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JUDICIAL ABDICATION AND EQUAL ACCESS TO THE CIVIL JUSTICE SYSTEM

Gene R. Nichol, Jr.†

There has been, of late, much talk of the Roberts Court's constricting view of access to the judicial system. Its tight standing decisions,[1] its embrace of more potent Eleventh Amendment and common law immunities,[2] its enthusiastic retrenchment of habeas corpus,[3] its aversion to facial and vagueness challenges,[4] its emboldened standards of federal preemption,[5] its unfolding limits on

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[1] *See, e.g.*, Hein v. Freedom from Religion Found., 127 S. Ct. 2553 (2007) (imposing arbitrary limitations on jurisdiction to challenge federal expenditures to further religion); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) (making an analogous restrictive reading of Article III standing requirements).

[2] *See, e.g.*, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (making summary judgment more readily available in constitutional tort cases); Van de Kamp v. Goldstein, 129 S. Ct. 855, 864–65 (2009) (bolstering prosecutorial immunity from § 1983 claims); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296–97 (2006) (limiting liability for states that take federal funds accompanied by ambiguous conditions).

[3] *See, e.g.*, Knowles v. Mirzayance, 129 S. Ct. 1411, 1422 (2009) (remanding with instructions to deny habeas petition for failure to adequately demonstrate ineffective assistance of counsel); Allen v. Siebert, 128 S. Ct. 2, 4–5 (2007) (per curiam) (finding that an inmate was not entitled to equitable tolling of the AEDPA's one-year statute of limitations for a habeas claim); Fry v. Pliler, 127 S. Ct. 2321, 2327–28 (2007) (holding that the district court did not err in applying a more deferential *Brecht* standard when assessing the state court's alleged prejudicial impact of constitutional error). *But see* Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008) (extending the constitutional writ of habeas corpus to detainees at Guantanamo Bay).

[4] *See, e.g.*, United States v. Williams, 128 S. Ct. 1830 (2008) (rejecting a vagueness challenge in a child pornography case).

[5] *See* Reigel v. Medtronic, Inc. 128 S. Ct. 999, 1008 (2008) (finding state common law tort claims to be preempted by the Medical Device Amendments Act of 1976, 21 U.S.C. § 360k); Rowe v. N.H. Motor Transp. Ass'n, 128 S. Ct. 989, 995 (2008) (holding that the FAAAA preempted state tobacco delivery laws); and Preston v. Ferrer, 128 S. Ct. 978, 987 (2008) (holding that when parties agree to arbitrate a dispute, the Federal Arbitration Act preempts state laws placing jurisdiction in another forum).

punitive damages,[6] and more,[7] have led many to conclude that the high court, under the Chief Justice's leadership, will significantly curtail the availability of the federal judicial forum.[8] Even the often-cranky *Wall Street Journal* could enthuse that "the biggest change under Chief Justice John Roberts might not involve who wins on the merits. Rather, it may be who gets through the courthouse door in the first place."[9] Less here is thought, perhaps, to be more, or, at least, better.

It is not my purpose to make light of such musings. I have, truth told, partaken occasionally of them myself.[10] Nothing pleases the palate of a federal courts aficionado like the endless dissection of the intricacies of our national jurisdiction. But these exhortations explore, at best, the lawyers' vision of access to the halls of justice. They cobble and patch at the edges of traditional patterns of judicial power. They suggest, in particularized terms, that cases might be brought earlier or later, or via different groups of plaintiffs, or under more imposing barriers, or against keener shields of liability. They might even mean that limited categories of disputes, previously thought amenable to judicial process, are now relegated to the fickle tides of democratic decision making. The scales of justice notwithstanding, or, even, be damned—no tiny matters these.

Still, any perceptive discussion of access to our judicial system with a probing visitor from a distant culture or clime would surely begin and, perhaps end, on a much different front. She would be more

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[6] Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2634 (2008) (upholding the lower court's limitation on punitive damages awarded by a jury); Phillip Morris USA v. Williams, 549 U.S. 346, 356–58 (2007) (bolstering limitations on punitive damages claims).

[7] For example, the Court's restrictive reading of statutes of limitations. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 628–29 (2007) (imposing a restrictive statute of limitations for filing a complaint with the EEOC in Title VII cases), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[8] *See* Jonathan N. Crawford, *Bush's Lasting Legacy: A Pro-Business Judiciary*, KIPLINGER LETTER, Mar. 10, 2008, *available at* http://www.kiplinger.com/businessresource/forecast/archive/Bush_Leaves_a_Lasting_Legacy_080310.html (arguing that the Roberts Court takes a "pro-business" approach in restricting access to the federal judiciary); Jeffrey Toobin, *Five to Four*, NEW YORKER, June 25, 2007, at 35 (discussing the drastic transformation of the Supreme Court under Roberts).

[9] Jess Bravin, *Court Under Roberts Limits Judicial Power*, WALL ST. J., July 2, 2007, at A1.

[10] *See, e.g.*, Gene R. Nichol, Jr., *The Roberts Court and Access to Justice*, 59 CASE W. RES. L. REV. (forthcoming 2009) (challenging standing doctrine as neutral access principle); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301 (2002) (criticizing implementation of Article III standing rules); Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987) (dissecting mootness standards—constitutional and prudential); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915 (1986) (challenging restrictions on access to federal courts); Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985) (same); Gene R. Nichol, Jr., *An Activism of Ambivalence*, 98 HARV. L. REV. 315 (1984) (same).

interested, I'm guessing, in our strongest and most pervasive transgression against access and equality—the exclusion from the effective use of our civil justice system of that huge portion of the American populace who cannot afford to pay the fare. We have constructed, honed and maintained an immensely complicated, arcane, formal, imposing and mystifying structure for the government-enforced resolution of civil disputes. Almost no one, unschooled in its specialized practices, could conceivably navigate its corridors. We have, at least occasionally, conceded as much.[11] Lawyers are the necessary triggers of its determinatively adversarial processes. Cases are to be investigated, explored, organized, researched, presented, rebutted, and appealed. They are not self-executing. Lay Americans cannot here sensibly proceed on their own.

But, as is widely known, lawyers cost money. Some of us have it; many do not. Yet, beyond a tiny category of disputes, and unlike many Western democratic nations, we recognize no affirmative right to counsel in civil cases.[12] And it shows. Study after demoralizing study demonstrates, with daunting and repetitive consistency, that over eighty percent of the legal need of the poor and the near poor—a cohort including at least ninety million Americans—is unmet.[13] As a result, these economically marginalized citizens are left outside the bounds of the effective use of our adjudicatory systems, state and

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[11] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (arguing, in the context of a criminal case, that one "unfamiliar with the rules of evidence" and "lack[ing] . . . the skill and knowledge adequately to prepare his defense, even though he ha[d] a perfect one," is denied effective access to counsel and to a fair trial (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

[12] *See* DEBORAH L. RHODE, ACCESS TO JUSTICE 7 (2004) ("Unlike most other industrialized nations, the United States recognizes no right to legal assistance for civil matters and courts have exercised their discretion to appoint counsel in only a narrow category of cases.").

