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**697* SHAPING A CONTEXT-BASED CIVIL GIDEON FROM THE DYNAMICS OF SOCIAL CHANGE

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Introduction

In this paper, I outline a strategy of an incremental, context-based approach to achieving a civil right to counsel. I do so against the backdrop of the renewed interest in, and increasing calls for, such a right, also called a "Civil Gideon." [\[FN1\]](#) Despite my support for a Civil Gideon in a broad array of cases, I believe that litigation or legislative strategies that seek, as the next step, the establishment of a broad-based right to counsel, rather than a more targeted approach, will be difficult to achieve.

I reach this conclusion because I see the problem primarily as one of effectuating social change, not of developing constitutional or statutory doctrine. I therefore do not focus here on the legal arguments that might support a civil right to counsel. Instead, I examine initiatives of the past forty years to understand why those efforts did not achieve a Civil Gideon. I also look beyond the Civil Gideon history for more successful examples in which litigation played an important role in strategies designed to effectuate systemic change. Using the past as a backdrop, I explain what I mean by a context-based approach to an expanded right to counsel, and explore strategies to achieve that result. If the recent surge of activity is to bear fruit, we must first understand why we have made so little progress in the first forty years. The dynamics of the first forty years must shape the strategies for the immediate future.

Recognizing the interrelationship between Civil Gideon strategies and the dynamics of social change is particularly important at a Symposium named after Edward V. Sparer. A giant in the early years of the "poverty law" movement, Sparer's aggressive and affirmative use of the "law as an instrument of social change" became the credo of his legal services office in New York City. [\[FN2\]](#) Over **698* twenty years after Sparer's untimely death, a renewed focus on Civil Gideon should not ignore Sparer's vision or the first 40 years of Civil Gideon initiatives.

I. Gideon at 40, and the Renewed Interest in a Civil Gideon

The year 2003 marked the 40th Anniversary of the landmark decision of *Gideon v. Wainwright*. [\[FN3\]](#) The conferences and publications marking the anniversary assessed the decision's impact forty years later. [\[FN4\]](#) While the primary focus was on the criminal context in which Gideon was decided, the 40th anniversary coincided with a surge of activity designed to achieve a Civil Gideon. [\[FN5\]](#) Recent articles support the call for a Civil Gideon in various formulations. [\[FN6\]](#) Advocates formed a National **699* Coalition for a Civil Right to Counsel to share ideas and hone strategies. [\[FN7\]](#) The Sargent Shriver National Poverty Law Center [\[FN8\]](#) and the Brennan Center [\[FN9\]](#) for Justice developed Civil Gideon websites as part of their active roles in the efforts.

In some states, the planning and strategizing has led to action. Advocates in Maryland, Washington, and Wisconsin filed litigation seeking decisions to create an expanded right to counsel in certain civil contexts. [\[FN10\]](#) Other advocates have explored legislative responses to the issue. [\[FN11\]](#) Access to Justice initiatives are intensifying in these and other states, punctuated by the rapid expansion of State Access to Justice Commissions. [\[FN12\]](#) The Commissions, created by orders of state supreme courts, are comprised of members from an array of stakeholders in the legal system. [\[FN13\]](#) The **700* Commissions have a broad charge to engage in ongoing assessments of the civil legal needs of the poor, and to develop initiatives to respond to those needs. [\[FN14\]](#)

Collaboration across state lines is evident beyond the creation of the National Coalition. American Bar Association (ABA) President Michael Greco, declaring that a "defined right to counsel in civil cases is an idea whose time has come," charged his ABA Task Force on Access to Civil Justice with examining the idea; [\[FN15\]](#) The ABA House of Delegates adopted the resulting resolution at its 2006 Annual Meeting. [\[FN16\]](#) A 2006 special issue of *Clearinghouse Review*, and this Sparer Symposium, are both dedicated to the topic. [\[FN17\]](#)

II. The Failure to Achieve a Civil Gideon in the First 40 Years

Gideon was decided in 1963. The fact that we seemed further from achieving a Civil Gideon at the 40th anniversary of the *Gideon* decision than we did in 1963 says less about the legal arguments supporting a Civil Gideon, and more about the powerful and entrenched interests that have a stake in maintaining the status quo.

Changing the self-interest of the key players resisting change is a crucial component of a strategy designed to achieve a civil right to appointed counsel.

The arguments justifying a civil right to counsel appeared virtually from the day Gideon itself was decided. [FN18] At times, the arguments are framed in terms that would apply to a wide range of cases affecting the poor. [FN19] At other times, the arguments focus on categories of cases, such as eviction, [FN20] divorce, [FN21] termination of parental rights, [FN22] and immigration cases. [FN23]

*701 The litigation strategies of the first forty years failed to achieve their sweeping goals. The United States Supreme Court's decision *Lassiter v. Department of Social Services* [FN24] is the most noteworthy rejection of constitutional litigation aimed at establishing a civil right to counsel. *Lassiter* mandated a case-by-case evaluation. [FN25] Litigation efforts in New York City to win a right to counsel for indigent tenants became mired in a procedural morass, and failed to yield a favorable decision on the merits. [FN26] An alternative strategy of seeking appointment on a case-by-case basis through pro se motions yielded an occasional appointment, but no systematic expansion of the right to counsel. [FN27]

Not all efforts to expand the reach of a right to counsel failed. Litigation extending the application of Gideon to juvenile cases bore fruit in 1967 in the United States Supreme Court's decision of *In re Gault*. [FN28] Some states, in response to *Lassiter*, enacted statutes providing for a mandatory or discretionary right to counsel in the termination of parental rights context. [FN29] None of the initiatives achieved a broad-based right to appointed counsel in civil cases.

Although the current initiatives have not run their course, the rulings from the first forty years foreshadowed many of the recent results. In the recent Maryland *702 case of *Frase v. Barnhart*, [FN30] the lead plaintiff was an unrepresented mother whose unfavorable outcome in a custody dispute was overturned as part of the Civil Gideon litigation. [FN31] Three judges on the Maryland Court of Appeals produced an elegant and compelling concurring opinion supporting a Civil Gideon. [FN32] The Court's majority, however, ducked the larger issue. [FN33] In *Kelly v. Warpinski*, [FN34] the Wisconsin Supreme Court denied the respondents' request for original jurisdiction, declining to reach the Civil Gideon issue. [FN35] In Washington State, Civil Gideon litigation arising out of an eviction proceeding sunk into a procedural quagmire, before the named, elderly plaintiff passed away, stalling the litigation further. [FN36] In the subsequent case of *Halls v. Arden*, [FN37] the Washington Court of Appeals reversed orders modifying a parenting plan and holding the pro se mother in contempt, but declined to order appointment of counsel in the custody modification proceedings. [FN38]

Analyzing the problem as one of social change, rather than one of framing legal arguments, helps explain why the early litigation efforts failed to achieve the desired relief: powerful interests did not support the efforts to establish the right to counsel. Viewed in this light, a crucial lesson from Gideon appears in the introductory material preceding Justice Black's opinion. [FN39] Supporting Clarence Gideon's petition was not only Abe Fortas, but "a brief for the state governments of twenty-two States and Commonwealths, as amici curiae, urging reversal." [FN40]

No equivalent set of entrenched interests supported the early Civil Gideon efforts. To be sure, powerful allies supported the cause. For example, the American Bar Association, National Legal Aid and Defender Association and North Carolina Civil Liberties Union were among the amici supporting the right to appointed counsel in *Lassiter*. [FN41] Yet, more powerful interests opposed the litigation. Unlike in Gideon, the states and attorneys general weighing in, did so in opposition to the constitutional claim. [FN42] The results in the more recent cases suggest that the interests of those in power remain largely unchanged.

*703 Litigation designed to expand the provision of counsel in civil cases must be developed as part of a broader strategy designed to effectuate social change. That process includes analyzing the context in which the change must occur, at a minimum by identifying the players in the system and their self-interest. As explained below, the strategy that emerges should be designed to shift the interest of the key players from one of favoring the status quo to one of favoring an expansion of the right to appointed counsel.

