gideon, 2 SEATTLE J. SOC. JUST. 609 (Spring/Summer 2004) (examining the possibility of achieving a right to civil counsel via the American’s with Disabilities Act); Boston Bar Association Task Force on Expanding the Civil Right to Counsel, Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts (September 2008), http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf (establishing pilot projects to determine the best method for ascertaining a civil right to counsel in Massachusetts).
1981’s Lassiter\textsuperscript{68} case is the obstacle that has effectively thwarted many initiatives geared towards achieving a civil right to counsel. In addition to the hardships indigents already face when trying to effectively access the court system, Lassiter made their judicial undertaking even harder. Lassiter involved a state-initiated proceeding regarding the termination of a mother’s custody rights. After denying Ms. Lassiter’s request for appointed counsel and losing all parental rights to her son, she filed an appeal which ultimately made its way to the United States Supreme Court. The only argument that Ms. Lassiter made on appeal was that “because she was indigent, the Due Process Clause . . . entitled her to the assistance of counsel.”\textsuperscript{69} In response to this argument, the court looked to the 1979 case Mathews v. Eldridge.\textsuperscript{70} Mathews set forth the balancing test, still used today, that is used to determine the required level of due process protection. Specifically, the court declared that Mathews “propounds three elements to be evaluated in deciding what due process requires: (1) the private interests at stake; (2) the government’s interest; and (3) the risk that the procedures used will lead to erroneous decisions.”\textsuperscript{71} To start their analysis of the Mathews test, the court first held that “fundamental fairness” places the “presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty” and that “[i]t is against this presumption” that the three “[Mathews] elements in the due process decision must be measured.”\textsuperscript{72}

After establishing this presumption, the court went on to make three interesting points which begin to underlie the confusing standard this decision has made. First, under its own analysis of the facts:

\textsuperscript{68} Lassiter, 452 U.S. 18 (1981).
\textsuperscript{69} Id. at 24.
\textsuperscript{70} Mathews v. Eldridge, 424 U.S. 319 (1979).
\textsuperscript{71} Lassiter, at 27.
\textsuperscript{72} Id. at 26-27.
To summarize the above discussion of the [Mathews] factors: the parent’s interest is an extremely important one; the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent’s rights insupportably high.73

Yet the Court’s deemed it “fundamentally fair” to deny counsel to Ms. Lassiter.

Second, the court made clear that “it is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements.”74 Nevertheless, since this declaration, courts look to Lassiter for guidance.75

Finally, in its concluding paragraph, Lassiter acknowledges that many policy considerations76 as well as precedent77 have set forth a civil right to counsel and that “informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well.”78

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73 Id. at 31.
74 Id. at 32 (citing Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)).
75 See e.g., Joni B. v. State, 549 N.W.2d 411 (Wis. 1996) (applying the Lassiter presumption as part of the required analysis).
77 Lassiter, at 30 (“[C]ourts have generally held that the State must appoint counsel for indigent parents at termination proceedings.”). Prior to Lassiter, many states had already found the need for a right to counsel in parental termination cases. See, e.g., State ex rel. Heller v. Miller, 399 N.E.2d 66 (Ohio 1980); Dep’t of Public Welfare v. J. K. B., 393 N.E.2d 406 (Mass. 1979); In re Chad S., 580 P.2d 983 (Okl.1978); In re Myricks, 533 P.2d 841 (Wash. 1975); Crist v. Division of Youth and Family Services, 320 A.2d 203 (N.J. Super. 1974); Danforth v. Maine Dept. of Health and Welfare, 303 A.2d 794 (Me.1973); In re Friesz, 208 N.W.2d 259 (Neb. 1973).
78 Lassiter, at 33-34. see also Id. at FN6 (“A number of courts have held that indigent parents have a right to appointed counsel in child dependency or neglect hearings as well.”); see e.g., Davis v.
Although the language in *Lassiter* is clear on establishing a presumption against a civil right to counsel and weighing it against the *Mathews* factors, it is not a far stretch to see that the decision itself does not suggest a strict following. At the very least, it is no surprise why *Lassiter’s* language has been the source of numerous inconsistent rulings from state to state. Before turning to it as the relevant precedent, states may ultimately find it prudent to examine *Lassiter’s* final sentence – possibly the disclaimer: “The Court’s opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.”

### B. State Trends Post-Lassiter

Since *Lassiter’s* decision almost thirty years ago, many states have established “access to justice” commissions, Bar Association committees and private organizations dealing with civil right to counsel issues. There are five organizations however, at the core of national efforts: the Public Justice Center (PJC)\(^80\); the Brennan Center for Justice at NYU School of Law\(^81\); the Committee for Indigent Representation and Civil Legal Equity (CIRCLE) at the Northwest Justice Project; the Sargent Shriver National Center of Poverty Law\(^82\); and the Standing Committee on Legal Aid and Indigent Defendants (SCLAID) of the American Bar Association.\(^83\)

Together, these five organizations constitute the heart of the National Coalition for a Civil Right

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\(^{79}\) *Lassiter*, at 35.

\(^{80}\) The Public Justice Center website, [http://www.publicjustice.org](http://www.publicjustice.org).

\(^{81}\) The Brennan Center for Justice at NYU School of Law website, [http://www.brennancenter.org](http://www.brennancenter.org).

\(^{82}\) Sargent Shriver National Center of Poverty Law website, [http://www.povertylaw.org](http://www.povertylaw.org).

\(^{83}\) Standing Committee on Legal Aid and Indigent Defendants of the American Bar Association website, [http://www.abanet.org/legalservices/sclaid](http://www.abanet.org/legalservices/sclaid).
to Counsel (NCCRC), an entity with approximately 150 participants from 35 states who communicate regularly to discuss and coordinate advocacy.