[13] *See id.* at 3–4, 7, 13 ("[L]egal services offices can handle less than a fifth of the needs of eligible clients and often are able to offer only brief advice, not the full range of assistance that is necessary."); Gene R. Nichol, *The Charge of Equal Justice*, JUDGES' J., Summer 2008, at 38; Peter Edelman, . . . *And A Law for Poor People*, NATION, Aug. 3, 2009, at 23–24; ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POL'Y, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2009, at 10 (July 2009), http:// www.clasp.org/admin/site/publications/files/0373.pdf (citing an ABA study that found that the less than twenty percent of low-income Americans' legal needs were being met); LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA—THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2009), http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf; ABA TASK FORCE ON ACCESS TO CIVIL JUSTICE, REPORT TO THE HOUSE OF DELEGATES 112A, at 5 n.6 (2006), http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf (noting seven recent state studies in Oregon, Vermont, New Jersey, Connecticut, Tennessee, Illinois and Montana, which indicated that "only a very small percentage of the legal problems experienced by low-income people (typically one in five or less) is addressed with the assistance of a private or legal aid lawyer").

federal. Crucial disputes, frequently involving the most vital questions of life—divorce, child custody, domestic violence, health care, shelter, subsistence, life-sustaining benefits—are either rejected, ignored, or determined under terms of extraordinary imbalance, as a result of the absence of counsel. And we know it.[14]

"How," our curious and persistent visitor might ask, "can you struggle so vigorously over the relative mite of what you call taxpayer standing while ignoring the timber, or perhaps the great oak forest, of near-total economic exclusion? "What passes for civil justice among your have-nots is a charade, or less."[15] "I should have thought you would understand that 'there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.'"[16] "Do you, in fact, even consider this to be a *SYSTEM* of justice?" "Can any *system*, pretending fairness, be squared with the recognition that large segments of society are simply unable to effectively employ its mechanisms? What is it, after all, that you carve on your courthouse walls?"[17]

The literal chasm that exists between our aspiration of "equal justice under law" and the actual exclusionary operation of our civil justice system has hardly gone unnoticed. Scholars have documented both its breadth and its impact.[18] Bar association studies and state equal justice commissions have decried it.[19] National coalitions have surged to contest it.[20] Law school curricula have expanded (though

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[14] President Carter put it, famously, in words that I wish were exaggeration: "Ninety percent of our lawyers serve ten percent of our people. We are overlawyered and underrepresented." Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 371 (2004).

[15] *See generally* RHODE, *supra* note 12 (outlining the gap between our purported principles regarding equal justice and the realities regarding its true availability).

[16] *See* Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion).

[17] I refer, of course, to our sometimes-mocking inscribed refrain, "equal justice under law." Supreme Court of the United States, The Court Building 2 (2010), http://www.supremecourtus.gov/about/courtbuilding.pdf (last visited Jan. 23, 2010).

[18] *See, e.g.*, RHODE, *supra* note 12, at 13–14 ("[M]illions of Americans are locked out of law entirely. Millions more attempt to represent themselves in a system stacked against them."); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L.J. S83 (2000); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001); LEGAL SERVS. CORP., *supra* note 13; ABA TASK FORCE ON ACCESS TO CIVIL JUSTICE, *supra* note 13.

[19] *See, e.g.*, COLO. ACCESS TO JUSTICE COMM'N, THE JUSTICE CRISIS IN COLORADO: A REPORT ON THE CIVIL LEGAL NEEDS OF THE INDIGENT IN COLORADO 5 (2008), http://www.cobar.org/repository/Access%20to%20Justice/08ATJ_FULLReport.pdf (acknowledging that "Colorado faces a serious crisis in civil legal representation of the indigent"); ABA TASK FORCE ON ACCESS TO CIVIL JUSTICE, *supra* note 13, at 10–12, (reporting state developments aimed at increasing indigent access to counsel).

[20] *See generally* Brennan Center for Justice, http://www.brennancenter.org/pages/about/

too modestly) to explore it.[21] The American Bar Association and many of its state counterparts have passed passionate resolutions to condemn it.[22] Activists have crafted strategies to challenge it.[23] Meantime, huge numbers of our fellows "lose their families, their housing, their livelihood, and like fundamental interests" as the result of the want of counsel.[24] Even more telling, a system of adjudication premised on the foundational notion that all parties are entitled to a meaningful chance to participate and to contest any adverse decision before a loss of liberty or property occurs, stands this foundational norm soundly upon its head. And this hypocrisy, which resides squarely at the core of the American system of justice, remains securely unmolested. In fact, given the dramatic economic challenges of 2008, 2009 and, one guesses, 2010, the cancer grows.[25]

This Article explores one cornerstone of the American embarrassment of access to justice—the decisions and the obligations of judges. Judicial response to the excision of the poor and near poor from the civil adjudication process is not the only trigger of our extraordinary and indefensible flight from fairness. Lawyers, bar associations, law schools, faculties, legislatures (state and federal),

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(last visited Jan. 29, 2010) (declaring the Brennan Center's focus on "fundamental issues of democracy and justice"); National Coalition for a Civil Right to Counsel, http://www.civilrighttocounsel.org/who_we_are/about_the_coalition/ (last visited Jan. 29, 2010) (stating the Coalition's mission to be "ensuring meaningful access to the courts for all").

[21] *See* Gene R. Nichol, *The Command of Equal Justice*, 31 COLO. LAW. 57, 58 (2002) (noting that "[i]ssues of access to justice are either missing or marginalized in [law school] curricula").

[22] *See* ABA TASK FORCE ON ACCESS TO CIVIL JUSTICE, *supra* note 13, at 1 (stating 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 . . . where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody"); HOUSEMAN, *supra* note 13 (outlining state bar responses to ABA resolution).

[23] *See generally* Laura K. Abel, *Toward a Right to Counsel in Civil Cases in New York State: A Report of the New York State Bar Association*, 25 TOURO L. REV. 31 (2009) (discussing the potential methods of expanding the right to counsel for an array of civil law issues); Conference, *An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State*, 25 TOURO L. REV. 1 (2009), *available at* http://www.tourolaw.edu/lawreview/Vol25_No1_2009.html (noting the conference's purpose of "advanc[ing] an enormously important discussion . . . about how [to] go about securing a right to counsel in civil legal matters affecting fundamental needs for people who cannot afford legal help").

[24] ABA TASK FORCE ON ACCESS TO CIVIL JUSTICE, *supra* note 13, at 10 ("[E]very day the administration of justice is threatened . . . by the erosion of public confidence caused by lack of access." (alteration in original) (quoting Ronald George, Chief Justice, Supreme Court of California, State of Judiciary Speech to California Legislature (2001))).

[25] *See* Tony Pugh, *Growing Numbers of Poor People Swamp Legal Aid Offices*, MCCLATCHY NEWSPAPERS, July 9, 2009, http://www.mcclatchydc.com/homepage/v-print/story/71580.html ("After years of funding shortfalls, legal aid societies across the country are being overwhelmed by growing numbers of poor and unemployed Americans who face eviction, foreclosure, bankruptcy and other legal problems tied to the recession. The crush of new clients comes as the cash-strapped agencies cut staff and services.")

governors, and presidents, too, have played their respective parts.[26] But judges—state and federal—shoulder a singular and defining role in creating, maintaining, and assuring open, effective, and meaningful access to the system of justice they administer. United States Supreme Court Justices, federal court judges, state supreme court justices, and state trial and appellate jurists work atop a massive, monopolistic, government-proffered, violence-secured system for the orderly resolution of civil disputes. They determine, in actual and concrete ways, the nature and scope of our concept of constitutionally commanded fairness—the "process" "due" in a regime of equal citizenship and dignity. They, in generation after generation, put flesh upon the unfolding requirements of a meaningful right to participate and to be heard, without which the state's techniques for binding conflict resolution cannot be justified.[27] They set, quite literally, the constitutive markers of legitimate judicial decision making. Common law courts and their constitutional successors have done so for centuries.[28] In short, it is "emphatically the province and duty of the judicial department"[29] to gauge and ensure the essential fairness and integrity of its proceedings. But American judges have abdicated this central mission by ignoring the exclusion from our civil regime that occurs for those unable to afford counsel.

This does not mean that judges have been uniformly silent and unconcerned about the wholesale distortion of effective and useful access occurring daily in the courtrooms they administer. Thoughtful jurists, both state and federal, decry economic exclusion, and its painful impacts, in moving terms.[30] But they do so now, ironically,

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[26] *See* Nichol, *The Charge of Equal Justice*, *supra* note 13, at 39 ("And spanning the profession, I fear that we have all played our parts."); Thomas W. Lambeth & Gene Nichol, *Access to Justice*, N.C. ST. B.J., Spring 2008, at 12 (noting the shortcomings of various professions in addressing the problem); Gene R. Nichol, Jr., *Educating for Privilege*, NATION, Oct. 13, 2003, at 22–24 (noting how the extremely high costs of a law school education fence out a large part of society).

[27] At least that is the way Justice Harlan put it almost forty years ago in *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971) ("Without [a constitutional] guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable . . . .").

[28] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 16 (1956) (plurality opinion) ("Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Carta." (footnote omitted)).

[29] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). The *Marbury* language is borrowed here from a modestly distinct context.