III. Analyzing the Context, Identifying the Players

The relevant contexts for the development of a Civil Gideon involve the courts and agencies in which poor people routinely forfeit important rights due to the absence of counsel. The "Poor People's Courts," handling family, housing, consumer and bankruptcy cases, are flooded with unrepresented litigants, whose numbers have surged over the past decade. [FN43] Reports from state after state document the high incidence of unmet legal needs among the poor and working poor, as well as a shortage of available lawyers to represent the poor. [FN44] Issues involving unrepresented, or "self-represented," litigants gained increased attention in writings, conferences and trainings over the past decade. [FN45]

A familiar scenario, involving the unrepresented litigant in a court case in which the opposing party is represented, illustrates how the self-interest of the players favors the status quo. In the clerk's office, a court clerk might prefer that the litigant has counsel so fewer questions are asked, but not enough to support a diversion of court resources to pay for counsel; dealing with the litigant might be an irritant, but court clerks have developed techniques and defense mechanisms for moving the litigants along. [FN46] In the courtroom, court personnel, including the *704 judges, will likely encourage the unrepresented litigant to settle the case. [FN47] That, in turn, may require the litigant to go to the hallway to negotiate with the lawyer, or to resort to some form of court-based mediation. [FN48] The hallway negotiations are rife with instances of overreaching and unethical behavior by lawyers, unmonitored and unpunished by a legal system that depends on a high settlement rate. [FN49] Where the litigants resist settlement, strong words from the judges, mediators or lawyers eventually induce litigants to settle. [FN50] Few civil cases are tried, and most settlements involving the unrepresented poor occur with a minimum of judicial involvement. [FN51]

The unrepresented litigant is a "problem" for all, but the docket moves sufficiently for the court and the players in the court to transact their business. [FN52] However much the key players grumble, the status quo is preferable to the alternatives. While some judges and opposing lawyers prefer having counsel on both sides,

others do not. [\[FN53\]](#) Opposing lawyers might have an easier time achieving their clients' goals when the other side is without counsel. [\[FN54\]](#) Some judges may find that lawyers are part of the problem and cases involving fewer counsel move more quickly. [\[FN55\]](#) Even where this is not true, if the choice is between the status quo and a burden on the court to play a major role in developing a solution involving appointed counsel, the status quo is preferable.

I have explained more fully elsewhere the need to revise the roles of the key players in the court system in cases involving unrepresented litigants and the justifications for the proposed revisions. [\[FN56\]](#) To achieve meaningful access to justice, we should require judges, court-connected mediators and clerks to assist unrepresented litigants as necessary to ensure that the litigants do not waive important rights due to the absence of counsel. [\[FN57\]](#) The justifications for the traditional roles of judges, mediators, and clerks flow from standard assumptions underlying an adversary system designed to achieve fairness and justice. Where the traditional limitations frustrate, rather than further, the underlying goals in settings with a high volume of unrepresented litigants, the roles should be adjusted. [\[FN58\]](#)

**705* A successful implementation of these revisions, or the realistic threat that the revisions might be made, is a crucial tool in changing the self-interest of the players in the system. Where the self-interest changes, the key players shift from potential opponents to potential allies of a Civil Gideon. A return to the common scenario described above illustrates the point.

Assume again that we have a case involving a represented party and an unrepresented party, but that the roles of the players have been modified along the lines I urge. The court system still prefers settlement, but significant resources must be dedicated to place the unrepresented litigant in the position of understanding her rights, the court process, and any settlement provisions. The judge must ensure the fairness of the result and will need to fill existing gaps in terms of the litigant's understanding. The judge will need to monitor closely both the process and the terms of any agreement emerging from either unmonitored negotiations or those before court personnel, such as court-connected mediators. The mediators now must also be responsible for achieving fair results, or they will not be saving the court time and resources, since the judge will need to revisit each of the issues. The opposing lawyer is suddenly reluctant to try to settle the case in the unmonitored hallway setting, since his comments may lead to discipline, and the court will be scrutinizing the terms of the agreement and rejecting those that are unfair.

The self-interest changes under this scenario. It is no longer easier to deal with the unrepresented party, and the problems facing the players rise above mere annoyance. Each player has a powerful incentive in having someone else there to provide the appropriate protection. Continued pressure on those in the high-volume courts will eventually require court administrators and chief judges to craft solutions, since the routine processing of cases no longer occurs swiftly and without scrutiny. The expansion of the right to appointed counsel will follow where those with power believe that the expansion is in their self-interest.

The preceding example is over-generalized. Available data reveals a wide range of practices among individual judges, court-connected mediators, clerks and lawyers in the dealings with unrepresented litigants. [\[FN59\]](#) Some players within the legal system still resist even the simplest of accommodations under the belief that it is inappropriate to modify the rules to assist those without counsel. [\[FN60\]](#) Others, however, have developed creative practices to help those without counsel achieve justice; **706* these individuals are more in need of the backing of court administrators, additional resources, or even philosophical justifications to support their work. Moreover, the process is dynamic, not static, as conferences, trainings and reports have caused a detectable shift in attitudes. [\[FN61\]](#) Behavior that was impermissible a decade ago is becoming more acceptable today. [\[FN62\]](#)

Even acknowledging variations in behavior and changes over time, it is difficult to overstate the extent to which judges, court-connected mediators, clerks, court administrators, and the bar's rank and file are hindering the expansion of a right to counsel in transacting their daily business. While many in those ranks are focused on the "problem" of unrepresented litigants, it would be a mistake to assume that those players are natural allies in Civil Gideon initiatives. Rather, for most key players, the "problem" is one of docket control, not fairness as measured by outcomes. Unrepresented litigants are perceived to be a problem because they take up court and attorney time. In contrast, the routine waiver of important rights on a daily basis by countless numbers of unrepresented litigants, due to their unfamiliarity with the legal system and lack of power, is not yet an embarrassment to court personnel to the extent their self-interest causes them to support change. This operation of the system furthers the goal of docket control.

While the details may vary from context to context, the larger Civil Gideon strategy remains the same. In any context in which we seek to expand the appointment of counsel, we must first identify the players and their self-interest in maintaining the status quo. The strategy becomes one of "divide and conquer." With each player, we need to imagine what it would take to have an appointment of counsel be in that player's self-interest. Where the self-interest is different, the reasons for the self-interest and the possible solutions might differ as well. [\[FN63\]](#)

Apart from the Civil Gideon strategy, the roles of the key players must be expanded if the court system is to provide fairness and justice for unrepresented litigants. The expanded roles should be supplemented by assistance programs short of representation by counsel, an array of which have arisen across the country in an effort to provide at least some help. These programs include telephone hotlines, **707* self-help centers, pro se clerks and offices, advice-only clinics and court-annexed limited legal services programs. [\[FN64\]](#) While assistance programs are important tools in the fight to provide greater access to justice for the unrepresented poor, the programs should be evaluated carefully, to identify which programs are simply relieving pressure on the regular players in the system, and which are actually stemming the forfeiture of rights.

The scope of the Civil Gideon in a particular context will be related to the extent to which the revised roles of the key players and the assistance programs succeed in protecting the unrepresented litigants. The more cases in which steps short of appointment of counsel will provide the necessary assistance, the smaller the pool

of cases in which counsel must be appointed will be. The less effective the assistance by court personnel and assistance programs, the more extensive the scope of the right to counsel will need to be. [\[FN65\]](#)

IV. Litigation And Social Change In Other Settings

Because Civil Gideon strategies have failed to achieve their desired goals, it is important to look beyond the Civil Gideon setting for strategies that might prove instructive. This section explores three examples: the movement against domestic violence, the right to shelter litigation studied recently by Beth Harris, and Ed Sparer's litigation strategies. The examples offer insight into the extent to which litigation that is political in nature can effectuate social or systemic change, the importance of analyzing the contexts in which change is sought, and the need to recognize the self-interest of the players in developing strategies.

The movement against domestic violence provides one illustration. Sadly, the development of persuasive legal arguments alone did not effectuate change, nor did the widespread tragedy of countless deaths of the victims of domestic violence. The players with power in the legal system, including judges, clerks, lawyers, and the police, needed to understand the process of domestic violence, recognize that the courts were a part of the problem, and have a stake in changing how they operated. While litigation was one tool, the larger strategy involved grass-roots organizing, educational efforts for those inside and outside the courthouse and public pressure, including the use of the media. As the players inside the system gained a greater understanding of the issues, and the pressure from outside the courts became too powerful to ignore, the self-interest of those within the court system shifted. The players in the court system no longer benefited from a processing of cases that suppressed the issues of domestic violence. It became in their self-interest to **708* uncover and confront the issues of domestic violence, becoming part of the solution, providing justice and protection for those victims. [\[FN66\]](#)

A second source of lessons is Beth Harris' recent analysis of five cases filed by legal aid lawyers on behalf of impoverished families seeking adequate housing in which to raise their children. [\[FN67\]](#) According to Harris, the framing of a tenable claim is only one source of the "power of anti-poverty lawyers." Other elements crucial to the success of the litigation include 1) establishing that the relief sought makes sense financially in relation to what the plaintiffs oppose; 2) shaping the relief in a way that advantages people or entities beyond the plaintiffs; and 3) combining adversarial techniques with "collaborative" legislative and administrative advocacy. [\[FN68\]](#) Thus, for example, the relief crafted by the plaintiffs' lawyers in *Jiggetts v. Grinker* [\[FN69\]](#) helped New York City officials by reducing the amount of families eligible for city shelters, allowed New York to use money from the federal emergency assistance program to help cover rent payments and prevent eviction, and helped landlords by providing additional rent they would not otherwise have collected. [\[FN70\]](#) With New York City and landlords shifted from adversaries to allies, the preliminary injunction obtained by the plaintiffs' lawyers remained in place for over a decade. [\[FN71\]](#) New York City supported the *Jiggetts* plaintiffs' efforts to protect the state legislation on which their claims were based. Tens of thousands of **709* families, who otherwise would have been evicted, obtained increased shelter allowances. [\[FN72\]](#)