Another significant accomplishment that has fueled “access to justice” momentum throughout the states occurred on August 7, 2005. On this day, the American Bar Association House of Delegates unanimously passed a resolution urging for a right to counsel when basic needs are involved. Notably, while the resolution contains a detailed report on a number of civil right to counsel initiatives and judicial decisions, one of the clauses has been adopted by many states, who have embedded the objective into their own State Bar Association resolutions. This provision, thoroughly endorsed by various states including Alaska, California, Maine and Massachusetts, reads as follows:

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85 For more on the history, mission and objectives of these organizations, see http://www.civilrighttocounsel.org/who_we_are/about_the_coalition/ and http://www.publicjustice.org/our-work/index.cfm?pageid=88.
87 The Alaska Bar Association resolution urges the state to “provide legal counsel as a matter of right 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.” See Alaska Bar Ass’n Pro Bono Comm., Resolution in Support of Recognizing a Right to Counsel for Indigent Individuals in Certain Civil Cases (Sept. 2008), available at http://civilrighttocounsel.org/pdfs/alaska_bar_resolution_9_2_2008.pdf; see also Alaska Bar Latest to Endorse Civil Right to Counsel, Civil Right to Counsel Update (Oct. 2008), available at http://www.civilrighttocounsel.org/pdfs/2008-10-13-newsletter.pdf.
88 The Conference of Delegates of California Bar Associations passed a resolution that recommends the state legislature to add a new provision to the state constitution. If passed in its entirety, Article 1, Section 32 would read: “All people shall have a right to the assistance of counsel in cases before forums in which lawyers are permitted. Those who cannot afford such representation shall be provided counsel when needed to protect their rights to basic human needs, including sustenance, shelter, safety, health, child custody, and other categories the Legislature may identify in subsequent legislation.” Conference of Delegates of California Bar Associations, Resolution 01-06-2006, available at http://cdeca.org/pdfs/R2006/01-06-06.pdf.
90 Like the ABA Resolution, the Massachusetts resolution was passed unanimously by the state Bar Association in 2007: “RESOLVED, That the Massachusetts Bar Association urges the
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.91

The ABA has also held an annual Access to Civil Justice Symposium which has garnered increasing support from advocates and scholars across the U.S.92 The 2010 conference is currently being promoted on the ABA website.93 Useful tools that have been provided at the past two meetings and are now accessible online include the Access to Justice Headlines, which detail submissions by each state regarding changes in the current year.94 Also online through the ABA, are guidance resources for creating and establishing “State Access to Justice Commissions and Structures.”95

Aside from the valuable awareness spread by these prolific organizations, others have tried to expand a civil right to counsel through two other main routes: legislation and litigation.

i. Legislation

Commonwealth of Massachusetts to provide legal counsel as a matter of right at public expense to low income persons in those categories of judicial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody, as defined in Resolution 112A of the American Bar Association.” The resolution can be seen in the extensive report made by the Boston Bar Association. See infra note 105. See also Massachusetts Bar Ass’n – House of Delegates Unanimously Supports Principle of Civil Gideon, Lawyers e-Journal, available at http://www.massbar.org/for-attorneys/publications/e-journal/2007/may/523/hod.

91 Resolution 112A, at 1 (emphasis added).
As noted in one of the most thorough statutory resources available through 2006, Laura K. Abel and Max Rettig conclude that “most state right-to-counsel statutes . . . fall into three broad categories: family law matters, involuntary commitment, and medical treatment.”96 Unfortunately, many of the current statutes continue to provide counsel only in these very limited circumstances. However, a handful of states have recently taken new legislative routes for implementing an expanded notion of appointed counsel. Three examples are California, Louisiana and New York.

In 2004, the Access to Justice Commission in California authorized the creation of a task force to draft model legislation that provided for a right to counsel. In drafting the statute, the task force was confronted with a series of questions that apply to any advocates attempting to create legislation:97 “What would be the eligibility criteria for free counsel?”98 “Should there be a merits or significance test so that courts would appoint counsel only if the litigant had a chance (or a likelihood, or a probability, or a significant chance) of prevailing?”99 “Who would administer the program?”100 Tackling these potential barriers, the task force completed a final draft and entitled it the State Equal Justice Act.101 With the model statute, a California Bar Association resolution endorsed by California Chief Justice Ronald M. George,102 and the

96 Abel and Rettig, supra note 60, at 245.
97 See Pastore, supra note 17.
98 The task force adopted a presumption that counsel should only be available in cases dealing with: a litigant’s right to his primary home, maintenance of employment or income, health and other government benefits, custody and parental rights, and protection from domestic violence.
99 Id. (“[O]ur draft embraces a concept from the English system, making assistance available to a plaintiff only if a reasonable person in the plaintiff’s position, with the financial means to employ counsel, would be likely to pursue the matter in light of the costs and potential benefits.”); (“The standard we embraced for defendants is somewhat broader. [O]ur draft specifies that defendants are eligible for services if they have a reasonable possibility of achieving a favorable outcome.”)
100 Id. (regarding the administration of the program, the task force “envision[ed] a new administrative agency called the State Equal Justice Authority, which would oversee the provision of legal services under the statute.”).
102 See supra note 88.
structure of a pilot project, California in 2007 proposed to implement the suggested changes. The legislature however, turned down the proposals along with a $5 million budget proposed by Governor Schwarzenegger that was to finance the pilot projects. This year, California again proposed legislation – the State Basic Access Act\(^\text{103}\) – which would establish pilot projects for indigents seeking counsel and on June 5, 2009, the bill passed the California Assembly.\(^\text{104}\) The current financial crisis unfortunately diminished the hope, at least for now, that the pilot project would begin anytime soon.\(^\text{105}\)

In July of 2008, Louisiana expanded on their current right to appointed counsel. Prior to the new legislation, the right to counsel in parental termination proceedings only existed when the proceedings were initiated by the state. After passing both houses of the legislature without opposition, the new statute affords a right to counsel when similar proceedings are brought by a private individual as well.\(^\text{106}\)

New York has also been diligently advocating for new legislation in recent years and has even attempted to cover new grounds through a housing initiative. Currently, the New York City Council is reviewing a bill that would provide a right to counsel for low-income seniors in eviction and foreclosure cases.\(^\text{107}\)

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103 The State Basic Access Act (2008) can be viewed at, http://www.brennancenter.org/content/resource/state_basic_access_act/.
105 It should be noted that pilot projects are already under way in Massachusetts. The projects examine the need and best possible resolution for affording representation in eviction cases. Their creation is based on an extensive report released by the Boston Bar Association Task Force on Expanding the Civil Right to Counsel. For a detailed look on this report and another recent article highlighting the projects objects, see Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts (September 2008), available at http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf. See also Houseman, supra note 104, at 18.
107 The 2007 final draft of the bill can be viewed at, http://www.brennancenter.org/Justice/RTC%20Final%20Bill.pdf; A video of the press conference for the bill can be seen at,
While other states have passed and continue to attempt to push new legislation forward, only incremental steps have been achieved towards an overall expansion of the right to counsel. While many advocates consider implementing a legislative strategy, the research shows that this route arguably results in only narrow successes. Another angle, considered by many to be the ideal strategy for expanding the right to counsel is found behind the courtroom doors.