[30] *See, e.g.*, ABA TASK FORCE ON ACCESS TO CIVIL JUSTICE, *supra* note 13, at 10 ("[E]very day the administration of justice is threatened . . . by the erosion of public confidence caused by lack of access." (quoting Ronald George, Chief Justice, Supreme Court of California, State of Judiciary Speech to California Legislature (2001))); Robert W. Sweet, *Civil "Gideon"*

primarily in law day speeches, or at legal aid banquets, or in reports to the bar, or before equal justice commissions, or in law school graduation homilies, or, perhaps, before state legislative oversight committees. Not in their rulings. It is almost as if Justice Earl Warren, upon studying the horrors of educational apartheid, decided to take a couple of school superintendents to lunch or talk to the local Rotary Club, rather than pen *Brown v. Board of Education*.[31] The rejection of a judicially imposed right to effective access and participation by the poor is apparently thought to be so complete and unshakeable that jurists now see the challenge as principally a political or an ethical one. Judges may have developed, overseen, and implemented a dispute resolution system sufficiently complex and costly that many cannot deploy it. It is the obligation of others, however, to repair their work.

The overarching denial of equal access to our system of civil justice may be stunningly at odds with what we say we believe, but judges, somehow, are distinct from the sin. It has no impact on the essential validity of their endeavor. It presents no challenge to the heart of their undertaking or to the oaths of office they avow. Their hands are, somehow, clean. If they are able to offer the fruits and the majesty of their processes only to those of significant economic means, such is the way of the world. If the poorest must be gently, or even cruelly, cast aside, there it is. Under this view, the inherent judicial obligation to assure a meaningful opportunity to participate in a meaningful forum is not a serious undertaking. Empty formalism will do. Both the rich and the poor are free to engage the utterly requisite and profoundly expensive services of expert counsel. If one seeks relief from the impact of this bewildering transgression, American jurists effectively suggest that he turn elsewhere. The good-hearted among them, it seems, might even be willing to help make the case. But don't argue that they are obliged, in their own arenas, to squarely face the monster. Actual justice must be the writ of those who work in other venues. God knows why.

This Article argues that the removal from our constitutional agenda of the question whether the guarantee of meaningful access to a fair hearing in the civil justice system demands the affirmative provision of counsel—a removal that has effectively occurred at least since the United States Supreme Court's decision in *Lassiter v.*

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and Justice in the Trial Court (the Rabbi's Beard), 52 RECORD 915 (1997).

[31] 347 U.S. 483 (1954).

Department of Social Services in 1981[32]—is a rank and unacceptable betrayal of our defining commitment to constitutionalism. Due process of law is an amorphous notion. It is also a searching and skeptical one—looking past the claims of unexamined and untenable habit. It is the "least frozen concept of our law—the least confined to history" and most seamlessly linked to the powerful social standards that mark us as a progressive society.[33] Its commands are not merely "theoretical or illusory," but also "practical and effective."[34] It addresses itself to actualities—forcing action when the gap between theory and reality becomes too far attenuated.

No non-cynical vision of due process of law—demanding, as it does, a reality-driven examination of the meaningful opportunity to participate—can be squared with the exclusion of massive numbers of litigants from the effective use of the justice system. The fact that American judges continue to pretend otherwise, with or without the blush of embarrassment, is a clear indication of the facile nature of our commitment to the rule of law. The dereliction is defining. It renders suspect both the assertion and the implementation of our foundational norms. Curiously, most Western democracies, though they talk less about commitments to equal justice, do far more.[35] During Justice Sotomayor's recent Senate hearings, Lindsay Graham pompously claimed "the hope of the world, really, [is] that our legal system, even though we fail at times, will spread."[36] Sadly, as the poor and near poor of the United States could explain to Senator Graham, it is not so. Not so, at least, until we better match the reality of our system of civil adjudication to the promise of equal justice upon which it purports to be based.

Part I will briefly explore how we arrived in our present circumstance of recognizing a significant and broadly applicable right to counsel in criminal cases while simultaneously rejecting similar treatment for civil cases, except in a very narrow category of family-related disputes.[37] In a series of decisions from the 1950s

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[32] 452 U.S. 18 (1981).

[33] These are the words not of a liberal firebrand but of the ever-cautious Justice Felix Frankfurter over a half-century ago. *Griffin*, 351 U.S. at 20–21 (Frankfurter, J., concurring in judgment).

[34] Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A), at 12 (1979) (discussing the importance of procedural guarantees under the European Convention for the Protection of Human Rights and Fundamental Freedoms).

[35] *See, e.g.*, *infra* note 119.

[36] *Sotomayor Confirmation Hearings, Day 2*, N.Y. TIMES, July 14, 2009, http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?pagewanted=57&_r=1&ref=politics.

[37] *See Lassiter*, 452 U.S. at 26–27 (stating a broad, but largely unexplained, presumption against right to counsel in civil cases); United States v. Kras, 409 U.S. 434, 448–50 (1973) (refusing to grant a right to a fee waiver for poor litigants in bankruptcy cases). *But see* Boddie

through the early 1980s, the United States Supreme Court recognized a growing tension between its burgeoning due process and equal protection mandates, and the frequent de facto (and, sometimes, de jure) exclusion of the poor from effective use of the civil justice system. Procedures which meant that those unable to pay various fees, purchase transcripts, post expensive bonds, or, occasionally, afford counsel, could not be readily reconciled with either the rights of meaningful participation or the equal citizenship of the impoverished.[38] Accordingly, modest steps were taken, under the Due Process or Equal Protection Clauses, to assure more effective access to those unable to proffer the costs of litigation. These unfolding patterns began to be significantly curbed by the Burger Court in the mid-1970s. A few years later, they were brought to a stilted halt in *Lassiter*.[39] Although the decision purported to offer a fact-sensitive approach to the possible recognition of a right to counsel in particular civil actions, it has been understood, and applied, to bar right to counsel claims in virtually all civil cases.[40]

Part II examines the operation of the *Lassiter* line of decisions in the state courts. *Lassiter* developed a potent presumption against the recognition of a right to civil counsel. It did so despite claiming to employ, in some fashion, the broad-ranging procedural due process balancing inquiry traceable to *Mathews v. Eldridge*.[41] In the almost three decades since *Lassiter* was handed down, state supreme courts wishing to more meaningfully address the contradiction of economic exclusion might have taken either of two more promising paths. First, they could have actually turned to a fact-based, individualized, open inquiry across the spectrum of civil actions, exploring the nature and complexity of the dispute and the likely resulting destruction of the ability to participate without counsel. In other words, state courts could have done what *Lassiter* pretended to do, but didn't. The cases starkly reveal, however, that this has not occurred.[42] Second, state jurists could plausibly have concluded that *Lassiter*'s closed door was

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v. Connecticut, 401 U.S. 371, 380–82 (1971) (requiring fee waiver in a divorce case because of the fundamental right to marry and to end a marriage).

[38] *See infra* notes 51–75.

[39] *See supra* text accompanying note 32.

[40] *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) ("In sum, . . . this Court has not extended *Griffin* to the broad array of civil cases. But tellingly, the Court has consistently set apart from the mine run of cases those involving . . . intrusions on family relationships.").

[41] *See Lassiter*, 452 U.S. at 27 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)). The *Mathews* Court employed a balancing test that weighed the importance of the interest at stake, the strength of the government's justification, and the risk of error under the challenged process. *Mathews*, 424 U.S. at 334–35.

[42] *See* discussion *infra* Part II.

based, in no small measure, on federalism grounds. Perhaps no searching national standard would be mandated; the problem is too large for "one-size-fits-all" conclusions. Still, state laboratories should experiment boldly to bring our civil justice practices more closely in line with our famously declared constitutional aspirations.[43] Broadly speaking, state court systems have failed to answer this call as well. Instead, states have overwhelmingly explored civil counsel claims by asking only whether the dispute in question is closely akin to the narrow category of family-procreative rulings in which the federal courts have mandated special solicitude for the indigent.[44] This has rendered the right to civil counsel question little more than a footnote to the enforcement of a constitutional right to privacy. The irony that state courts can create and administer complex, binding, and monopolistic dispute resolution regimes, while remaining agnostic about whether large segments of their citizenry are barred from deploying them, goes unaddressed in much the same way as it does in federal tribunals.