Ed Sparer's "test-case" approach designed to achieve a "right to survive" for poor people provides a third source of lessons. [\[FN73\]](#) In the infancy of the "new" legal aid movement in the 1960's, Sparer wrote: "Central to the new legal aid lawyer's role is the task of helping to articulate and promote the hopes, the dreams, and the real possibility for the impoverished to make the social changes that they feel are needed through whatever lawful methods are available." [\[FN74\]](#)

Concerned that the press of individual client demands precluded the opportunity for strategic advocacy, Sparer developed a two-tier delivery model, with routine services delivered by the neighborhood offices and strategic litigation generated by specialized impact litigators. The strategy produced an impressive string of Supreme Court victories, and established the federal judiciary as an effective alternative forum to the political process, until the political tides turned in Congress, in state governments, and in the judiciary. [\[FN75\]](#)

Sparer's strategy, as well as the criticisms it spawned, provide important lessons for Civil Gideon strategies. First, as with the domestic violence movement and the Right to Shelter litigation, the connection between law and politics is unavoidable, and a litigation strategy that ignores political realities and the need to mobilize powerful political pressure is likely to fail. Sparer's legal campaign mobilized grassroots support culminating in the formation of the National Welfare Rights Movement (NWRO). The welfare backlash of the late 1960's and early 1970's coincided with, and contributed to, the demise of the welfare rights movement. [\[FN76\]](#)

Second, the criticism of Sparer's delivery model, as elitist and ignoring the power of the caseload, is instructive. [\[FN77\]](#) Apart from the dispute over the extent to which Sparer actually discounted the value of individual casework in neighborhood offices, [\[FN78\]](#) the debate underscores the importance of developing litigation or legislative strategies that grow out of the contexts in which the rights of potential legal-services clients are adjudicated. Moreover, Sparer was "one of the few poverty lawyers who understood that a legal campaign was an organizing tool for a social movement, not the other way around." [\[FN79\]](#) Developing a Civil Gideon strategy **710* with an eye toward cultivating allies and expanding political support for the goals should be a component of the planning process. [\[FN80\]](#) Finally, Sparer might have rejected the mission of "access to justice" if it meant returning to a model of high volume assistance without correlation to the underlying mission of the alleviation of poverty. [\[FN81\]](#) His positions serve as a reminder that access to justice initiatives must do more than merely open the door to the courthouse without affecting the outcomes. [\[FN82\]](#) As Sparer wrote over forty years ago, "[t]he gap between the promise of justice and the practices that the impoverished, the uneducated and the inarticulate have endured is what cannot be tolerated any longer." [\[FN83\]](#)

V. Starting Points for a Civil Gideon Strategy

Since the success of a renewed Civil Gideon initiative depends more on the dynamics of social change than the legal arguments framed, those same dynamics suggest a starting point for the context-based approach. In ABA President Greco's broad statement of the challenge, he referred to "certain serious civil matters, such as

those that threaten the integrity of one's family, shelter or health." [\[FN84\]](#) Building on President Greco's challenge, his Task Force on Access to Civil Justice developed an ABA policy Resolution that, in its adopted version, urges the provision of,

legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction. [\[FN85\]](#) *711 The focus on family, housing, and other cases involving fundamental rights is hardly new, since these are the same areas in which the struggles of the past forty years have been waged. Family and housing matters appear highest on the list of unmet legal needs.

[\[FN86\]](#) Assistance programs short of full representation are heavily focused on family and housing issues.

[\[FN87\]](#) Enormous numbers of unrepresented litigants appear in courts handling family and housing cases.

[\[FN88\]](#)

It is in these settings that those without counsel forfeit important rights and suffer substantial injustice due to the absence of counsel. The devastating consequences of the loss of one's child and loss of one's home underscore the importance of extending the right to appointed counsel to these areas. Many parents would choose to serve thirty days in prison before giving up custody of their children. Many tenants would similarly choose a temporary loss of liberty to avoid eviction and homelessness. The loss of custody or housing might be both more devastating and of greater duration than a thirty-day jail sentence, yet litigants are not entitled to appointed counsel in custody and housing cases. The right to appointed counsel must more accurately reflect our societal values, rights and interests.

Despite the importance of custody and housing, however, a strategy targeting all eviction or custody cases is unlikely to succeed as a first step. The failure of broad-based litigation strategies in these two areas confirms the dangers of failing to narrow the target. Targeting all custody cases, or all eviction cases, skips crucial steps in the analysis described above. Those steps involve analyzing the context in which the change is to occur, identifying the players in the system, recognizing and then trying to change their self-interest, and mobilizing powerful allies to support the expanded provision of counsel. The analysis will suggest the narrowing of categories and targeting of subsets of cases as a starting point for achieving a civil right to counsel.

A narrowing of the categories should focus on power imbalances, with one important power imbalance involving cases that pit an unrepresented party against a represented one. These cases represent the ultimate breakdown of an adversary system that depends upon a rough equality between the parties in the quest for justice. Instead of thinking in terms of represented and unrepresented parties, we should consider three categories: cases in which both sides are represented, cases in which both sides are unrepresented, and cases in which a represented party is pitted against an unrepresented one. Cases in which both parties are represented by counsel are not part of the Civil Gideon analysis. Cases in which both sides are without counsel more easily lend themselves to other options, since courts are more willing to provide significant help if they are doing so equally to both sides. [\[FN89\]](#)

The third scenario, pitting unrepresented litigants against represented ones, is a promising place to start. It does not take complicated analysis to demonstrate the *712 fundamental unfairness of this scenario. The focus on the imbalance in cases between a represented party and an unrepresented one shifts the focus from the general pro se problem to the fundamental unfairness of cases involving a breakdown of the adversarial system. Because the third category presents the greatest challenge to the players involved, it has the potential to provide the greatest embarrassment to the system, thus fueling a context-based strategy. [\[FN90\]](#)

Within the context of custody cases, those pitting unrepresented parties against represented ones are only one form of power imbalance. A second form of power imbalance is present in cases involving domestic violence. As with the imbalance of cases pitting unrepresented parties against represented ones, the focus on cases involving domestic violence has the potential to cause discomfort for those inside the system. The courts have made important progress over the past decades in handling domestic violence issues. [\[FN91\]](#) The players within the system remain publicly committed to handling issues of domestic violence effectively and sensitively. For those not so disposed, the strategies of education and public pressure remain potent. [\[FN92\]](#) Highlighting an area of domestic violence where the courts do less well-custody cases involving unrepresented litigants and domestic violence-can provide important impetus for change. Custody cases pitting a represented party against an unrepresented one, and custody cases involving domestic violence, are cases in which the self-interest of the players might be reversed.

Under this analysis, custody cases involving these forms of power imbalance are strong starting points for Civil Gideon strategies. Other factors related to a social change analysis also suggest that custody cases might be more promising than eviction cases as a starting point. Cases involving a represented party against an unrepresented one are a smaller percentage of family law cases than eviction cases. [\[FN93\]](#) The resources required for the resulting right to counsel, and the disturbance to the functioning of the system, will be less.

In terms of mobilizing additional allies, targeting domestic violence cases allows for the collaboration with existing, well-organized groups, as does a focus on cases with particular disabilities. A subset of custody cases, rather than eviction cases, also removes one likely source of powerful opposition. In a movement that would benefit tenants, the real estate industry might be a united and powerful opponent to the push for counsel. The power dynamics in the custody area are less *713 clear. The "Father's Rights" groups, that might traditionally resist progress in the area of the courts' handling of domestic violence, custody and child support issues, might be split on the general question of appointed counsel, since many fathers, as well as mothers, appear without counsel. [\[FN94\]](#)

In terms of the legal frame, the more widespread recognition of fundamental interests in parents' care, custody, and control of their children in contrast to the right to housing, further supports this as a starting point. [\[FN95\]](#) Factors that may indicate different starting points include variations in the structure of particular courts or the development of a jurisdiction's laws. Given the political nature of the Civil Gideon initiatives, a different starting point might emerge where support can be mobilized for vulnerable groups of litigants, such as the elderly or disabled. [\[FN96\]](#)

A strategy must highlight the scenarios in which the absence of counsel most embarrasses those inside the system. Where victims of domestic violence lose custody to their batterers due to the absence of counsel, the result is shocking and unfair. It is also an embarrassment to those claiming progress in the legal system's handling of domestic violence. Focusing on cases that pit an unrepresented party against a represented one exposes a fundamentally unfair scenario, causing discomfort to those charged with providing justice.

Where the Civil Gideon strategy involves litigation, the data demonstrating harm due to the absence of counsel is an essential part of the record. As with litigation generally, the admissible evidence that is needed is driven by the claims, defenses and remedies in the case. [\[FN97\]](#) While the articulated claims will dictate the facts to be proven, the strongest claims will emerge from the facts. [\[FN98\]](#) In this respect, questions regarding which Civil Gideon claims are the strongest or which plaintiff profiles are the most compelling need to be informed by the data or systemic facts that can be proven. [\[FN99\]](#) The available data that prove the requisite harm will drive the [*714](#) selection of the claims and the framing of the relief; as with other impact litigation, the ideal plaintiff will be the one whose facts present the articulated features. If the data do not support relief in as broad a version of a Civil Gideon as proponents desire, the incremental approach urges beginning with the narrower claim, and building on an initial victory in subsequent efforts.