ii. Litigation

As mentioned earlier, research shows large inconsistencies in the pertinent case law. Indigents who are unable to afford counsel are in no way a new group of people to our court system. And for that matter, neither is a court’s inherent power to appoint counsel. Gideon v. Wainwright expressly affords counsel for criminal indigents, yet to this day there is no concrete standard in the civil context for judges to follow. Even Lassiter, considered by many to be the dominant precedent, conflicts with statistics showing that more states have found an implied right today, than the number of states already having the right when Lassiter was


108 See, e.g., State ex rel. Fitas v. Milwaukee County, 221 N.W.2d 902 (Wis. 1974) (finding an inherent power for the court to appoint counsel for the representation of an indigent litigant); Caron v. Betit, 300 A.2d 618 (Vt. 1972) (noting that a court has inherent “power to require attorneys to serve and protect the vital interests of uncounseled litigants where circumstances demand it”); Bothwell v. Republic Tobacco Co., 912 F. Supp. 1221 (D. Neb. 1995) (holding that a federal district court possesses inherent power to compel attorney to represent indigent litigant in civil case); State ex rel. A.P., 815 So. 2d 115 (La. Ct. App. 2002) (“Louisiana courts have the inherent constitutional authority to order the state, its appropriate subdivision, department, or agency to provide for payment of counsel fees and necessary expenses when necessary for effective representation of indigents. The legislative and executive branches can aid this inherent judicial power, but their acts or failure to act cannot destroy, frustrate, or impede that constitutional authority.”).

decided. 110 Under a system that promotes “equal justice for all” as one of its most fundamental traditions, there simply is no excuse – and frankly no given reason – that adequately justifies why an indigent routinely fails to receive his or her “equal justice.”

The majority of cases that explicitly address a civil right to counsel pertain to family law and when a right to counsel is granted, with or without a Lassiter analysis, it is only done in very narrow circumstances. 111 While the right to counsel in these situations is of dire importance, the decisions’ emphasis rests primarily on the right to privacy and a parent’s right to take part in their child’s upbringing. Combined with Lassiter, this has had the effect of causing a disorganized application of a right to counsel for those cases falling outside of family law. Until judges adhere to our foundational principles of fairness and equality when asking whether counsel should be afforded, cases with routinely inconsistent rulings will continue to occur.

However, despite Lassiter’s fickle ruling – which has yet to be overruled – there have been a number of courts that have concocted a cornucopia of methods for analyzing and ruling on the question of whether counsel should be appointed in a civil matter. Some blatantly disregard Lassiter and others simply work around it, refusing to adhere to its guidelines entirely. The following present a glimpse of courtroom trends and in particular, the various analytical tests that courts have used that stand out from the norm.

110 See Bruce A. Boyer, Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham, 36 LOY. U. CHI. L.J. 363, 367 (2005) (noting that forty states now provide free counsel for parents in state-initiated termination-of-parental rights actions, up from thirty-three at the time of the Lassiter decision). See also Rosalie R. Young, The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States’ Response to Lassiter, 14 TOURO L. REV. 247, 260 (1997); cf. Brown v. Division of Family Services, 803 A.2d 948, 956 (Del. Supr. 2002) (“As a consequence of the holding in Lassiter, the seventeen states that did not provide indigent parents with a right to counsel in termination proceedings were required to examine the matter on a case-by-case basis.”).

111 Many of the prominent “parental rights” dating before and after Lassiter are included in the chronological research outline on file with the UNC Center on Poverty, Work and Opportunity.
1. **In re Jay R.**\(^{112}\) (California)

In 1982, William, an indigent father incarcerated in a Missouri prison was served a citation requiring that he appear in a California court in less than a month’s time. There, he was required to show why his estranged wife and her new husband should not be able to adopt his son.\(^{113}\) Although William never received a copy of the petition filed by ex-wife, he sent a letter to the court stating that he could not be present, and that he did not consent to the adoption.\(^{114}\) He also requested that the proceedings be continued until his scheduled parole.\(^{115}\) However, many miles away, the proceedings took place although William was neither present nor represented by counsel. The court filed an order of abandonment and entered a decree of adoption.\(^{116}\) When learning that a judgment had been made, William filed an appeal even though he was never notified what the judgment was or received a copy of either the decree of adoption or the order of abandonment.\(^{117}\)

Accepting the appeal, the court reviewed William’s right to counsel. The court first cited the *Mathews* test factors as the appropriate analysis for determining when due process requires the appointment of counsel.\(^{118}\) The court however, rejected the presumption in *Lassiter*, and citing to the State’s highest court, said:

> The California Supreme Court . . . does not weigh these factors against a presumption that appointed counsel is required only if a person's physical liberty is at stake. [The California Supreme] court specifically rejected, as a matter of

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\(^{113}\) *Id.*

\(^{114}\) *Id.*

\(^{115}\) *Id.*

\(^{116}\) *Id.*

\(^{117}\) *Id.*

\(^{118}\) In *re Jay R.*, 197 Cal. Rptr. 672, 679 (Cal. Ct. App. 1983) (“The touchstone of due process is fundamental fairness. Whether due process requires the appointment of counsel in a particular case depends on the interests involved and the nature of the proceedings.’ In making this determination, we ‘must examine the nature and magnitude of the interests involved, the possible consequences appellants face and the features which distinguish [this proceeding] from other civil proceedings. These factors must then be balanced against the state’s interests.’ ” (quoting *Salas v. Cortez*, 593 P.2d 226, 229 (1979)).
California law, the contention that appointed counsel is required only when imprisonment is imposed. We therefore evaluate the present case under the California Constitution, article 1, section 7, and do not presume that appointed counsel is required only where physical liberty is at stake.\textsuperscript{119}

In conducting their analysis minus any presumption, the court then noted certain aspects of the case showing unfair disadvantages William faced as an indigent prisoner. “Legal concepts of willfulness and lawful excuse, though perhaps simple to the attorney, may not be simple to an indigent parent with a ninth grade education.”\textsuperscript{120} “An uneducated indigent can easily become overwhelmed by such a proceeding without the assistance of counsel.”\textsuperscript{121} Determining that “fundamental fairness” could not be achieved without the appointment of counsel, the court reasoned that “William, unable to attend the hearing, unrepresented by counsel, and unaware of the allegations against him, could not challenge the [opposing side] or cross-examine witnesses.” The court also noted that “[t]he [lower] court was aware of William’s status and his inability to attend, yet made no inquiry about the representation of his interest.”\textsuperscript{122} Although limiting their holding to a right to counsel for indigent natural parent’s in an adoption proceeding, the court observed first-hand the disadvantages an indigent like William faces and that “such a proceeding can hardly be characterized as ‘fundamentally fair.’”\textsuperscript{123}

\textbf{2. Tennessee v. Min\textsuperscript{124}}

In 1990, two indigent parents entered into suit against the Commissioner of the Tennessee Department of Human Services, alleging that their due process rights were violated

\textsuperscript{119} In re Jay R., at 679 (internal quotations omitted); In pertinent part, California Constitution art. I, § 7 states: “A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.”