Part III argues that, despite its cursory and marginalized treatment in the courts, the effective exclusion of millions from the meaningful use of much of the civil justice system presents an immensely serious constitutional question. It is almost too obvious to state that those forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Just as obvious, the right to be heard must include more than the bare possibility of appearing in person before the tribunal. As the Supreme Court has regularly concluded in the criminal context, the "assistance of counsel is often a requisite to the very existence of a fair trial."[45] We have created, at the hands of the state, overarching tribunals for the resolution of private and public disputes. In that process, we made them complex, cumbersome, professionally technical, and expensive. We could, perhaps, have done otherwise. But having chosen our course, state and federal actors should surely be hard-pressed to claim it is of no constitutional moment that the system is knowingly and continually rendered inaccessible to many of the citizens for whom it was designed.

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[43] *See* New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); Steven G. Calabresi, *"A Government of Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 777 (1995) (describing the advantages of federalism as including experimentation among the states in policy).

[44] *See infra* notes 93–99.

[45] Argersinger v. Hamlin, 407 U.S. 25, 31 (1972).

To illustrate the point, I will briefly explore examples of the work of four of the twentieth century's greatest jurists—Felix Frankfurter, John Marshall Harlan, William O. Douglas, and William Brennan—who struggled, tentatively but perceptively, to square realistic claims of procedural fairness with long-standing economic exclusions from the civil justice system. Though advancing dramatically different visions of judicial power and predisposition, each sought to mitigate the most obvious and debilitating instances of economic exclusion.[46] The steps they advocated said much about their respective approaches to constitutional decision making. What none of them would have guessed, I'm certain, is that their successors, equally schooled in the challenges and rigors of meaningful constitutional review, would simply have cast their gaze away and said, "no matter."

Part IV sketches the fundaments of a constitutional right to civil counsel in cases where it is essential to assure the ability to meaningfully participate in the proffered judicial forum. It is not my purpose to exhaustively outline the categories of controversies or interests that should compel an affirmative right to counsel. It is, rather, to make the broad claim that the due process guarantee necessarily includes a derivative right to effective access—a right that implicates the very legitimacy of the process of dispute resolution. There may be an array of methods to meet its demands, but a realistic interpretation of due process of law begins with an exploration of the fairness of the state-directed forum if counsel is not provided. It asks whether it is realistic to assume that the judicial forum can be successfully navigated without the aid of counsel. If not, the right to a meaningful hearing is, of course, impaired.

Finally, in Part V, I argue that the failure to constitutionalize a right of effective access in civil cases does not represent a mere want of generosity or failure to assure some idealized, progressive vision of judicial power. It undermines the very legitimacy of a system dependent upon the promise of due process of law. Without a vibrant commitment to meaningful participation for all, the validity of the state's assumed and exercised authority over the coercive resolution of civil disputes is drawn into serious and defining question. Wholesale judicial abdication, in the face of the crushing challenges of equal access to civil justice, is brutally unacceptable. It mocks the entirety of the judicial enterprise. It suggests that in the American version of fundamental fairness, poor people do not count. It marks us as an enemy to equality, rather than apostle for it. Judges are responsible for the dramatic gulf that now exists between our words

[46] *See* discussion *infra* pp. 349–54.

and our deeds. They aren't immune from it. Ignoring its cruelty violates their charge and demeans our national promise.

I. THE EXPLORATION AND REJECTION OF A DERIVATIVE RIGHT TO CIVIL COUNSEL

The United States Supreme Court's two most famous right-to-counsel cases in the criminal context, *Powell v. Alabama*[47] and *Gideon v. Wainwright*,[48] are steeped in both realism and the profound seriousness of constitutional obligation. *Powell*, the Scottsboro decision from the 1930s, held that Alabama violated the Due Process Clause of the Fourteenth Amendment by failing to provide counsel in a capital case.[49] *Powell*'s holding was rooted squarely in the notion of a meaningful hearing:

> 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. . . . He lacks . . . the . . . knowledge adequately to prepare his defense, even though he have a perfect one. . . . [H]e faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate . . . .
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> . . . [T]he Sixth Amendment relates only to criminal prosecutions, . . . "but . . . that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner."[50]

Gideon, the landmark Warren Court ruling extending the right to provided counsel for indigents in felonies, hewed the same line:

> [A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . From the very beginning, our state and national constitutions

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[47] 287 U.S. 45 (1932).

[48] 372 U.S. 335 (1963).

[49] *Powell*, 287 U.S. at 71.

[50] *Id.* at 68–70 (quoting *Ex parte* Chin Loy You, 223 F. 833, 838 (D. Mass. 1915)) (internal quotation marks omitted).

> 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. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[51]

Almost a decade later, *Argersinger v. Hamlin*[52] extended the right to any criminal trial where the accused might be deprived of his liberty.[53] It did so for similar reasons. Counsel, the Court concluded, may well be necessary for a fair trial even in a minor prosecution. In support of this conclusion, the Court asserted: "We are by no means convinced that [the] legal . . . questions . . . [presented in petty cases] are any less complex than . . . [in felonies]. . . . Counsel is needed so that the accused may know precisely what he is doing . . . and . . . [be] treated fairly by the [state]."[54]

Gideon and *Argersinger*, perhaps unsurprisingly, echo the thrust of the Warren Court's[55] most defining opinion, *Brown v. Board of Education*.[56] They seek to look past formalism and tradition in a quest for actual fairness. They reject the belief that the American Constitution can be relegated to dismissible hypocrisy. The Justices declared, principally, that they were unwilling to be the only people in the nation pretending that our criminal justice system could be fairly navigated without the aid of a lawyer. And they seemed to say, again with *Brown*, that in a serious constitutional democracy, everyone counts—even those at the bottom.

The concern for those at the bottom led, somewhat contemporaneously, to the development of a second line of cases that embraced equality analysis more overtly and moved past any claimed linkage to the Sixth Amendment. *Griffin v. Illinois* invalidated a transcript funding requirement to perfect appeal in criminal cases.[57] Justice Black, announcing the Court's judgment, observed that "[p]roviding equal justice for poor and rich, weak and powerful alike

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[51] *Gideon*, 372 U.S. at 344.

[52] 407 U.S. 25 (1972).

[53] *Id.* at 37 ("We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.").

[54] *Id.* at 33–34.

[55] Argersinger was written in 1972, but its author was Justice Douglas—and the opinion was joined by Justices Brennan, Stewart, White, Marshall and Blackmun. Chief Justice Burger concurred and Justices Powell and Rehnquist concurred in the result.

[56] 347 U.S. 483, 495 (1954) (holding state-imposed racial segregation in public education unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment).

[57] 351 U.S. 12, 19 (1956).

is an age-old problem."[58] The imposition of costs would render the right of appeal a "meaningless promise[] to the poor."[59] Such an exclusion "is a misfit in a country dedicated to affording equal justice to all and special privileges to none . . . ."[60] For, famously, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[61]

In *Douglas v. California*,[62] the Court used *Griffin*'s central premises to demand the appointment of counsel in criminal appeals, noting that "[i]n either case the evil is the same: discrimination against the indigent."[63] Similarly, in *Mayer v. City of Chicago*,[64] the Court required a local government to "provide a full verbatim record where . . . necessary to assure [an] indigent as effective an appeal as [those who] pay [their] own way."[65] And then *Boddie v. Connecticut*[66] effectively drew on both lines of decisions to invalidate a filing fee in divorce cases.[67] The offending fee denied indigent litigants "an *opportunity* . . . granted at a meaningful time and in a meaningful manner" to assert their fundamental constitutional interests.[68] In actual implementation, it worked to "block[] access to the judicial process" by the poor.[69] A significant basis was thus laid for two complementary principles: (a) the failure to assure access to counsel in complex legal proceedings can effectively deny the right to fair trial; and (b) there are limits on the extent to which the Constitution will countenance differing systems of justice for the rich and poor.

Unfortunately, *Boddie* represented the high-water mark of the Supreme Court's moves toward equal access to justice. Two years later, in *United States v. Kras*,[70] the Court upheld a fee requirement that prevented an indigent from filing for bankruptcy.[71] Limiting *Boddie* to its "marital relationship" context, the Court "decline[d] to

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[58] *Id.* at 16.

[59] *Id.* at 17.

[60] *Id.* at 19.

[61] *Id.*

[62] 372 U.S. 353 (1963).