A great deal of data exists relevant to a Civil Gideon strategy focused on custody cases with power imbalances. We know that large numbers of litigants in family cases are unrepresented, [\[FN100\]](#) that family law cases are prevalent in unmet legal needs studies, [\[FN101\]](#) and that unrepresented litigants struggle in cases in which they face unrepresented litigants. [\[FN102\]](#) One study found that access to legal services is the only proven way to reduce incidences of domestic violence. [\[FN103\]](#) Another reported that, in seeking protective orders, applicants with lawyers succeed eighty-three percent of the time, while only thirty-two percent of applicants without lawyers obtain such orders. [\[FN104\]](#) Custody cases are often prioritized in legal services offices, presumably due to the impact the assistance of counsel makes in the outcomes, and many assistance programs short of full representation handle family law cases. [\[FN105\]](#)

Many unanswered questions still remain. Is the absence of counsel equally likely to produce a risk of erroneous decision [\[FN106\]](#) in all custody cases? Do the data demonstrate a greater risk of an erroneous decision in cases in which the other side has counsel or where domestic violence is present? If the legal frame is "suffering substantial hardship," instead of a risk of erroneous decision, do the available data prove the claim and match the requested relief? Where the data show that assistance does make a difference, to what extent is it representation by counsel, as opposed to some form of assistance, short of full representation, that affects the outcome? The data are key components of the record that must match the legal frame and the requested relief.

Ironically, data from eviction cases provide a troubling example of cases in which the fundamental unfairness in the forum extends beyond cases involving a [*715](#) represented party against an unrepresented one. Over twenty years ago, my study of Boston Housing Court revealed that whether the landlord was represented had minimal impact on the outcome: unless the tenant was represented by counsel, the landlord invariably won. [\[FN107\]](#) Barbara Bezdek's study of Maryland's rent court, a forum absent of lawyers for both sides, similarly showed that the landlords invariably won. [\[FN108\]](#) More recent studies from Chicago (53% of landlords represented) and Phoenix (87% of landlords represented) reveal the same thing: the landlord usually wins regardless of representation, and usually does so with shocking speed. [\[FN109\]](#)

The data from housing courts, far from undercutting the need for appointed counsel, prove only that the imbalance in representation is merely one power imbalance that needs to be addressed. The studies of housing courts also routinely show that the provision of counsel to the tenant is a crucial factor affecting the outcome of the case and preventing eviction. [\[FN110\]](#) Whether the landlord is represented or not, the courts operate in a manner that swiftly serves the landlord's interests. The power imbalance between unrepresented tenants and landlords, whether represented or not, may be disparate enough to trigger the need for appointed counsel. In theory, the first step would be a dramatic shift in the courts' operation in all cases. Whether those shifts can reduce the risk of error in the absence of counsel, remains to be seen, and needs to be assessed by careful evaluation. Moreover, advocates have labored for years to effectuate change in the routine operation of housing courts across the country, so we may already have reached the limits of change feasible from this step alone.

There may also be unintended consequences from a strategy premised on the idea that cases involving lawyers against unrepresented parties are fundamentally unfair. We would need to acknowledge that it is fundamentally unfair when the unrepresented litigant is a landlord facing a represented tenant or an abuser facing a represented party who is a victim of domestic violence. It would not follow that the claims for appointed counsel are equal. The landlord's claim for rent is different from the tenant's claim for shelter. The more evident the history of domestic violence, the greater the likelihood that the abuser's viable legal claims are related [*716](#) to financial issues, rather than custody, or that the abuser's claim for custody is presumptively weaker on the merits.

What would not change is our need to acknowledge the unfairness of the scenario of a represented party against an unrepresented one, regardless of which side has counsel. Any other approach has the strategy, and its proponents, forfeiting the moral highroad in the claim of fundamental unfairness. Indeed, to grease the wheel for the strategy, it may even be advisable for advocates of the poor to file motions for appointment of counsel for the opposing party, again to establish precedent. Even if we do not go that far, a strategy that offers benefits not simply to the traditional clients of legal services offices, but to some of the traditional adversaries as well may provide a measure of political cover in the face of predictable opposition and backlash. In terms of numbers and percentages, far more of the traditional beneficiaries of representation for the poor will receive counsel than traditional opponents.

Ultimately, these points are simply details of the strategic decisions, as are the subject areas, courts or agencies and legal claims that are most fertile as a starting point. [\[FN111\]](#) Yet, even suggesting that we may need to start narrowly and work toward a broader end is controversial. Any attempt to draw lines will be imperfect, and open to criticism. [\[FN112\]](#) That the proposed solution is not a perfect fit does undercut the strength of the approach, absent a more compelling one.

We do not yield the claim for a broader Civil Gideon by starting with a carefully targeted, context-based strategy. Available data might support a clearer case for expanded counsel in one context, while illuminating the need for better data elsewhere. The subsequent accumulation of data might later reveal a powerful case for change in additional contexts. The constitutions and statutes of some states might afford a broader array of fundamental rights than are recognized in other states. The rights that might require appointed counsel to prevent substantial injustice will necessarily evolve as our standards of fairness and decency evolve. A success in one context can provide an impetus for expansion elsewhere. A narrower victory might yield broader relief where the broader relief is more financially and administratively feasible.

Once the balance is tipped, and a civil right to counsel is obtained in a particular context, it must not be implemented on a case-by-case basis if it is to be meaningful. Lassiter's approach has proven to be flawed. A system that requires a litigant, appearing without counsel, to prove that he or she will suffer a substantial hardship due to the absence of counsel necessarily requires a vulnerable and often powerless litigant to prevail under the very circumstances in which defeat is likely. Rather, implementing a set of presumptions, as Justice Earl Johnson has suggested, is a crucial middle ground between appointing counsel in every civil case for both sides, and requiring a litigant to prove in each case that counsel is necessary:

**717* The overarching test? . . . [A]ll disputants are entitled to effective access to the court or other dispute-resolving forum. The presumption? Virtually the opposite of the presumption the U.S. Supreme Court majority announced in Lassiter: a presumption that effective access requires the government to supply free representation by a lawyer, or a non-lawyer representative where sufficient, to those who are unable to afford their own representation. [\[FN113\]](#)

This presumption may only be overcome where a court can legitimately certify that a particular forum deciding the dispute can and does provide a fair and equal opportunity for justice to those who lack representation. [\[FN114\]](#) Once particular subcategories of cases are identified as needing counsel, and because of the impact of the presumptions urged by Judge Johnson, appointment of counsel should follow for cases fitting in the subcategories, without further individualized assessment. [\[FN115\]](#)

Conclusion

The targeted, context-based approach urged here does not insist that we start with certain contexts or that we frame arguments in a particular way. It may or may not prove to be most effective to begin with contested custody disputes involving power imbalances. That is a dispute over the details of the strategy. Regardless of the particular starting points we choose, it is hard to imagine a successful strategy that ignores the context in which the Civil Gideon is to be created. It is hard to imagine a successful strategy that fails to recognize the self-interest of the players. Every step proposed will meet with resistance, confirming the need to craft strategies to fit particular contexts, each having a power dynamic of its own. The strategy must also mobilize allies to insure that the self-interest of those with power supports the Civil Gideon initiatives.

The process of narrowing the framing of the right, at least initially, and collecting data to demonstrate the risk of error in those cases, will strengthen the Civil Gideon efforts both inside and outside the litigation. [\[FN116\]](#) Proponents of change working inside the courts will benefit from the accumulation of the data. The data also can be used to pressure and embarrass those within the system who are wedded to the status quo. Inside the litigation, the data not only help prove a crucial prong of any likely claim, but they mobilize potential allies who might support the claim, **718* if only because the right to counsel claim has become the least intrusive and most fiscally responsible way to solve a problem that will not go away.

How soon the next case might succeed in winning a right to counsel will depend on how successful the movement has become in aligning the self-interest of the players within the system with the advent of such a right. The more the evidence, both in the litigation record and in the court of public opinion, reveals that the players within the court system are unable or unwilling to prevent unrepresented litigants from suffering substantial injustice due to the absence of counsel, the greater the chance that a consensus will emerge that appointment of counsel is the best solution for all the players in the system. That evidence will expose the fundamental unfairness, in terms of outcomes, where cases involve these power imbalances. The details will vary based on the context, but the goal in terms of power dynamics is to achieve the equivalent of the support of the state attorneys general that advocates obtained in Clarence Gideon's case.

[\[FN11\]](#). Professor of Law and Director of Clinical Programs, New England School of Law in Boston. I am grateful for the helpful feedback I received from Florence Roisman, Raun Rasmussen, Deborah Perluss, Jane Murphy, Tracy Miller and Paul Marvy. This work was supported by a Summer Stipend from the Board of Trustees of New England School of Law.