\textsuperscript{120} Id. at 679 (internal quotations omitted); see Lassiter v. Dep’t of Social Services, 542 U.S. 18, 29-30 (1981).

\textsuperscript{121} Id.

\textsuperscript{122} Id. at 681

\textsuperscript{123} Id.

\textsuperscript{124} Tennessee v. Min, 802 S.W.2d 625 (Tenn.Ct.App. 1990).
when they were not afforded counsel during the custody hearing that temporarily removed their
daughter.\textsuperscript{125} After judgment against them, an appeal was filed to which their due process right to
counsel was addressed.\textsuperscript{126} Although the court stipulated that \textit{Mathews} and \textit{Lassiter} applied to the
case, their analysis did not contain \textit{Lassiter’s} presumption.\textsuperscript{127} Holding that the appointment of
counsel was due, the court outlined specific factors to be used when assessing the third part of
the \textit{Mathews} test – the risk of an erroneous decision absent counsel:

To help assess the risk of an unfair proceeding resulting in an erroneous
decision . . . [there are] . . . several factors that bear on the question. They include:
(1) whether expert medical and/or psychiatric testimony is presented at the
hearing; (2) whether the parents have had uncommon difficulty in dealing with
life and life situations; (3) whether the parents are thrust into a distressing and
disorienting situation at the hearing; (4) the difficulty and complexity of the issues
and procedures; (5) the possibility of criminal self-incrimination; (6) the
educational background of the parents; and (7) the permanency of potential
depprivation of the child in question.\textsuperscript{128}

Similar to \textit{In re Jay R.}, the court further acknowledged the challenges certain litigants
face when attempting to represent themselves. “While the difficult and complexity of the issues
and procedures may not have been significant to the ordinary lay person, the education,
intelligence and personal experience of the [plaintiffs] are so minimal that they could barely
understand what was going on.”\textsuperscript{129} Like so many other pro se litigants, “[t]hese people were
thrust into a distressing and disorienting experience.”\textsuperscript{130}

\textsuperscript{125} Id. at 625. \\
\textsuperscript{126} Id. \\
\textsuperscript{127} Id. at 626. \\
\textsuperscript{128} Id. at 627. \\
\textsuperscript{129} Min, at 627; see also Salas v. Cortez, 593 P.2d 226 (Cal. 1979) (finding that the complexity of
the proceedings requires counsel in state-initiated paternity actions); Amek Bin-Rilla v. Israel, 335
N.W.2d 384 (Wis. 1983) (noting that a pleading from a self-represented party, “like many pro se
petitions, is difficult to understand.”); Quail v. Municipal Court, 171 Cal. App. 3d 572, 578 (1985)
(Johnson, J. dissenting in part) (citing \textit{Massey v. Moore}, 348 U.S. 105, 108 (1954), for the
proposition that “a litigant need not be incompetent to stand trial in order to be mentally deficient
enough for due process to mandate appointment of free counsel.”).

\textsuperscript{130} Tennessee v. Min, 802 S.W.2d 625, 627 (Tenn.Ct.App. 1990); see also \textit{In re Adoption of R.I.},
312 A.2d 601, 603 (“In such a proceeding, it would be grossly unfair to force [a litigant] to
It should also be noted that the Min factors which ultimately lead to an appointment of counsel in this case have been subsequently upheld in similar litigation in Tennessee, including litigation involving privately-initiated proceedings where the government was not a party to the suit as was the case in Min.\textsuperscript{131} Tennessee state courts have also found it to be reversible error when the factors were not used.\textsuperscript{132}

3. \textit{U.S. v. 1604 Oceola}\textsuperscript{133} (Texas)

In a 1992 forfeiture proceeding in Texas, a district court addressed the question of whether the currently incarcerated defendants had a right to appointed counsel.\textsuperscript{134} The court declared that their “authority to appoint counsel in a forfeiture proceeding stem[med] from three possible sources.”\textsuperscript{135} The first source is 28 U.S.C. 1915: \textsuperscript{136} “The statute authorizing \textit{in forma pauperis} proceedings . . . which allows a court to request an attorney to represent a party in any case.”\textsuperscript{137} The second source, 18 U.S.C. § 3006A,\textsuperscript{138} pertains to criminal proceedings.\textsuperscript{139} The third source is when “the Due Process Clause of the U.S. Constitution requires” an

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\textsuperscript{131} See, e.g., Adoption of Howson, 1993 WL 258783 (Tenn. Ct. App. 1993) (holding that the Min factors applied to privately-initiated termination of parental rights proceedings and that once applied, mother was found to be entitled to court-appointed counsel).

\textsuperscript{132} See, e.g., State Dep’t of Human Services v. Taylor, 1997 WL 122242 (Tenn. Ct. App. 1997); In re M.E., 2004 WL 1838179 (Tenn. Ct. App. 2004) (holding that when trial court did not apply Mathews Test and the seven Min factors in parental rights proceeding, reversible error was made).


\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{1604 Oceola}, at 1196.

\textsuperscript{136} Proceedings in forma pauperis, 28 U.S.C. § 1915 (1948) (as amended April 26, 1996); see § 1915(e)(1) (“The court may request an attorney to represent any person unable to afford counsel.”).

\textsuperscript{137} \textit{1604 Oceola}, at 1196.