[63] *Id.* at 355 (finding an appeal as of right from a conviction, without benefit of appellate counsel, violates the Sixth Amendment right to attorney). *But see* Ross v. Moffitt, 417 U.S. 600, 617–19 (1974) (refusing to extend *Douglas* to discretionary appeals).

[64] 404 U.S. 189 (1971).

[65] *Id.* at 195.

[66] 401 U.S. 371 (1971).

[67] *See id.* at 374.

[68] *Id.* at 378 (alteration in original) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)) (internal quotation marks omitted).

[69] *Id.* at 382.

[70] 409 U.S. 434 (1973).

[71] *See id.* at 450.

extend [its] principle . . . to the no-asset bankruptcy proceeding."[72] Casting aside the due process inquiry's demand for actual and meaningful participation, Justice Blackmun wrote, "[h]owever unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiat[ing] . . . with his creditors."[73] Anatole France would have been proud.[74] In dissent, Justice Stewart moaned angrily that the majority was permitting Congress to decide that "some . . . are too poor even to go bankrupt."[75]

Next, almost to prove Stewart's point, *Ortwein v. Schwab* ruled that a twenty-five-dollar filing fee could constitutionally bar access to sue over welfare benefits.[76] Justice Douglas fumed in dissent over the move to render justice "the private preserve [of] the affluent,"[77] while Justice Marshall said, simply, that "important benefits [have been] taken . . . without affording . . . a chance to contest the legality of the taking in a court of law."[78] Thus, *Boddie* had been successfully transformed into a narrow privacy ruling, and sham formalism was warmly embraced.

The final shoe dropped eight years later in *Lassiter*.[79] There, a closely divided Court rejected an indigent's request for appointed counsel in a case brought by the state to terminate parental rights. Although conceding that the complexity and emotion of a termination proceeding could "overwhelm an uncounseled parent," the majority chided that no "specially troublesome" question of law was presented.[80] Nominally, *Lassiter* employed *Mathews v. Eldridge*'s[81] well-trod balancing test, exploring "the private interests at stake, the government's interest, and the risk that the procedures used will lead

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[72] *Id.* at 444, 450.

[73] *Id.* at 451. Justice Blackmun, however, did not remain satisfied with mere pretense. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 37 (1981) (Blackmun, J., dissenting) ("Where an individual's liberty interest assumes sufficiently weighty constitutional significance, and the State by a formal and adversarial proceeding seeks to curtail that interest, the right to counsel may be necessary to ensure fundamental fairness.").

[74] France once famously quipped that it was "the majestic equality of the laws, which forbid the rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." ANATOLE FRANCE, THE RED LILY 95 (Frederic Chapman ed. & Winifred Stephens trans., 1910) (1894).

[75] *Kras*, 409 U.S. at 457 (Stewart, J., dissenting).

[76] 410 U.S. 656, 661 (1973) (per curiam).

[77] *Id.* (Douglas, J., dissenting) (quoting Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 961 (1971) (Douglas, J., dissenting from denial of certiorari)).

[78] *Id.* at 666 (Marshall, J., dissenting).

[79] 452 U.S. at 32–33 (holding that, in view of all the circumstances, the trial court did not deprive Lassiter of due process by failing to appoint counsel for her).

[80] *Id.* at 30, 32.

[81] 424 U.S. 319 (1976).

to erroneous decisions."[82] But the private interest at stake was admittedly crucial, the government's goal was consistent with affording counsel, and the costs entailed were modest. *Lassiter* looked like a slam-dunk case for requiring counsel. Without explanation, however, the Court overlaid the balancing inquiry with a hefty presumption against the appointment of counsel where there is no risk of the loss of physical liberty.[83] *Lassiter* taught, immediately, that the presumption, not the test, is what matters.

Federal cases since have, at best, tinkered at the edges of these constricted paths. Advocates for appointed counsel attempt to show that the interests they assert are parallel to "*Gideon*-blessed" losses of liberty.[84] Fee-related actions cling close to *Boddie*'s tie to "intrusions on family relationships."[85] In civil cases generally, however, no overarching right to counsel is recognized. Nor is any searching particularized inquiry required to assure the possibility of a fair hearing. If neither physical liberty nor the tightly drawn family interest is implicated, the right to civil counsel claim loses.

It is still the case that without a lawyer, the "right to be heard" is "of little avail,"[86] and that unless counsel is appointed, it is "an obvious truth" that no fair trial can be had.[87] Excluding the poor and near poor from the effective use of much of the civil justice system remains "a misfit in a country dedicated to affording equal justice to all and special privileges to none . . . ."[88] What has changed is that it no longer matters.

II. *LASSITER* AND THE STATE COURTS

In the nearly three decades since it was handed down, *Lassiter* has—at least as a matter of logic—played out oddly in the (predominantly) state courts charged with enforcing it. By its terms,

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[82] *Lassiter*, 452 U.S. at 27 (citing *Mathews*, 424 U.S. at 335).

[83] *Id.* at 26–27.

[84] *See* Steven D. Schwinn, *Sidestepping* Lassiter *on the Path to Civil Gideon: Civil Douglas*, 40 CLEARINGHOUSE REV. 217, 219 (2006) ("[A]dvocates seek to demonstrate a heightened interest on the part of the litigant and ultimately to equate the litigant's interest with physical liberty.").

[85] M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996). In the context of a termination-of-parental-rights case in which transcript costs on appeal were at issue, the Court observed that "[i]n sum, . . . this Court has not extended *Griffin* to the broad array of civil cases. But . . . the Court has consistently set apart from the mine run of cases those involving . . . intrusions on family relationships." *Id.*

[86] Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

[87] Gideon v. Wainwright, 372 U.S. 335, 344 (1963); *see also supra* text accompanying notes 47–51 (discussing *Powell* and *Gideon*).

[88] Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion); *see also supra* text accompanying notes 57–61 (discussing *Griffin*).

Lassiter initiates an open-ended balance to determine whether counsel is required in civil cases. That weighing process is seemingly not limited to *Lassiter*'s wrenching facts, a termination of parental-rights dispute. It is, however, oddly trumped by the implementation of a presumption against providing a lawyer unless liberty is at risk. Weighing the demanded presumption against the prescribed balance is tough sledding—comparing apples and oranges, and balancing individualized circumstance against broader social cost and concern. That seems especially to be the case since *Lassiter* itself presented an exceptionally strong case under the *Mathews* balance, but was readily dismissed by the Court as unworthy of appointed counsel. A thumb, it appears, presses the scale.

States, perhaps ironically, have reacted strongly to the *facts* of *Lassiter*. A majority, for example, have moved, either by statute or state constitutional determination, to require the appointment of counsel for indigents in termination or dependency and neglect proceedings,[89] even though *Lassiter* did not require it. The reports are also replete with cases exploring analogous parental or privacy-related interests.[90] And many, unsurprisingly, consider

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[89] *E.g.*, Brown v. Div. of Family Servs., 803 A.2d 948, 955 (Del. 2002) (stating that, as of 2002, more than half of states had "established a right for indigent parents to be represented by counsel at State expense in dependency and neglect proceedings," even though doing so is not required by the Constitution); *see also* K.P.B. v. D.C.A., 685 So. 2d 750, 752 (Ala. Civ. App. 1996) (holding, on the basis of a prior Alabama Supreme Court decision, that the Alabama Constitution guarantees counsel for indigents in termination-of-parental-rights cases); *In re* K.L.J., 813 P.2d 276, 283–84 (Alaska 1991) (holding that parents' state constitutional right to assistance of counsel in termination-of-parental-rights proceedings also applies in the adoption context); State *ex rel.* Johnson, 465 So. 2d 134, 138 (La. Ct. App. 1985) (holding that due process requires appointment of counsel for indigent parents in abandonment proceedings where the state seeks to terminate parental rights), *aff'd*, 475 So. 2d 340 (La. 1985); *In re* Render, 377 N.W.2d 421, 423 (Mich. Ct. App. 1985) (noting that Michigan courts disagree with *Lassiter*'s holding that the Fourteenth Amendment does not require appointment of counsel in all termination proceedings); *In re* A.S.A., 852 P.2d 127, 129 (Mont. 1993) (holding that the Montana State Constitution's guarantees of due process require parents to be represented by counsel in parental termination proceedings); *In re* D.D.F., 801 P.2d 703, 706 (Okla. 1990) (stating that appointment of counsel in all termination proceedings is required by the Oklahoma Constitution); Zockert v. Fanning, 800 P.2d 773, 776 (Or. 1990) (remarking that state law requires the state to provide assistance of counsel in parental termination proceedings in juvenile court upon request of an indigent parent).