[\[FN1\]](#). The constitutional right to appointed counsel in state court criminal cases was established in [Gideon v. Wainwright, 372 U.S. 335 \(1963\)](#). The constitutional right to appointed counsel in civil cases has not yet been established. Martha F. Davis, We need a civil 'Gideon', *The National Law Journal* (2006), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1154682259240>.

[FN2]. Gary F. Smith, Remembering Edward Sparer: An Enduring Vision for Legal Services, 39 Clearinghouse Rev. 329 (Sept.-Oct. 2005). Sparer directed the Mobilization for Youth (MFY) Legal Unit beginning in 1963, moving to the Center on Social Welfare Policy and Law, the first legal services "backup center" in 1965 to pursue his litigation strategy. *Id.* at 331. Professor Sylvia Law has referred to Sparer as "the father of poverty law." Sylvia Law, *The Father of Poverty Law*, 1999 *American Lawyer* 117.

[FN3]. [372 U.S. 335 \(1963\)](#).

[FN4]. For example, the National Legal Aid & Defender Association's (NLADA's) 2003 Annual Conference adopted the theme "United in the Promise of Justice" and commemorated the 40th Anniversary of the Gideon decision. Press Release, National Legal Aid & Defender Association, NLADA Annual Conference Commemorates the 40th Anniversary of Gideon v. Wainwright (Sept. 16, 2003), http://www.nlada.org/News/News_Press_Releases/2003091741032633 (last visited Sept. 10, 2006). The ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) sponsored hearings in 2003 honoring the decision. 25:2 NLADA Cornerstone, 1, C4 (2003). The NLADA co-sponsored one such hearing at Georgetown Law School in March, 2003. 23:3 NLADA Cornerstone, 1, 24 (2002/2003).

[FN5]. Conferences across the country included panels on Civil Gideon as part of the broader discussion of Access to Justice in civil cases. For example, the 2002 Washington State Access to Justice Conference included a Civil Gideon panel, while the Keynote Speaker for New York's 2001 Access to Justice Conference was Justice Earl Johnson Jr., who dedicated his remarks to the topic of a Civil Gideon (conference materials on file with author).

[FN6]. See, e.g., Special Issue, *A Right to a Lawyer? Momentum Grows*, 40 Clearinghouse Rev. 163, 293 (2006) [hereinafter *Momentum Grows*]; Paul Marvy & Debra Gardner, *A Civil Right to Counsel for the Poor*, 32 *Hum. Rights* 8 (2005) (arguing that the right to counsel in civil cases is a basic right, because, based on the Gideon logic, lay litigants are no more equipped to navigate the legal system in a civil case than in a criminal case); James A. Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 *Seattle U. J. for Soc. Just.* 383 (2005) (arguing that Washington's Constitution includes a provision that expressly grants the right to court access and implies that meaningful access requires representation, even if it is at public expense); 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 (2005) (noting that the American judicial system is not impartial based upon wealth, and there is a large discrepancy between the justice provided to the wealthy and to the poor); Andrew Scherer, *The Importance of Collaborating to Secure a Civil Right to Counsel*, (unpublished paper presented at Partners in Justice: A Colloquium on Developing Collaborations Among Courts, Law School Clinical Programs and the Practicing Bar, May 9, 2005) (stating that it is unacceptable that large numbers of the population cannot afford legal counsel when faced with legal disputes that may have dire consequences on their personal or financial well-being); John Nethercut, "This Issue Will Not Go Away": Continuing to Seek the Right to Counsel in Civil Cases, 38 Clearinghouse Rev. 481 (Nov.-Dec. 2004) (arguing that the courts need to use the same logic as Gideon v. Wainwright to establish a right to counsel in civil cases, because, for example, a mother would surely rather spend a month in jail than lose her children, but based upon current law, she is only entitled to representation in a criminal proceeding); Rachel Kleinman, Comment, [Housing Gideon: The Right to Counsel in Eviction Cases](#), 31 *Fordham Urb. L. J.* 1507 (2003/2004) (arguing that because the adversarial process relies on the assumption that both parties have equal legal resources, indigent individuals should have a fundamental right to counsel); Deborah Perluss, Washington's

Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest, 2 Seattle U. J. for Soc. Just. 571, 595 (2004) (arguing that an access-based analysis "would also necessarily enable the court to make reasonable determinations about individual litigants' differing abilities to meaningfully participate in the proceedings"); Hon. Earl Johnson, Jr., Will Gideon's Trumpet Sound A New Melody? The Globalization of Constitutional Values and its Implications for a Right to Equal Justice in Civil Cases, 2 Seattle U. J. for Soc. Just. 201 (2003) (noting that Europe's highest court held that the European Convention on Human Rights and Fundamental Freedoms required the government to provide free counsel to indigent litigants in civil matters); Simran Bindra & Pedram Ben-Cohen, [Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants, 10 Geo. J. on Poverty L. & Pol'y 1 \(2003\)](#) (noting that because there are a lack of legal services to help the poor and there are a lack of alternatives when a person is brought into a civil suit, the government should create a public civil defenders office, not to mention that the denial of counsel to indigent civil defendants is a Constitutional violation); Deborah M. Weissman, [Law as Largess: Shifting Paradigms of Law for the Poor, 44 Wm. & Mary L. Rev. 737, 826-27 \(2002\)](#) (arguing that civil matters, like criminal matters, often implicate inalienable rights to life, liberty and the pursuit of happiness and courts will only grant the right to counsel in civil cases if they are asked to contemplate the ramifications of unassisted litigation when the outcome threatens the party's freedom). For a listing of articles that includes those earlier than 2002, see Paul Marvy, Thinking About a Civil Right to Counsel Since 1923, 40 Clearinghouse Rev. 170 (July-Aug. 2006).

[FN7]. Marvy & Gardner, *supra* note 7, at 9.

[FN8]. Sargent Shriver National Center on Poverty Law, http://www.povertylaw.org/legalresearch/collections/civil_gideon/index.cfm (last visited on Sept. 5, 2006).

[FN9]. Brennan Center for Justice, http://www.brennancenter.org/programs/pov/civil_gideon.html (last visited Sept. 21, 2006).

[FN10]. [Frase v. Barnhart, 840 A.2d 114 \(Md. Dec. 11, 2003\)](#); [Halls v. Arden, 109 P.3d 15 \(Wash. Ct. App. 2005\)](#); City of Moses Lake v. Smith, No. 01-2-00766-8 (Wash. Super. Ct., Grant Cty., filed July 18, 2001); King v. King, No. 04-3-02385-0 (Wash. Super. Ct., Snohomish Cty., filed Sept. 1, 2004); Machado v. Ashcroft, No. CS-02-0066-FVS (E.D. Wash. Mar. 14, 2002) (order granting preliminary injunction); Kelly v. Warpinski, No. 04-2999-0A (Wis. Sup. Ct., filed Nov. 17, 2004).

[FN11]. See, e.g., Texas H.B. No. 2124 (proposed May 2, 2005) (relating to appointment of counsel in appeals of certain eviction suits). Advocates in California drafted a Model Statute. See Clare Pastore, The California Model Statute Task Force, 40 Clearinghouse Rev. 176 (2006). The statute appears online at http://www.brennancenter.org/dynamic/subpages/download_file_38656.pdf (last visited on November 21, 2006). Advocates in New York are considering legislative initiatives covering the elderly and disabled in eviction cases.

[FN12]. Although only five states had Access to Justice Commissions in 1999, the number had increased to 23 by June, 2006. More than a dozen additional states had an active committee of the state bar or bar association that is charged with the broad access to justice function. See Access to Justice Partnerships State by State, Access to Justice Support Project, at 1 (May, 2005), <http://www.nlada.org/DMS/Documents/1113666733.35/NLADA-AccessToJustice%239.pdf>.

[FN13]. Robert Echols, The Rapid Expansion of "State Access to Justice Commissions",

Mgmt. Info. Exchange J. 41 (Summer 2005). The stakeholders typically include the courts, organized bar, civil legal aid providers and law schools. *Id.*

[\[FN14\]](#). *Id.*

[\[FN15\]](#). Michael Greco, [Court Access Should Not Be Rationed: Defined Right to Counsel in Civil Cases Is an Issue Whose Time has Come](#), 91 A.B.A. J., 6 (December 2005).

[\[FN16\]](#). See note 85 *infra*, and accompanying text.

[\[FN17\]](#). Marvy & Gardner, *supra* note 6. The Sparer Symposium, held on March 28, 2006 and titled "Civil Gideon: Making the Case," was co-sponsored by Rutgers, Penn, Villanova and Widener Law Schools. The Symposium aimed to bring together leading academics, activists and public interest lawyers and produced the articles for this Symposium Issue. University of Pennsylvania Law School, 23rd Annual Edward V. Sparer Symposium--Civil Gideon: Making the Case (2006), available at <http://www.law.upenn.edu/psp/students/Sparer06Program.pdf>.