\textsuperscript{138} Adequate Representation of Defendants, 18 U.S.C.S. § 3006A, (as amended October 13, 2008). In part § 3006A states that, “[e]ach United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation,” \textit{Id.}

appointment.140 “When the action of a court clearly implicates the substantial interests of a party, the Due Process Clause of the Constitution may require a court to appoint an attorney to insure the adequate representation of that party’s interest.”141

In regards to due process, although this case dealt with a forfeiture of property in relation to a criminal matter, the court held that the *Lassiter* presumption as well as the *Mathews* test factors applied142- a far stretch from the familial fact pattern set forth in *Lassiter*. Before ultimately finding that due process did not require appointment of counsel in the case at bar, the court made two notable observations about forfeiture cases:

The additional burdens imposed upon the government by appointment of counsel . . . would not be overwhelming. The mechanism to appoint counsel already exits, and though a question might arise of where funds for such an appointment might be found, no substantial procedural or administrative burdens would be created. Perhaps the most substantial imposition upon the government would be requiring the Plaintiff to oppose an attorney in a complicated and abstruse field where the Plaintiff normally expects to meet only pro se litigants struggling through the claimant process.143

It is quite likely that in most, if not all forfeiture cases, the appointment of counsel would substantially aid a claimant in negotiating the arcane forfeiture procedures. It is also quite likely that in forfeiture cases where the claimant has a chance of success, the risk of an erroneous deprivation of property right is substantially higher if the claimant must proceed pro se.144

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140 Id.
141 Id. at 1196
142 Id.; See also Rapoport v. G.M., 657 N.Y.S.2d 748 (N.Y. App. Div. 1997) (finding that *Lassiter* requires counsel in all involuntary hospitalizations); Hughen v. Highland Estates, 48 P.3d 1238 (Idaho 2002) (unemployment case citing *Lassiter* and holding that in civil cases there is no right to appointed counsel where physical liberty is not threatened).
143 *1604 Oceola*, at 1197.
144 *Id.*; see also New York City Housing Authority v. Johnson, 565 N.Y.S.2d 362, 364 (N.Y.Sup. Ct. 1990) (applying *Lassiter* presumption against *Mathews* test factors and finding that no right to appointed counsel existed for indigent tenant). In their analysis, the *Johnson* court stated: “Balancing the [*Mathews*] factors and weighing them against the presumption, we find that while tenant's property interest in continued possession is certainly significant, it is not so fundamental an interest mandating a due process right to assigned counsel. Notably, we know of no jurisdiction to date that has established such a constitutional right to counsel for indigent tenants faced with eviction from public housing.” However, other courts have found a fundamental difference in a litigant’s home. See, e.g., Lindsey v. Normet, 405 U.S. 56, 89-90 (1972) (Douglas, J., dissenting in part) (“Where the right is so fundamental as the tenant’s claim to his home, the requirements of due process should be more embracing.”).
Additionally, “in deciding whether to request an attorney to represent a party” under another source of their inherent power, 28 U.S.C. § 1915, “the proper standard to employ is whether the particular case presents . . . exceptional circumstances.”145 Although “[n]o clear definition of [exceptional circumstances] exists . . . two basic factors” should be considered: “[T]he type and complexity of the case and the abilities of the individuals bringing it.”146 These factors were not held to be exhaustive and variations can be seen with other courts using the “exceptional circumstances” standard. The next case under consideration, Tabron v. Grace,147 serves as one such example.148

4. Tabron v. Grace149

In 1989 an indigent prisoner named Harvey Tabron brought a 42 U.S.C. § 1983150 suit against eight prison officials claiming they had violated his constitutional rights by failing to protect him when another prisoner attacked him with a razor blade.151 Tabron initially moved for

146 Id.; see Branch v. Cole, 686 F.2d 264 (5th Cir. 1982) (“No comprehensive definition of exceptional circumstances is practical. The existence of such circumstances will turn on the quality of two basic factors: the type and complexity of the case and the abilities of the individual bringing it.”).
147 Tabron v. Grace, 6 F.3d 147 (3d Cir. 1993).
148 See also Ulmer v. Chancellor, 691 F.2d 209 (D.C. Miss. 1982) (trial court is not required to appoint counsel for indigent plaintiff asserting claim under federal statute 42 U.S.C. § 1983 unless the case presents exceptional circumstances. Factors to consider: the type and complexity of the case; whether the indigent is capable of adequately presenting his case; whether the indigent is in a position to investigate adequately the case; and whether the evidence will consist in large part of conflicting testimony so as to require skill in the presentation of evidence and in cross examination).
149 Tabron v. Grace, 6 F.3d 147 (3d Cir. 1993).
150 42 U.S.C. § 1983, (as amended Oct. 19, 1996). (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.”)
151 Tabron, at 150.
appointment of counsel under 28 U.S.C. § 1915(d) [now (e)],\textsuperscript{152} arguing that “he did not have the legal education or experience necessary to present his case and that he needed an attorney to assist him with discovery.”\textsuperscript{153} Denying his request, the magistrate ordered that in “civil rights cases,” counsel may only be appointed when there were “exceptional circumstances” and that there were none present.\textsuperscript{154} Acting pro se, Tabron filed an appeal without objecting to the magistrate’s order, a procedural error likely to not have occurred had counsel been present.

The Third Circuit granted the appeal, noting that they “have traditionally given pro se litigants greater leeway where they have not followed the technical rules of pleading and procedure.”\textsuperscript{155} Holding that the magistrate judge incorrectly used the standard of “exceptional circumstances,” the court listed six factors to help determine when counsel should be appointed: (1) the plaintiff’s ability to present his case;\textsuperscript{156} (2) the difficulty of the legal issues;\textsuperscript{157} (3) the degree to which factual investigation will be necessary and the plaintiff’s ability to pursue such

\textsuperscript{152} See 28 U.S.C. 1915(e)(1) (as amended April 26, 1996) (“The court may request an attorney to represent any person unable to afford counsel.”).
\textsuperscript{153} Tabron, at 151.
\textsuperscript{154} Id.
\textsuperscript{155} Tabron v. Grace, 6 F.3d 147, 154 (3d Cir. 1993); \textit{see, e.g.}, Riley v. Jeffes, 777 F.2d 143, 147-48 (3d Cir. 1985); Siers v. Morrash, 700 F.2d 113, 116 (3d Cir. 1983).
\textsuperscript{156} Tabron, at 156 (“The plaintiff’s ability to present his or her case is, of course, a significant factor that must be considered in determining whether to appoint counsel. Courts generally should consider the plaintiffs education, literacy, prior work experience, and prior litigation experience. An indigent plaintiff’s ability to present his or her case may also depend on factors such as the plaintiff’s ability to understand English, or, if the plaintiff is a prisoner, the restraints placed upon him or her by confinement.”) (internal citations omitted). \textit{See also} Castillo v. Cook County Mail Room Dep’t, 990 F.2d 304 (7th Cir.1993) (instructing district court to appoint counsel on remand to represent indigent plaintiff who had difficulty with the English language); Rayes v. Johnson, 969 F.2d 700 (reversing denial of request for counsel where indigent prisoner was severely hampered in pressing his claims by conditions of confinement making him unable to use typewriter, photocopying machine, telephone, or computer).
\textsuperscript{157} Tabron, at 156 (“In conjunction with the consideration of the plaintiff’s capacity to present his or her case, the court must also consider the difficulty of the particular legal issues. The court ‘should be more inclined to appoint counsel if the legal issues are complex.’”) (quoting Hodge v. Police Officers, 802 F.2d 58, 61 (2d Cir.1986)). \textit{See also} Tabron, at 156 (“[W]here the law is not clear, it will often best serve the ends of justice to have both sides of a difficult legal issue presented by those trained in legal analysis.”) (quoting Maclin v. Freake, 650 F.2d 885, 889 (7th Cir.1981)).
investigation;\textsuperscript{158} (4) the plaintiff’s ability to retain counsel on his own;\textsuperscript{159} (5) the extent to which
the case is likely to turn on credibility determinations;\textsuperscript{160} and (6) whether the case will require
expert testimony.\textsuperscript{161} Although the court in Tabron never mandated that the factors be followed,
they have subsequently been upheld in multiple cases.\textsuperscript{162}