[90] *See, e.g.*, Ind. Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127, 1138 (7th Cir. 1983) (holding that statute establishing a judicial bypass procedure for parental notification requirement for minors seeking abortions impermissibly failed to provide for the appointment of counsel for the minors); Salas v. Cortez, 593 P.2d 226, 234 (Cal. 1979) (holding that indigent defendants are entitled to appointed counsel under both federal and state constitutions in state-initiated paternity actions); *In re* Jay R., 197 Cal. Rptr. 672, 678 (Ct. App. 1983) (holding that due process requires appointment of counsel for indigent noncustodial parents in stepparent adoption proceedings); Lavertue v. Niman, 493 A.2d 213, 218–19 (Conn. 1985) (holding that the federal and state constitutions require appointment of counsel for indigent defendants in state-sponsored paternity actions); Kennedy v. Wood, 439 N.E.2d 1367, 1368–69, 1372 (Ind. Ct. App. 1982) (holding that in cases where the state brings a paternity

appointment of counsel in actions that may threaten physical liberty, such as certain prisoner cases, contempt disputes, and civil commitment suits.[91] A few courts have also been clear that, under their own constitutional mandates, the *Mathews* balance is not to be so readily overcome by a presumption against the appointment of counsel.[92]

What state courts haven't done, however, is apply a searching scrutiny to the tension that occurs in the broad array of civil cases—beyond the narrow parental privacy interests coincidentally at issue in *Lassiter*—when indigents are denied access to a meaningful hearing because they cannot afford a lawyer. State courts have, perhaps, over-learned the context of *Lassiter*'s determination and under-learned the importance of the due process inquiry necessitated by the denial of representation in the run-of-the-mill civil dispute.[93]

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action on behalf of welfare-recipient mothers, in compliance with Title IV-D of the Social Security Act, application of *Mathews* factors establishes that due process requires appointment of counsel for indigent defendants); Mead v. Batchlor, 460 N.W.2d 493, 504 (Mich. 1990) (holding that the Due Process Clause of the Fourteenth Amendment prohibits incarceration of indigent defendants in contempt proceedings for nonpayment of child support if they have been denied assistance of counsel); *In re* Fernandez, 399 N.W.2d 459, 461 (Mich. Ct. App. 1986) (holding that trial court may appoint counsel for indigent noncustodial parent in a stepparent adoption case); Carroll v. Moore, 423 N.W.2d 757, 776 (Neb. 1988) (holding that due process requires appointment of counsel for indigent defendants in paternity proceedings); Pasqua v. Council, 892 A.2d 663, 674 (N.J. 2006) (holding that federal and state constitutions require appointment of counsel for indigent parents facing incarceration at child-support enforcement hearings); Ward v. Jones, 757 N.Y.S.2d 127, 128 (App. Div. 2003) (denying a right to counsel in case involving child visitation rights); Wake County *ex rel.* Carrington v. Townes, 293 S.E.2d. 95, 99 (N.C. 1982) (holding that indigent parties do not have an automatic right to counsel in civil paternity actions, but that the trial court should determine on a case-by-case basis whether true fairness requires it); Corra v. Coll, 451 A.2d 480, 487 (Pa. Super. Ct. 1982) (holding that a *Mathews* analysis mandates appointment of counsel for indigent defendants in civil paternity proceedings); Blake v. Blake, 878 S.W.2d 209, 212 (Tex. App. 1994) (holding that trial court's failure to appoint counsel for allegedly indigent putative father in a civil paternity action did not violate his substantive due process rights); State v. Santos, 702 P.2d 1179, 1182–83 (Wash. 1985) (holding that a child's interest in paternity proceedings requires counsel).

[91] *See* Yarbrough v. Superior Court, 702 P.2d 583, 585, 589 (Cal. 1985) (holding that appointment of counsel may be required, as a last resort, for an indigent prison inmate facing a civil suit); Sheedy v. Merrimack County Superior Court, 509 A.2d 144, 147–48 (N.H. 1986) (stating that the indigent are entitled to counsel in complex civil contempt proceedings or when they are incapable of speaking for themselves); McBride v. McBride, 431 S.E.2d 14, 19–20 (N.C. 1993) (holding that counsel is required for indigent defendants in civil contempt proceedings that may result in incarceration).

[92] *See, e.g.*, O.A.H. v. R.L.A., 712 So. 2d 4, 7 (Fla. Dist. Ct. App. 1998) (holding that an indigent, incarcerated parent is entitled to counsel at adoption proceedings that would involuntarily terminate his or her parental rights); *Render*, 377 N.W.2d at 424–25 (holding that, under Michigan law, the parental right to custody of one's child constituted a compelling liberty interest entitled to constitutional due process protection); *Corra*, 451 A.2d at 488 (holding that indigent defendants are entitled under the Fourteenth Amendment to counsel in civil paternity suits).

[93] Run-of-the-mill civil cases include those where the possibility of a contingent fee is

This likely represents, of course, the significant power of *Lassiter*'s presumption against the appointment of counsel in non-liberty-threatening civil cases. Although both the *Mathews* balance and the presumption against an affirmative right to counsel matter under *Lassiter*, the presumption matters a lot more.

Consider, for example, a case like *New York City Housing Authority v. Johnson*.[94] There, an indigent tenant faced with eviction from her home was denied access to counsel. Although the New York Court of Appeals acknowledged that "'eviction from homes' is ordinarily one of 'the many kinds of private litigation which may drastically affect indigent litigants,'" it easily concluded that no right to appointed counsel would be recognized.[95] Never mind that she had been "haled into court" and that her right to a fair trial was rendered "a meaningless promise." Or that this occurred only and precisely because she was poor. The case was simple under the operative reading of *Lassiter*. The indigent was not in danger of incarceration, nor were narrow parental rights threatened. Nothing more was demanded. But it should have been.[96]

Of course state tribunals are not relegated, helplessly, to closed doors and knowing exclusion. *Lassiter* outlines only the floor—such as it is—demanded by the Court's tepid reading of the federal Due Process Clause. States are free to do their own work. Seeing the disparities and exclusions that mark their civil justice systems at close hand, state supreme court justices can demand greater steps toward realism in enforcing their own due process, equality, open courts,[97] or law of the land[98] provisions. If troubled by the tensions and

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unavailable to trigger representation.

[94] 565 N.Y.S.2d 362 (App. Term 1990).

[95] *Id.* at 364 (quoting *In re* Smiley, 330 N.E.2d 53, 57 (N.Y. 1975)).

[96] It can, of course, be worse. See, for example, *City of Moses Lake v. Smith*, No. 01-2-007668 (Wash. Ct. App. May 21, 2003), in which the court denied appointed counsel to an elderly, indigent, and mentally challenged man whose home of fifty years was threatened with demolition by a city seeking to enforce building code requirements. *See "Civil Gideon" Litigation Pending in Two States*, *in* NAT'L LEGAL AID AND DEFENDER ASS'N, SPAN UPDATE 3, 3 (2003), http://www.nlada.org/DMS/Documents/1059747591.39/SPAN%20July%2003%20%231.pdf (noting that as the appeal was pending, the man died and the Washington Supreme Court remanded the case to the appellate court for consideration whether the man's death rendered the case moot).

[97] My home state of North Carolina's constitution explicitly requires that courts be open. According to N.C. CONST. art. I, § 18: "All courts shall be open; every person for an injury done to him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial or delay."

[98] *See, e.g.*, N.C. CONST. art. I, § 19 ("No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."). The North Carolina constitution also indicates that "[a] frequent recurrence to fundamental principles is absolutely necessary to

contradictions of *Lassiter*'s tangle of feckless balances and presumptions, jurists can overtly explore the necessities of representation against the challenges of cost. If state judges are unsatisfied with standards that result in the wholesale marginalization of classes of litigants, they are given broader reign to actually demand constitutional compliance. If justices are committed to a robust, rather than moribund, vision of undergirding adjudicatory fairness, they are empowered to seek it.[99] Sadly, they have not done so. Instead, they have cabined the debate over the wrenching question of equal justice into the exceedingly confined quarters of the appropriate bounds of rights of paternity and family association—thus relegating the constitutional access to a subset of privacy law. As a result, the "age-old problem" of "[p]roviding equal justice for poor and rich, weak and powerful alike"[100] has been removed from the American constitutional agenda.