[\[FN18\]](#). See Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545 (1967). In his dissent in the landmark New York case [In re Smiley, 36 N.Y.2d 433 \(1975\)](#) (Fuchsberg, J., dissenting), Judge Fuchsberg referred to this article as the "now classic Note [of] Stanford University Law Professor Thomas Grey." [In re Smiley, 36 N.Y.2d at 452](#).

[\[FN19\]](#). See, e.g., Note, The Indigent's Right to Counsel In Civil Cases, *supra* note 18; Hon. Robert W. Sweet, [Civil Gideon and Confidence in a Just Society](#), 17 Yale L. & Pol'y Rev. 503 (1998) (proposing that the right to counsel should arise when access to the justice system warrants appointment).

[\[FN20\]](#). See, e.g., Rachel Kleinman, *supra* note 7; Andrew Scherer, [Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings](#), 23 Harv. C.R.-C.L. L. Rev. 557 (1988) (arguing that individuals must have a right to an attorney in eviction proceedings because being evicted can have traumatic results, and publicly funded legal services programs and the services of volunteer private attorneys is extremely limited); Frances E. Werner, *Toward a Right to Counsel for Indigent Tenants in Eviction Proceedings*, 17 Housing L. Bull. 65 (1987).

[\[FN21\]](#). See, e.g., William S. McAninch, *A Constitutional Right to Counsel for Divorce Litigants*, 14 J. Fam. L. 509 (1975-76) (arguing that because the only way to obtain a divorce is through the courts, a person should have a right to retain counsel in such proceedings); [In re Smiley, 36 N.Y.2d 433, 369 N.Y.S.2d 87 \(1975\)](#) (holding that indigent parents have no right to publicly compensated counsel and this issue is more appropriate for the legislature).

[\[FN22\]](#). Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 Touro L. Rev. 247 (1997-1998); [Lassiter v. Dep't of Soc. Services, 452 U.S. 18 \(1981\)](#).

[\[FN23\]](#). Sharon Finkel, [Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children](#), 17 N.Y.L. Sch. J. Hum. Rts. 1105 (2001).

[\[FN24\]](#). [452 U.S. 18 \(1981\)](#).

[\[FN25\]](#). [Id. at 27](#): See also Young, *supra* note 23, at 247. The *Lassiter* court relied on the three elements articulated in [Mathews v. Eldridge, 424 U.S. 319 \(1976\)](#): "the private interests at stake, the government's interest, and the risk that the procedures used will

lead to erroneous decisions." [Lassiter, 452 U.S. at 27 \(citing Mathews, 424 U.S. at 335\)](#). Those elements are to be balanced against the presumption against a right to appointed counsel unless "the indigent, if he is unsuccessful, may lose his personal freedom." [Lassiter, 452 U.S. at 27](#).

[FN26]. See [Donaldson v. State, 548 N.Y.S.2d 676 \(App. Div. 1989\)](#) (holding that a provision for assignment of counsel, to grant a poor person relief, was discretionary and so a mandamus could not be used to compel appointment of counsel absent a declaration by Supreme Court that a right to counsel existed).

[FN27]. See [UBO Realty Corp. v. Fulton, No. 98761/91 \(N.Y. Civ. Ct. Dec. 9, 1991\)](#); [Gardenia Realty v. McMillan, No. 77216/87 \(N.Y. Civ. Ct. Aug. 3, 1987\)](#); [Eos Brook Ass'n v. Lizard, No. 77533/87 \(N.Y. Civ. Ct. July 1, 1987\)](#) (unpublished decisions, on file with author). Advocates in Michigan developed a detailed blueprint to establish a right to counsel through the appellate courts, and achieved a series of appellate victories until setting aside the initiative in the wake of the Lassiter decision.

[FN28]. [387 U.S. 1 \(1967\)](#). A year earlier, however, the Court had declined the opportunity to extend the right to civil cases more generally when it denied certiorari in the case of [Sandoval v. Rattikin, 395 S.W.2d 889 \(Tex. App. 1965\)](#), cert. denied, [385 U.S. 901 \(Oct. 17, 1966\)](#). See Note, The Indigent's Right To Counsel In Civil Cases, *supra* note 18.

[FN29]. At the time Lassiter was decided, thirty-three states provided a right to counsel in termination of parental rights proceedings in some form. Young, *supra* note 22, at 262. Of the seventeen states that failed to guarantee a right to counsel prior to Lassiter, five states continue to follow the Mathews v. Eldridge case-by-case standard, six of the states now require appointment of counsel under certain conditions, and six more enacted sweeping right to counsel statutes. *Id.* at 260-262. One state (Mississippi), listed as providing a right to counsel in the Lassiter record, no longer does so, although it is likely that the statute affording the right had already been repealed by the time Lassiter was decided. *Id.* at 262.

[FN30]. [840 A.2d 114 \(Md. 2003\)](#).

[FN31]. *Id.*

[FN32]. *Id.* at 131 (Cathell, J., concurring).

[FN33]. *Id.* at 114. For a discussion of the Frase litigation, see Nethercut, *supra* note 7, at 488-89.

[FN34]. [Kelly v. Warpinski, No. 04-2999-0A \(Wis., filed Nov. 17, 2004\)](#).

[FN35]. *Id.*

[FN36]. [City of Moses Lake v. Smith, No. 01-2-00766-8 \(Wash. Super. Ct., Grant Cty., filed July 18, 2001\)](#).

[FN37]. [Halls v. Arden, 109 P.3d 15 \(Wash. Ct. App. 2005\)](#).

[FN38]. *Id.* For a summary of the case and decision, see Washington Appellate Court Reverses Prior Orders Against Unrepresented Mother but Declines to Appoint Counsel in Custody Modification Proceeding, 38 Clearinghouse Rev. 774 (March-April 2005).

[FN39]. [Gideon, 372 U.S. 335, 1963 U.S. LEXIS 1942 \(1963\)](#).

[FN40]. Id. (quoted material found in headnote on Lexis). A twenty-third state, Oregon, filed a separate brief as amicus curiae. Id.

[FN41]. See [1980 WL 340032](#) for a listing of the Briefs and Other Related Documents in Lassiter.

[FN42]. Id. In making this point, I do not suggest that the Lassiter litigation failed for this reason alone. I offer the comparison as a tool to encourage a strategy that not only constructs legal claims, but cultivates powerful allies to support the cause, and tailors the claim to maximize support and neutralize opposition of key players. Because Lassiter failed, I look to examples in other settings to identify more promising strategies and apply them to the Civil Gideon setting. See discussion *infra* Part V.

[FN43]. See Jona Goldschmidt et al., Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers (American Judicature Society 1998) (hereinafter Meeting the Challenge) (reporting statistics from various jurisdictions in domestic relations cases, torts cases, other civil cases, as well as federal court prisoner and appellate cases that tend to show a drastic increase in the number of situations where at least one party represents him/herself, possible explanations for the increase, as well as information about what population is likely to represent him/herself). For data regarding family law, housing, and bankruptcy courts, see, e.g., Russell Engler, And [Justice for All-Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks](#), 67 *Fordham L. Rev.* 1987 (1999).

[FN44]. Legal needs studies have consistently shown that anywhere from seventy to ninety percent of legal needs of the poor go unaddressed in America. See, e.g., Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans, A Report of the Legal Services Corporation 12 (2005), http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf (listing the results of studies of low-income households in several states analyzing the percentage of each household's total legal needs that received legal assistance). The LSC report relies in part on recent Legal Needs Studies from Montana (2005), Illinois (2005), Tennessee (2004), Connecticut (2003), Massachusetts (2003), Washington State (2003), Washington D.C. (2003), New Jersey (2002), Vermont (2001), Oregon (2000). Id. at 9. Nearly "all of the recent state studies found a level of need substantially higher than the level" found in a 1994 Study conducted by the American Bar Association. Id. at 13 (emphasis in original).

[FN45]. One resource reflecting the dialogue is the American Judicature Society's website, <http://www.ajs.org/prose>.

[FN46]. Engler, *supra* note 43, at 1994-1997.

[FN47]. Id. at 2020.

[FN48]. Id. at 2060 (describing how most cases in Boston's Housing Court were settled via "voluntary" mediation or were settled in hallways); see also Engler, *infra* note 49, at 103-104 (exploring hallway settlements).

[FN49]. For a more detailed exploration of the hallway settlements, see Russell Engler, [Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons](#), 85 *Cal. L. Rev.* 79, 103-04. (1997).

[FN50]. Id. at 121, 124, 130.

[FN51]. Engler, *supra* note 43, at 2019 ("[I]n the 'poor people's courts,' where the numbers of unrepresented litigants are the highest, the judicial oversight in settlement is typically minimal."); see also Engler, *supra* note 49, at 108 (describing how in New York City Housing Court, 'most cases are settled with only minimal supervision by the court') (quoting [144 Woodruff Corp v. Lacrete, 585 N.Y.S.2d 956, 960 \(Civ. Ct. 1992\)](#)).

[FN52]. Engler, *supra* note 43, at 1992.

[FN53]. *Id.* at 2015-2016.