5. \textit{In the Matter of K.L.J.}\textsuperscript{163} (Alaska)

After a divorce in 1983, Ronald Miller’s ex-wife sought to terminate his parental rights as
K.L.J.’s father. Miller was unable to afford an attorney because a crippling work-related injury

\textsuperscript{158} \textit{Tabron}, at 156 (“Other key factors are the degree to which factual investigation will be
required and the ability of the indigent plaintiff to pursue such investigation. [W]here the claims
are likely to require extensive discovery and compliance with complex discovery rules,
appointment of counsel may be warranted.”) (internal citations omitted). \textit{See also Rayes}, 969 F.2d
700, 703 (8th Cir. 1992) (reversing a district court’s denial of a request for appointment of counsel
in part because conditions of the indigent prisoner’s confinement severely disadvantaged him in
discovery).

\textsuperscript{159} \textit{Tabron}, at 157 (“[E]ven if it does not appear until trial (or immediately before trial) that an
indigent litigant is not capable of trying his or her case, the district court should consider
appointment of counsel at that point.”). \textit{See Castillo}, 990 F.2d 304 (ordering a district court to
appoint counsel to represent indigent civil litigant who had difficulty with English language even
though the litigant had never requested assistance of counsel).

\textsuperscript{160} In “a case [that] is likely to turn on credibility determinations, [the] appointment of counsel
may be justified. [W]hen witness credibility is a key issue, it is more likely that the truth will be
exposed where both sides are represented by those trained in the presentation of evidence and in
cross examination.” \textit{Tabron}, at 156 (internal quotations omitted). \textit{See Maclin}, 650 F.2d at 888
(“[C]ounsel may be warranted where the only evidence presented to the fact-finder consists of
conflicting testimony.”). \textit{See also Manning v. Lockhart}, 623 F.2d 536 (8th Cir. 1980) (holding
that the district court abused its discretion in refusing to appoint counsel where claims were non-
frivolous and the question of fact turned on witness credibility)

\textsuperscript{161} \textit{Tabron} v. \textit{Grace}, 6 F.3d 147, 156 (3d Cir. 1993) (“[A]ppointed counsel may be warranted
where the case will require testimony from expert witnesses.”). \textit{See Moore v. Mabus}, 976, F.2d
268 (holding that the district court erred in denying a request for counsel to represent an indigent
civil litigant whose case required testimony from experts on HIV-AIDS management in a prison
environment).

\textsuperscript{162} \textit{See e.g.}, \textit{Parham v. Johnson}, 126 F.3d 454 (3d Cir.1997) (holding that if a district court
determines that plaintiff’s claim has some merit, then the court should consider the non-exhaustive
factors from \textit{Tabron} in determining whether to grant plaintiff’s request for appointed counsel.);
\textit{Montgomery v. Pinchak}, 294 F.3d 492 (3d Cir.2002) (citing the six \textit{Tabron} factors, the court held
that the inmate's § 1983 case under the Eighth Amendment that alleged deliberate indifference to
his serious medical needs, demonstrated clear need for factual investigation beyond that which
inmate could conduct from his prison cell. The court weighed in favor of appointing counsel,
since the absence of medical records were vital to the inmate's claim, defendants' resisted inmate's
requests during discovery, and inmate had an increasingly apparent inability to navigate case's
complex discovery rules).

had left him indigent. Miller requested appointed counsel, however his request was quickly denied, despite the fact that opposing counsel filed a memorandum indicating their belief that he was entitled to representation. However, on appeal the Alaska Supreme Court declared that appointed counsel was due. The court cited the Alaska State Constitution, the Mathews test and Lassiter as forming the basis for their decision. Most important was the court’s explicit rejection of the case-by-case analysis set forth in Lassiter. Citing to Justice Blackmun’s dissenting opinion, the Alaska Supreme Court held:

[T]he due process balancing in the abstract favors a bright line rule where “the private interest [is] weighty, the procedure devised by the state fraught with risks of error, and the countervailing governmental interest insubstantial.” Moreover, we agree with Justice Blackmun’s explanation of the benefits of “procedural norms,” and his caution about reviewability of case-by-case decision making.

Ironically, the court did not only use the Lassiter decision as an example of a faulty analysis, but consistently quoted from the majority’s opinion to support their determination that counsel was indeed warranted in similar situations. Taking it a step further, the court additionally rejected Lassiter’s presumption against a right to counsel, taking a page from California’s recent ruling on a similar question. Relying on California precedent, the Alaska

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164 In re K.L.J., at 277; The injury resulted from chemical poisoning and damage to his head and spine after falling from a scaffolding and Ronald’s only source of income was through federal Social Security Disability. After 50% was garnished for child support, Ronald was left with $300 a month, $200 of which was for rent. Id.
165 Id. at 278.
166 Id. (“Our analysis of what procedural process is due begins with article I, section 7, of the Alaska Constitution, which provides in part: ‘No person shall be deprived of life, liberty, or property, without due process of law.’” (quoting Alaska Const. art. 1, s. 7).
167 Id. at 282.
169 See, e.g., In re K.L.J., at 280 (“[T]hough the State’s pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here. . . .”) (quoting Lassiter, 452 U.S. at 28).
170 See supra discussion on In re Jay. R.
The Supreme Court declared that courts should “not weigh the factors in a due process analysis against a presumption that appointed counsel is required only if a person’s physical liberty is at stake.”\textsuperscript{171} Specifically addressing the scope of the type of cases that implicate the Due Process Clause, the Alaska Supreme Court reiterated that they have “consistently avoided any formalistic categorization of proceedings as criminal and civil when determining if strict due process safeguards are required.”\textsuperscript{172} Ultimately, the court found that the Due Process clause necessitated a more equal sense of justice for Ronald Miller and those like him because the unfair circumstances that are attached to indigency in cases like these “clearly demonstrate[] the need for appointed counsel.”\textsuperscript{173}