III. THE CHALLENGE OF MEANINGFUL ACCESS TO JUSTICE

It is, perhaps, too glib to dismiss the effective de-constitutionalization of access to civil justice by pointing out that it marginalizes both the interests and the dignity of a great portion of the American populace—though I'm unsure why. It is also easy to note that due process of law is described as a progressive and evolving notion, asking of each generation a reexamination of the inadequacies of the patterns and acceptances of established practice.[101] These claims are likely ambitious, even ennobling. But

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preserve the blessings of liberty." N.C. CONST. ART. I, § 35.

[99] *See, e.g.*, *In re* K.L.J., 813 P.2d 276, 278 (Alaska 1991) (rejecting the *Lassiter* presumption under the Alaska constitution and holding that the lower court violated an indigent father's due process rights under the Alaska constitution when the court failed to appoint an attorney for a hearing that removed the father's parental rights); *In re* Jay R., 197 Cal. Rptr. 672, 678 (Ct. App. 1983) (holding that in actions where a parent could lose all parental rights, a parent is entitled to counsel if he or she requests it and demonstrates a present indigency).

[100] Griffin v. Illinois, 351 U.S. 12, 16 (1956) (plurality opinion).

[101] *See* Lawrence v. Texas, 539 U.S. 558, 579 (2003) ("[The Framers of the Constitution] knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); *Griffin*, 351 U.S. at 20–21 (Frankfurter, J., concurring) ("Due process is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society." (internal quotation marks omitted)). Of course, even a more modest vision of due process recognizes that newly crafted limitations can be necessary to assure fundamental fairness. *See, e.g.*, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2265 (2009) (holding that a state judge who was newly elected with aid of enormous campaign contributions from a defendant in the process of appealing a $50 million adverse jury verdict violated due process by failing to recuse himself).

they are soft and grand as well. One need not venture to such bold terrain to call into question our overarching rejection of a right to civil counsel.

Justice John Marshall Harlan, the most perceptive and cautious member of the historic Warren Court, wrote almost forty years ago:

> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution . . . recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable . . . . Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.[102]

And if American courts depend upon the strictures of due process to assure their legitimacy, nothing is closer to the core commitment to procedural fairness than the requirement that those seeking "to settle their claims of right and duty through the judicial process . . . be given a meaningful opportunity to be heard."[103] "Meaningful," of course, demands the introduction of reality—of actual, concrete opportunity—into the calculus.[104] The right to be heard, as a result, must secure more than the mere chance of appearing in person before the tribunal. And, as the Justices have regularly insisted in the criminal context, the "assistance of counsel is often a requisite to the very existence of a fair trial."[105] A hearing would, in many cases, be

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[102] Boddie v. Connecticut, 401 U.S. 371, 375 (1971).

[103] Little v. Streater, 452 U.S. 1, 5–6 (1981) (quoting *Boddie*, 401 U.S. at 377); *see also Boddie*, 401 U.S. at 379 ("[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.").

[104] *See Griffin*, 351 U.S. at 23 (Frankfurter, J., concurring) ("[Due process of law] addresses itself to actualities.").

[105] Argersinger v. Hamlin, 407 U.S. 25, 31 (1972).

of little avail, "a worthless thing," and a "meaningless promise[] to the poor,"[106] if it did not include the ability to be represented by a lawyer.[107] This is the "obvious truth"[108] of modern American litigation. And that truth is triggered not by the type of case or substantive interest at stake, but by the foundational procedural due process requirement of meaningful access to an appropriate judicial forum. Effectiveness is swamped by the inability to navigate.

Our traditional response to this simple set of facts, in the civil context, is to ignore it. If pressed we might explain, as Illinois tried to do in *Griffin*, that "[the State] is not . . . responsible for [the] disparity in material circumstances" that makes it impossible for the appellant to secure counsel.[109] That barrier arises from "contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion."[110] Or, perhaps, as Chief Justice Burger argued in refusing to require a fee waiver for bankruptcy in *United States v. Kras*, "the government . . . is no more than the overseer and the administrator of the process . . . ."[111] No denial could be laid at its hand.

This neutrality thesis was put most directly, perhaps, in a path-breaking 1979 case before the European Court of Human Rights, *Airey v. Ireland*.[112] There, in a divorce and child-custody action, a wife was unable to afford counsel, and Ireland did not provide it for indigents in civil cases.[113] The Irish tribunal held that, since the appellant could come to court without a lawyer, her right to effective access under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms was not abridged. Before the European Court of Human Rights, Ireland defended its position, saying it had presented "no positive obstacle"[114] to Airey's

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[106] *Griffin*, 351 U.S. at 17.

[107] As the Supreme Court noted in *Powell v. Alabama*:

> 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. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

287 U.S. 45, 68–69 (1932); *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

[108] *Gideon*, 372 U.S. at 344.

[109] *Griffin*, 351 U.S. at 23 (Frankfurter, J., concurring).

[110] *Id.*

[111] 409 U.S. 434, 450 (1973) (Burger, C.J., concurring).

[112] 32 Eur. Ct. H.R. (ser. A) (1979).

[113] *See id.* at 6–7.

[114] *Id.* at 14.

participation: "[Denial] stems not from any act on the part of the authorities but solely from Mrs. Airey's personal circumstances, a matter for which Ireland cannot be held responsible . . . ."[115]

The European Court soundly rejected Ireland's claim. "Hindrance in fact," the Court ruled, can "contravene the Convention just like a legal impediment . . . ."[116] Fulfillment "of a duty," in this instance, "necessitates some positive action on the part of the State . . . [it] cannot simply remain passive . . . ."[117] Here, there is "no room to distinguish between acts and omissions."[118]

The *Airey* decision has done much to push Western industrial democracies a good deal closer to aspirations of equal access to justice than we have managed in the United States.[119] My point, though, is not to turn, as is now apparently controversial, to foreign sentiment for authority. Rather, I'm drawn to the clarity in which the non-obliged, neutral arbiter portrait was presented.

The act-omission dichotomy, as all first-year torts students understand, can be a slippery one. I'm guessing that the European Court of Human Rights, in searching for "realistic" and "effective" participation,[120] was right to move past it. But one need not go that far to demand constitutional accountability in the access to civil justice cases.

First, American courts, state and federal, readily reject claims to counsel even in disputes in which the state not only provides the forum, but has instituted, and is party to, the litigation. The public

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[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* (citation omitted).

[119] *See, e.g.*, J.G. v. Minister of Health & Cmty. Servs., [1999] 3 S.C.R, 48 (Can.) (holding that an indigent mother had a constitutional right to state-funded counsel during loss-of-custody proceedings initiated by the State); Steel & Morris v. United Kingdom, 2005-II Eur. Ct. H.R. 7, 43 (holding that denial of legal counsel to applicants in a defamation lawsuit violated Article 6, § 1 and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms); *see also* Earl Johnson, Jr., *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341 (1985) (providing an overview of the expansion in Europe of the right to counsel in civil cases and its possible application to California); Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769 (2006) (advocating that the U.S. follow the lead of other countries and guarantee counsel for low-income citizens in civil cases). For a historical account of historical and global use of court-appointed counsel, see MAURO CAPPELLETTI ET AL., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1975).

Furthermore, it should be noted that in 2006, the American Bar Association's Task Force on Access to Civil Justice reported that *Airey* "now applies to 41 nations and over 400 million people . . . and [requires] member states to provide counsel at public expense to indigents in cases heard in the regular civil courts." ABA TASK FORCE ON ACCESS TO CIVIL JUSTICE, *supra* note 13, at 9.

[120] *See Airey*, 32 Eur. Ct. H.R. at 13.

housing, forfeiture, and benefits cases[121] I have highlighted are examples. *Lassiter*, itself, is such a case—no neutral umpire there.