[FN54]. *Id.*

[FN55]. *Id.*

[FN56]. *Id.* at 2021.

[FN57]. *Id.* at 2042.

[FN58]. The underlying goals require a revised understanding of impartiality, so that impartiality is no longer equated with passivity. Failing to assist litigants unable to protect their rights alone produces a partial system, favoring those with lawyers over those without lawyers, without regard to the facts of the case and the governing law. In addition, due to the shortage of lawyers for the poor, unrepresented litigants cannot be left to their own peril, since their appearance without counsel is likely compelled by circumstances, rather than freely chosen. Finally, the frequent choices litigants make, whether to settle, and on what terms, cannot be accepted as "voluntary" unless measured by a standard of "informed consent." A system that depends on a high settlement rate to clear its docket cannot do so legitimately where the settlements routinely involve the unknowing waiver of rights by those without counsel. Engler, *supra* note 43, at 2024.

[FN59]. *Meeting the Challenge*, *supra* note 43, at 13-14 (reviewing various state and federal procedural rules addressing pro se litigants).

[FN60]. *Id.* at 29-30, 50 (describing a Florida ethics opinion where the minority argued that a judge could not distribute a brochure entitled "Family Law Division, Pro Se Pointers" for the purpose of assisting pro se litigants in uncontested dissolution of marriage cases, because such brochure may constitute the "unauthorized practice of law") (citing Committee on Standards of Conduct for Governing Judges, Opinion 93-98 (February 4, 1993)).

[FN61]. For example, with respect to judges, an evolution is detectable through a comparison of techniques discussed in *Meeting the Challenge*, *supra* note 43, and Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, American Judicature Society and State Justice Institute (2005), <http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf>. With respect to clerks, the trends toward an expanded definition of what constitutes permissible "legal information" as opposed to impermissible "legal advice," combined with the increased use of Guidelines for court personnel is a first step in this direction. See, e.g., John M. Greacen, *Legal Information v. Legal Advice*, American Judicature Society (2004), available at http://www.ajs.org/prose/pro_greacen.asp (describing recent developments in several states which have adopted guidelines for assisting pro se litigants). The reference to guidelines underscores how Chief Administrative Judges, of particular courts and state court systems, are important players, can set the tone, emphasizing fair results, rather than simply speedy resolutions, in cases involving unrepresented litigants.

[\[FN62\]](#). See Greacen, *supra* note 61.

[\[FN63\]](#). A recent decision from New York illustrates the potential for highlighting the failures of the players in the court system and leveraging momentum for appointment of counsel. [Kent v. Kent, 810 N.Y.S.2d 160 \(App. Div. 2006\)](#). The Appellate Division, First Department bitterly criticized the lower courts' handling of a ten-year child support case, involving pro se litigants, on appeal for the fifth time. *Id.* at passim. The Court admonished court officials for their mistakes and called on the state legislature to provide legal representation to parties in child support disputes. *Id.* at 165.

[\[FN64\]](#). Engler, *supra* note 43, at 1998-2007 (discussing limited assistance inside and outside the courthouse, interactions with opposing counsel and the limits of limited assistance). See also Model Rules of Prof'l Conduct R. 6.5 n.45 (2002) (Rule 6.5 of the ABA Model Rules of Professional Conduct was adopted in 2002 to cover some of the ethical issues arising in these settings and is titled "Nonprofit and Court-Annexed Limited Legal Services Programs").

[\[FN65\]](#). For a more detailed exploration of this strategy of achieving a context-based Civil Gideon, see Russell Engler, *Towards a Context-Based Civil Gideon Through Access to Justice Initiatives*, 40 *Clearinghouse Rev.* 196 (July-Aug. 2006).

[\[FN66\]](#). The materials on the domestic violence movement are voluminous. One place to start is the chapter in Martha R. Mahoney, John O. Calmore & Stephanie Wideman, *Social Justice: Professionals, Communities, and Law: Cases and Materials 1031-1120* (West 2003). Regarding the importance of training and education for the "judges, social workers, and other decision makers throughout the civil and criminal justice systems, including for attorneys" see *id.* at 1054. Regarding the use of litigation, the threat of litigation, and education are all used in an effort to effectuate changes in police policies, see *id.* at 1059-62, including the excerpted materials from Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 *J. Crim. L. & Criminology* 46, 47-48, 50-52, 54-55, 59-60 (1992). As with any attempt to summarize the domestic violence movement, this summary likely is over-generalized and flawed in certain respects. Nonetheless, the general points are valid and instructive for efforts to expand the right to appointed counsel. Identifying the key players and developing pressures to supplement litigation strategies will be crucial to achieving success for the Civil Gideon movement. As discussed below, the topic of domestic violence serves not only as an illustration for developing strategy, but a potential component of an initial Civil Gideon strategy. See Harris, *infra* note 67.

[\[FN67\]](#). Beth Harris, *Defending the Right to a Home: The Power of Anti-Poverty Lawyers* (2004). For an excellent review of Harris' book, see Florence Wagman Roisman, *How Litigation Can Lead to Substantial Relief for Clients and Significant Social Change*, 39 *Clearinghouse Rev.* 759 (Mar.-Apr. 2005). The material in this paragraph draws both from the Harris book and from Roisman's review. The five cases studied are [Hansen v. Dep't of Soc. Services, 193 Cal. App. 3d 283 \(Cal. 1987\)](#), [Jiggetts v. Grinker, 75 N.Y.2d 411 \(N.Y. App. Div. 1990\)](#), [Mass. Coal. for the Homeless v. Sec'y of Human Services, 400 Mass. 806 \(1987\)](#), [Norman v. Johnson, 739 F. Supp. 1182 \(N.D. Ill. 1990\)](#) and [Wash. Coal. for the Homeless v. Sec'y of Dep't of Soc. and Health Services, No. 91-2-15889-4 \(Wash. Super. Ct. King County 1991\)](#).

[\[FN68\]](#). See Roisman, *supra* note 67, at 762-765, nn.18, 33-34. Other lessons include the need to win judicial endorsement as a source of leverage with legislatures and agencies, having the resources and commitment to see the effort through the lengthy process of implementation and relief, and the importance of penetrating the targeted agencies. *Id.*

[\[FN69\]](#). [75 N.Y.2d 411 \(N.Y. 1990\)](#).

[\[FN70\]](#). Id.

[\[FN71\]](#). Harris, *supra* note 67, at 98-99.

[\[FN72\]](#). Id. at 96, 122, 125, 127, 197-206 (Jiggetts Chronology).

[\[FN73\]](#). For essential reading on Sparer's biographical account, the history of his test-case litigation, and his role in the welfare rights movement, see Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement 1960-1973* (Yale University Press 1993). For a review of *Brutal Need*, see [Andrew Dwyer, 2 Geo. J. on Poverty L. & Pol'y 157 \(1994\)](#).

[\[FN74\]](#). Edward Sparer, *The New Legal Aid as an Instrument of Social Change*, 1965 U. Ill. L. Forum 57, 60 (1965).

[\[FN75\]](#). See Davis, *supra* note 73; Smith, *supra* note 3; and Dwyer, *supra* note 73.

[\[FN76\]](#). See Davis, *supra* note 73. For a thorough analysis of "The Welfare Rights Movement," see Frances Fox Piven & Richard A. Cloward, *Poor People's Movements: Why They Succeed, How They Fail* 264-361 (Pantheon Books 1977).

[\[FN77\]](#). Prominent critics included Jean and Edgar Cahn, "perhaps the most prominent spiritual and intellectual leaders of the legal services movement." Smith, *supra* note 3, at 331-32. See also, Davis, *supra* note 73, at 36.

[\[FN78\]](#). See Smith, *supra* note 3, at 332.

[\[FN79\]](#). See Davis, *supra* note 73, at 73 (citing Gary Bellow). As Bellow also observed, "'rule' change, without a political base to support it, just doesn't produce any substantial result because rules are not self-executing: they require an enforcement mechanism." Comment, *The New Public Interest Lawyers*, 79 Yale L.J. 1069, 1077 (May, 1970). Professor Galanter argued a similar point a few years later in his classic study explaining why the "haves" come out ahead of the "have nots":
Rule change is in itself likely to have little effect because the system is so constructed that changes in the rules can be filtered out unless accompanied by changes at other levels The system has the capacity to change a great deal at the level of rules without corresponding changes in everyday patterns of practice or distribution of tangible advantages.

Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95, 149 (1974).

[\[FN80\]](#). See Sparer, *supra* note 74, at 59.

[\[FN81\]](#). See Smith, *supra* note 3, at 333.

[\[FN82\]](#). In exhorting the New Legal Aid Lawyer, Sparer identified the need to "close the gap between the theoretical legal rights of all our citizens and the prevailing legal defenselessness of the poor." Sparer, *supra* note 74, at 59. He also urged redefining our notion of "legal aid," to do more than advance a legal defense or take a "test case"; as with lawyers for the rich, legal aid lawyers should advance their clients' long-term interests in a multitude of ways, including advancing economic goals, serving as "lobbyists and propagandists," and being negotiators and advocates in the "truest and broadest sense of the term." Id. at 59-60.