6. \textit{City of Moses Lake v. Smith}\textsuperscript{174} (Washington)

Although ultimately dismissed as moot after the elderly defendant passed away, the facts of \textit{City of Moses Lake v. Smith} paint a clear example of a situation warranting a right to counsel.\textsuperscript{175} After more than half a century of owning his home, Mr. Smith was haled into court by the city of Moses Lake to answer for his home being in violation of various building codes. The city claimed that the house was “dangerous and unfit” and sought to have it demolished. Attempting to establish that his residence was not dangerous, Smith continuously responded to the city’s allegations by appearing in court when summoned. With his sole source of income from Social Security Disability Benefits, it is not surprising that Smith was unable to attain a private attorney – although he did try. Requesting the court to appoint him counsel produced

\begin{footnotesize}
\textsuperscript{172} \textit{In re K.L.J.}, at 283. \textit{See} Flores v. Flores, 598 P.2d 893 (Alaska 1979) (holding that due process clause of State Constitution guaranteed wife, an indigent party, the right to court-appointed counsel in a private child custody proceeding in which her spouse was represented by Alaska Legal Services corporation).
\textsuperscript{173} \textit{Id.} at 282.
\textsuperscript{175} The facts were taken from the defendant’s motion to vacate summary judgment and to appoint him legal counsel. \textit{City of Moses Lake v. K.S.}, No. 01-2-007668-8.
\end{footnotesize}
the same effect as his empty wallet. The court believed that he had no right to counsel because
the case was civil in nature. At 77 years old, with severe mental and physical illnesses, Smith
was forced to defend himself and his home from being destroyed by the city. Making matters
worse, the city had already disabled the water and electricity to Smith’s home and had
attempted to have him involuntarily committed. Dying before his appeal, the court declared the
issue as moot instead of properly evaluating the tragic circumstances many indigents face
without having a right to counsel.176

7. **M.E.K. v. R.L.K.**177 *(Florida)*

In 2006, a Florida appellate court overturned a trial court’s decision to deny an indigent
mother counsel in a termination of parental rights proceeding.178 Although the trial court
premised their ruling on *Lassiter*, the appeals court made clear that *Lassiter* in fact did not
control. Among other things, the court of appeals reasoned that the Florida Constitution
provided a higher degree of safeguards than the “minimum due process requirements” than the
“federal due process clause” implicated in *Lassiter*.179 The court accordingly held that the actual
precedential guidance that they were to rely on was from a case occurring just before *Lassiter:*
the Florida Supreme Court case, *In re D.B.*180 That case held in 1980 that “an indigent parent

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176 See also Quail v. Municipal Court, 171 Cal. App. 3d 572, 578 (1985) (Johnson, J. dissenting in part) (“If it is not merely difficult but impossible for a mental incompetent to defend himself without counsel in a criminal prosecution, it is just as impossible for him to do so in a civil case. And, even if due process eventually can be twisted to somehow tolerate imposing on normal poor people the difficult task of defending their property rights in the courts without lawyers, it can never be so stripped of meaning as to foist that task on those for whom it would be an impossibility – mentally incompetent poor people. That is tantamount to sanctioning legalized robbery – using the coercive power of the state to force defenseless people to surrender their property without a meaningful hearing.”).


178 *M.E.K.*, at 791.

179 Id. at 790; “The citizens of Florida are also protected by the due process clause in Article 1, section 9 of the Florida Constitution. In our federal system of jurisprudence, the United States Constitution establishes the minimum level of due process protections for all people, but state constitutions and laws may provide additional due process protections.” *Id.; see also* Traylor v. State, 596 So.2d 957, 961 (Fla. 1992).

180 In the Interest of D.B., 385 So.2d 83 (Fla. 1980).
has a right, under both the Florida and United States Constitutions, to appointed counsel in 'proceedings involving the permanent termination of parental rights to a child.'”\textsuperscript{181} Additionally, the court held that the oft-mentioned \textit{Mathews} factors should not be used in the case at hand,\textsuperscript{182} and that the factors used in \textit{Potvin v. Keller},\textsuperscript{183} another pre-\textit{Lassiter} Florida Supreme Court case, were more appropriate.\textsuperscript{184} Those factors include: “(1) the potential length of parental-child separation, (2) the degree of parental restrictions on visitation, (3) the presence or absence of parental consent, (4) the presence or absence of disputed facts, and (5) the complexity of the proceeding in terms of witnesses and documents.”\textsuperscript{185} Applying this precedential standard, derived much closer to home than \textit{Lassiter}, Florida was able to ultimately find a narrow constitutional civil right to counsel for indigent parents.

8. \textit{Frase v. Barnhart}\textsuperscript{186} (Maryland)

This Maryland opinion has been frequently discussed by civil right to counsel advocates.\textsuperscript{187} \textit{Frase v. Barnhart} involved a custody dispute between Deborah Frase, an unrepresented indigent mother of three, and a couple who had volunteered to care for the children during the mother’s eight-week incarceration.\textsuperscript{188} Strikingly, the most cited part of the

\textsuperscript{181} \textit{M.E.K.}, at 789 (quoting \textit{In re D.B.}, 385 So.2d at 90).
\textsuperscript{182} \textit{Id.} at 791 (“[I]n a case involving the parental-child relationship, Florida courts must weigh the factors enunciated in \textit{Potvin}, not \textit{Mathews}.”); see \textit{In re D.B.}, 385 So.2d at 90.
\textsuperscript{183} \textit{Potvin v. Keller}, 313 So.2d 703 (Fla. 1975).
\textsuperscript{184} \textit{M.E.K.}, at 791; see \textit{In re D.B.}, 385 So.2d at 90.
\textsuperscript{185} \textit{Id.}, at 791.
\textsuperscript{186} \textit{Frase v. Barnhart}, 840 A.2d 114 (Md. 2003).
\textsuperscript{188} The majority states that “it would be inappropriate for us to address and rule upon the right-to-appointed-counsel issue” although “Ms. Frase has argued that she, and any other civil litigant who is unable to afford counsel, has a common law and State Constitutional right to have counsel appointed for her, either by the court or by some State or local agency.” \textit{Frase}, at 129.
opinion is the concurrence which explicitly addressed the civil right to counsel issue that the
majority declared as moot. In it, three judges decry judicial abdication regarding equal justice.\(^{189}\)

The majority declines to address an issue I believe to be properly presented that
goes to the very center of the American constitutional and extra-constitutional
promises—equality under the law. . . . [D]o the poor receive equal treatment in a
matter concerning the most basic of fundamental and constitutional rights?
Rather than answer, or attempt to answer it, the question is avoided by a majority
of the Court.\(^{190}\)

It is always easiest to decline to address controversial issues. It is, perhaps, the
safest thing to do, even for courts. But the avoiding of such issues is best left to
the political processes of the other branches of government. It is our branch of
government, the judiciary, under the express and implied doctrine of the
separation of powers, to which the toughest and most difficult decisions are
delegated. It is our primary role to ensure that the fundamental constitutional
rights, which are reserved to the people, are protected.\(^{191}\)

And despite an understanding that there may not be a crystal-clear solution to the problem, the
concurrence believes that avoiding it is not the answer.