[\[FN83\]](#). Id. at 59.

[\[FN84\]](#). Greco, *supra* note 15, at 6.

[\[FN85\]](#). The ABA House of Delegates adopted the Resolution on August 7, 2006, at its Annual Meeting. See <http://abanet.org>. For the text of the resolution proposed by the ABA Task Force on Access to Civil Justice, which was modified only slightly before adoption by the House of Delegates by the adoption of the final five words ("as determined by each jurisdiction"), see 2006 Report to House of Delegates 1, available at <http://abanet.org/leadership/2006/annual/onehundredtwelvea.doc> (last visited July 26, 2006).

[\[FN86\]](#). See, e.g., Documenting the Justice Gap, *supra* note 44, at 10.

[\[FN87\]](#). See Engler, *supra* note 65.

[\[FN88\]](#). *Id.*

[\[FN89\]](#). *Id.*

[\[FN90\]](#). See, e.g., Boston Bar Ass'n, BBA Task Force on Unrepresented Litigants Report 26 (1998) ("[T]he judges ... worry over potential unfairness to both sides in a case where one of the litigants is unrepresented."); Meeting the Challenge, *supra* note 43, at 52-53 (stating that judges found it difficult to maintain their impartiality where one litigant was unrepresented); Jona Goldschmidt, [How Are Courts Handling pro se litigants?, 82 Judicature 13, 17-18 \(July-August 1998\)](#) ("Some judges have experienced some agonizing moments during the course of trials where one party is represented and one is pro se Some judges expressed concern regarding the conduct of attorneys toward pro se litigants").

[\[FN91\]](#). For a recent example, see [Davis v. Washington, 126 S. Ct. 2266 \(2006\)](#).

[\[FN92\]](#). This analysis underscores the extent to which the facts of *Frase v. Barnhart* presented a promising test case, involving a custody decision, pitting an unrepresented litigant, who was unable to obtain meaningful assistance from limited assistance programs or the court, against a represented party. For an analysis of refinements to the strategy that might make a subsequent test case more successful, see Engler, *supra* note 65.

[\[FN93\]](#). *Id.*

[\[FN94\]](#). See Young, *supra* note 22, at 256-57.

[\[FN95\]](#). The United States Supreme Court's decision in [Troxel v. Granville, 530 U.S. 57 \(2000\)](#), reaffirming the interest parents have in the care, custody and control of their children as "perhaps the oldest of the fundamental liberty interests recognized by this Court," [id. at 64](#), strengthens the compelling nature of the Civil Gideon claim in the custody setting. In contrast, lawyers in the cases analyzed by Beth Harris were forced to focus on right to shelter statutes, lacking the authority to base the litigation on the right to housing. See Harris, *supra* note 68. In [In re Custody of Halls, 109 P.3d 15 \(Wash. App. Div. 2 2005\)](#), both parties were pro se in the contempt proceeding. Since the case was a contempt proceeding, in which the defendant faced possible jail time, the appellate court ruled that lower court had erred in failing to appoint counsel. The New Jersey Supreme Court recently held that due process requires the appointment of counsel for parents facing incarceration at child support enforcement hearings. [Pasqua v. Hon. Gerald J Council, 892 A.2d 663 \(2006\)](#).

[\[FN96\]](#). Advocates from New York are exploring the right to appointed counsel for eligible elderly in eviction cases, while advocates in Washington State are considering modifications to court procedures to provide for a right to counsel for disabled litigants. A focus on disabled litigants adds to the list of potential claims that might be litigated. Cases involving the elderly or disabled may also be viewed as cases involving power imbalances. See *Access to Justice Partnerships State by State*, supra note 12.

[\[FN97\]](#). As one standard text explains: "Your job as a litigator is to obtain enough admissible evidence to prove your claims and disprove the other side's claims. Therefore, you need to identify what you must prove or disprove. This is determined by the substantive law underlying the claims, remedies, defenses, and counterclaims in the case." Thomas A. Mauet, *Pretrial* 20 (Aspen Law & Business 5th Ed. 2002).

[\[FN98\]](#). "In litigation, the facts and law are intertwined." *Id.*

[\[FN99\]](#). I use the term "systemic facts" to refer to the facts regarding the contexts and categories of cases I have described in this article. Textbooks use various terms, including "normative" or "legislative" facts, to refer to facts beyond the specifics of individual cases. See, e.g., David A. Binder & Paul Bergman, *Fact Investigation: From Hypothesis to Proof* 6-8 (West Publishing Co. 1984). "In cases in which one argues for a change in substantive law, one may introduce evidence to establish 'legislative facts.'" *Id.* at 7.

[\[FN100\]](#). See, e.g., *Documenting the Justice Gap*, supra note 44; Engler, supra note 49.

[\[FN101\]](#). See, e.g., *Documenting the Justice Gap*, supra note 44; Engler, supra note 49.

[\[FN102\]](#). See, e.g., Engler, supra note 49, at 122-30; Robert Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating, Divorce Reform at the Crossroads* 61-65 (Yale University 1999); Jane Ellis, [Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals](#), 24 *U. Mich. J.L. Reform* 65, 124-135 (1990).

[\[FN103\]](#). Daniel Cox, *Study: Legal Aid Only Proven Way to Curb Domestic Violence*, *Equal Justice Magazine* (August 2003), available at <http://www.ejm.lsc.gov/EJMIssue4/briefs/briefs.htm> (last visited Sept. 21, 2006).

[\[FN104\]](#). Jane Murphy, [Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women](#), 11 *Am. U.J. Gender Soc. Pol'y & L.* 499, 511-12 (2003).

[\[FN105\]](#). See, e.g., Engler, supra note 49, at 122-27.

[\[FN106\]](#). See, e.g., [Lassiter, 452 U.S. at 27](#). I frame the initial data inquiry in "risk of error" language not because that is my preferred place to draw the line, but because I believe it will prove to be the strongest place strategically to gain a foothold toward a broader right to counsel, with the harms that flow from the absence of counsel articulated using language that might resonate with the broadest array of stakeholders.

[\[FN107\]](#). Russell Engler & Craig S. Bloomgarden, *Summary Process Actions in Boston Housing Court: An Empirical Study and Recommendations for Reform*, 5 (May 20, 1983) (unpublished manuscript, on file with author).

[\[FN108\]](#). Barbara Bezdek, [Silence In The Court: Participation and Subordination of Poor Tenants' Voices in Legal Process](#), 20 *Hofstra L. Rev.* 533- 608 (1992).

[FN109]. The titles themselves are disturbing and revealing. Injustice In No Time: The Experience of Tenants in Maricopa County Justice Courts, The William E. Morris Institute For Justice (June 6, 2005) (for representation rates, see *id.*, at 8); No Time for Justice: A Study of Chicago's Eviction Court, Lawyer's Committee for Better Housing (December 2003) (for representation rates, see *id.* at 13). The data in both reports that the cases usually lasted less than two minutes, and often less than one, make the pace of the New York City Housing Courts seem almost leisurely. See, e.g., 5 Minute Justice or "Ain't Nothing Going on But the Rent!", Monitoring Subcommittee, City Wide Task Force on Housing Court, 1986.

[FN110]. See, e.g., Carroll Seron, Gregg Van Ryzin, Martin Frankel & Jean Korvath, [The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results from a Randomized Experiment](#), 35 *Law & Soc'y Rev.* 419, 420 (2001); Chester Hartman & David Robinson, Evictions: The Hidden Housing Problem, 14 *Housing Policy Debate* 461, 485 (2003); Engler & Bloomgarden, *supra* note 107.

[FN111]. Even the decision to use the label "right to civil counsel" or "Civil Gideon" should be determined by the strategic assessment of the likelihood that a particular phrase will further or hinder the ultimate goal of stemming the forfeiture of rights and preventing substantial hardship for those without counsel in civil cases.

[FN112]. For an early attempt to draw lines in the Civil Gideon area, see Note, The Indigent's Right to Counsel in Civil Cases, *supra* note 18, at 552-62.

[FN113]. Hon. Earl Johnson, Jr., Will Gideon's Trumpet Sound A New Melody? The Globalization of Constitutional Values and its Implications for a Right to Equal Justice in Civil Cases, 2 *Seattle U. J. Soc. Just.* 201, 220 (2003).

[FN114]. *Id.*

[FN115]. I do not view the approach urged in this article as necessarily a case-by-case analysis, as my co-panelist Deborah Perluss suggests, although the distinction may depend on how one defines the term. See Deborah Perluss, [Keeping the Eyes on the Prize: Visualizing the Civil Right to Counsel](#), 15 *Temp. Pol. & Civ. Rts. L. Rev.* 719 (2006).

[FN116]. Relevant data also include the social and financial costs of the failure to provide counsel. For example, Hartman & Robinson call for creation of a national database on evictions. See Hartman & Robinson, *supra* note 110, at 489-92. The New York City Council has appropriated funds to study broader the costs of the need for counsel in eviction proceedings and the costs and benefits of providing counsel to tenants facing eviction.

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