I think it can be agreed that the quality of justice received, even in our system,
arguably the best system of justice ever conceived, is impacted by the presence or
absence, and the quality of, legal representation of the respective parties. I readily
understand that it may well be beyond our power to create a perfectly equal
system, but, that acknowledged, there is no acceptable reason to avoid doing what
we can do, even if it is perceived that what we do may not be well received by
other governmental entities that will have to address the impact of our rulings.
And I believe that we, at the least, should begin the process of considering the
matter of ensuring equal access to justice. . . .\(^{192}\)

The concurrence continued, addressing the fact that the courts created the judicial system and
that they are responsible for the disadvantages that have implemented that depart from such
concrete notions of justice and equality.

With the constraints of the adversarial court system, and the prohibitions it (and
our cases) place upon judges not to assist either side, the poor, unrepresented

\(^{189}\) Id. at 131.
\(^{190}\) Id.
\(^{191}\) Id.
[litigant] faced with experienced counsel on the other side is at a great, system-built-in, disadvantage.\textsuperscript{193}

It is especially frightening to me to think that affluent third parties, by reason of the quality of the legal representation their affluence brings them, may be able to simply overwhelm poor parents who cannot afford counsel in a civil adversarial system that is not permitted to fully ensure equality in the presentation of cases... A trial is fair or it is not, and the ultimate result... cannot change the fairness of the process.\textsuperscript{194}

As Justice Blackmun opined in his \textit{Lassiter} dissent and as quoted in \textit{Frase}, “The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits... For the value of protecting our liberty from deprivation by the State without due process of law is priceless.”\textsuperscript{195}

CONCLUSION

There is not a clear answer for “fixing” our justice system so that it better adheres to the practices we claim or the ideals inscribed upon our highest court. Yet there is also no clear answer to why we have departed from such fundamental notions. One can only question our current state and examine the empirical research to determine the next step. This research paper set out to examine the various “civil right to counsel” trends occurring in a relatively global context consisting of other western democracies and the United States. Unfortunately, the results tend to show that we are more accurately, two worlds apart. With a preponderance of western democracies adhering to a more vivid sense of equal justice than our own democracy, it is not hard to see a lack of consistency behind American courtroom doors. Indeed our most prevalent

\textsuperscript{193} \textit{Id.} at 134.
\textsuperscript{194} \textit{Id.} at 136-37.
\textsuperscript{195} \textit{Id.} at 137 (quoting \textit{Lassiter} v. Dep’t of Social Services, 542 U.S. at 59-60 (Blackmun, J. dissenting)). In addition to the strong opinions occurring \textit{Lassiter} and \textit{Frase} outside the majority’s ruling, other dissenters have avidly voiced their dissatisfaction with the unequal limitations placed on indigents seeking counsel. See, e.g., \textit{In re McBride}, 766 N.W.2d 857, 858 (Mich. 2009) (Corrigan, J. dissenting) (declaring “that a miscarriage of justice [] occurred” after the majority failed to properly address the litigant’s need for counsel).
“doctrine” of civil counsel jurisprudence foreshadowed its own minimal value. Without concrete precedential guidance, our next step forward should involve looking back. We must look to the past Justices who not long ago spoke of the principles that we were founded upon, and strive to heed their advice.  

Many advocates today fighting for a civil right to counsel do just this, and in doing so, they have made some progress. Their steadfast efforts continue, as is seen by the increasing wave of “access to justice” initiatives and continued advocacy in the courts.

Currently, two cases are garnering noteworthy attention by media and advocates alike as they pursue an answer to one of our great judicial system’s injustices. The first, *Office of Public Advocacy v. Alaska Court System*, is under consideration by the Alaska Supreme Court and involves whether the State Constitution requires the appointment of publicly funded counsel for indigent litigants in custody hearings.  

Many advocates have contributed tireless support, including the American Bar Association who filed their first ever amicus brief in a state court. The second case, *Rhine v. Deaton* involves yet another mother and the termination of her parental rights in the state of Texas. Advocates are sure to maintain a constant vigil on the progress of *Rhine* as a petition for a Writ of Certiorari to the U.S. Supreme Court was filed to determine, in part, whether Ms. Rhine’s due process rights were violated when the Texas court

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196 See, e.g., supra notes 6-10 and accompanying text.
198 Id.
199 The ABA amicus brief is available at, (http://www.abanet.org/amicus/briefs/office_of_public_advocacy_v_alaska COURT_SYSTEM.pdf). Additional briefs can also be found on the National Coalition for a Civil Right to Counsel website, (http://www.civilrighttocounsel.org/advocacy/litigation/) (click “next” to access “page 2”), as well as a link to a recording of the oral arguments which can be found in the June 2009 newsletter, (http://www.civilrighttocounsel.org/pdfs/CRC120Update%20no.4%20June%202009.pdf).
failed to engage in the *Lassiter* analysis.\(^{201}\) If heard by the nation’s highest court, a ruling could potentially reshape the precedential standard that lower courts are to rely on when conducting a due process analysis of an indigent’s right to counsel. Regardless, continued progress is still wanting and an expanding awareness of the problem is needed. And there will not be appeasement for judicial access until the judicial overseers, who choose to either ignore the inequality their litigants face or who outright deny its existence, adapt the fundamentals of fairness. Not until our courts broaden the civil right to counsel will the research examining the state trends procure any different result than what was found herein.

\(^{201}\) *See Id.*, Petition for a Writ of Certiorari, No.08-1596 (filed June 25, 2009). *See also* Mary Alice Robbins, *Cert Sought Over Right to Counsel in Parental-Rights Termination Case*, TEXAS LAWYER, July 13, 2009, at 5.