But even beyond these categories, the matter is more complex. We have created, at the hands of the state, overarching tribunals for the resolution of private and public disputes. They are, at bottom, the only effective and ultimate means of finally resolving a massive array of civil controversies. We have, in turn, assured that these fora are hugely complicated, cumbersome, mysterious, professionally technical, adversarial, and expensive. Litigants are assigned the primary and costly tasks of discovering and asserting the controlling legal standards, marshalling the relevant facts, organizing them for presentation, offering them through convoluted and logically peculiar rules of evidence, overcoming or injecting constraining motions, arguing compellingly before a jury, and appealing or sustaining the judgment. Pulling off these steps requires no small measure of experience, sweat, wit, and expertise. It is as far beyond the kin of most citizens as brain surgery is to me. That means, of course, that, without counsel, the door we have theoretically opened is, in practice, closed shut.

We could, perhaps, have done otherwise. Even now, it would be possible to dramatically simplify the rules and resolution methods for large swaths of disputes, making the use of lawyers unnecessary. Despite the well-understood challenges of access, we have chosen not to do so. Having followed this path, state and federal actors are now unable to credibly claim that the justice system, which is knowingly and continually rendered inaccessible to many of the citizens it is meant to serve, is a mere reflection of a natural and unobjectionable neutrality. Rather, the decision to create, direct, operate, subsidize and maintain a system of civil justice that, on so many fronts, excludes millions is just that—a decision. To claim that it is anything but the obligating and knowing action of the state, rather than the product of some natural, non-ideological, unfolding course of human enterprise—the fruit of a disengaged "overseer and administrator"[122]—is not possible. Or at least it's not candid.

Accordingly, if we are to demand actual, rather than illusory, opportunities to participate; if we are to concede that the civil legal system is frequently impossible to navigate without professional assistance; and if we are to continue to insist, at least rhetorically, that all of us count, then the present marginalizing operation of the civil

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[121] *See supra* notes 94–96 and accompanying text; *see also* United States v. 1604 Oceola, 803 F. Supp. 1194, 1197–98 (N.D. Tex. 1992) (holding that an incarcerated indigent had no right to counsel in a government-instituted forfeiture action).

[122] United States v. Kras, 409 U.S. 434, 450 (1973) (Burger, C.J., concurring).

justice system is unacceptable. The refusal to look this most daunting of adjudicatory questions squarely in the eye undermines our core claims to what Justice Harlan characterized as a just, "orderly process of dispute settlement."[123] The fact that we readily ignore this, perhaps largest, of constitutional transgressions says much. But ignoring a contradiction, or an unyielding hypocrisy, doesn't, after all, make it disappear. That is particularly true when liberties, treasure, dignity, and confidence in the promise of American constitutional democracy are lost in the process. Judges—federal, state, Republican, Democrat, liberal, conservative, activist, passive, hard-nosed or heart-bled—play the dominant and ultimate role in this profound denial of equal citizenship. They are charged, in singular ways, to move to address it.

A. An Earlier Moment

But before turning to my own modest proposals to begin securing more effective and meaningful opportunities for the poor and near poor to participate in our civil justice system, I briefly explore a small corner of constitutional history. I do so not to reveal any enduring due process standard or to uncover any essential key to the challenges of equal justice. My path, instead, is one of illustration. We have become solidly comfortable with a scheme of civil justice that leaves millions out. There seems little doubt that at least a strong majority of the present United States Supreme Court considers the tensions of exclusion beyond its authority and concern.[124] No action, in their judgment, is demanded. No explanation is even required.

We have never moved as forcefully to challenge economic barriers to justice as most of our international peers.[125] But we have not always thought it a constitutional question simply to be ignored. For almost twenty years, four giants of twentieth century American jurisprudence—Felix Frankfurter, William O. Douglas, John Harlan, and William Brennan—struggled, under distinct theories and predispositions, to begin to match vital claims of procedural fairness and economic equality with the harsh realities of traditional exclusion from the operation of the civil justice system. Each rebelled at this "misfit in a country dedicated to affording equal justice to all."[126] But they acted tentatively, preliminarily. A more realistic and inclusive theory of constitutionalism, they thought, demanded more broadly

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[123] Boddie v. Connecticut, 401 U.S. 371, 375 (1971); *see also infra* text accompanying notes 162–71 (discussing Justice Harlan's opinion in *Boddie*).

[124] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

[125] *See supra* notes 112–20 and accompanying text.

[126] *Boddie*, 401 U.S. at 383 (Douglas, J., concurring) (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).

opened doors. How widely and how quickly those doors should be opened was another matter. Their struggles demonstrate both the complexity and the import of the search.

The period of the United States Supreme Court's greatest focus on questions of economic burden and exclusion coincided, unsurprisingly, with the tenure of the Warren Court. The Court decided *Griffin v. Illinois*, requiring waiver of a transcript fee for criminal appeals in 1956.[127] *Gideon v. Wainwright*[128] and *Douglas v. California*,[129] both assuring a right to counsel for indigents in criminal trials and appeals, came in 1963.[130] *Harper v. Board of Elections* invalidated the poll tax in 1966[131] and, in 1969, *Shapiro v. Thompson* prevented some forms of discrimination in welfare programs by outlawing a waiting-period requirement that precluded families from receiving basic welfare benefits until they had been residents of the state for one full year.[132] The following year, *Goldberg v. Kelly* increased procedural protections for the poor.[133] *Mayer v. Chicago*, requiring an adequate appeal transcript in non-felony cases,[134] and *Boddie v. Connecticut*, rejecting a filing fee in divorce actions,[135] were handed down in 1971. Almost the entire Supreme Court[136] had come to see marked tensions between an array of traditional patterns and practices which marginalized the poor and newly announced constitutional commitments to fair processes, equal dignity, meaningful participation, and actual opportunity. The Justices demonstrated powerfully divergent views and advocated strongly disparate tools to begin to bridge the chasm. They did not, however, believe that challenges could be ignored.

Felix Frankfurter, for example, at least when he took his seat on the Court, was hardly an advocate of bold judicial power.[137] He fretted over the dangers of stepping beyond accepted visions of the

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[127] 351 U.S. 12, 18–20 (1956).

[128] 372 U.S. 335 (1963).

[129] 372 U.S. 353 (1963).

[130] *See id.* at 356–58; *Gideon*, 372 U.S. at 343–45.

[131] 383 U.S. 663, 670 (1966).

[132] 394 U.S. 618, 642–44 (1969), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651, 670–71 (1974).

[133] 397 U.S. 254, 269–71 (1970) (requiring a meaningful pre-termination hearing prior to cessation of public assistance payments).

[134] 404 U.S. 189, 196–99 (1971).

[135] 401 U.S. 371, 380–83 (1971).

[136] *Mayer v. Chicago*, 404 U.S. 189, for example, was a unanimous decision.

[137] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 266–67 (1962) (Frankfurter, J., dissenting) (arguing that the delineation of voting districts in the South was not a question for the courts); Dennis v. United States, 341 U.S. 494, 550–56 (1951) (Frankfurter, J., concurring) (upholding convictions under the Smith Act).

judicial role,[138] obsessed about the traditions of English-speaking jurisprudence,[139] and sought, relentlessly, to preserve what he regarded as the essential institutional capital of the federal courts.[140] And, of course, he railed at what he deemed the simplistic declarations of Justices Hugo Black and William Douglas.[141]

But in *Griffin v. Illinois*, he wrote separately (ever reluctant to join an opinion by Justice Black) that the charge of constitutional review mandated that the Court refuse to be "willfully blind" to the impact of costly appellate procedures on the poor.[142] The "[s]tate need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse."[143] But when the government "deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions . . . produce such a squalid discrimination."[144]

Beyond that, he sought to avoid broad pronouncement. It is "not for us," he claimed, "to tell Illinois what means are open to the indigent" to assure effective participation.[145] The state could, no doubt, "find within the existing resources of Illinois law" ample means to satisfy the demands of "equal protection of the laws."[146]

Justice Douglas, on the other hand, seemed purposefully to seek the boldest stroke. He signed on to his partner's (Justice Black) opinion in *Griffin*,[147] of course, but then moved forcefully to extend it in *Douglas v. California*.[148] Denying counsel on appeal was "at least as invidious" as the demand for a transcript, he concluded.[149] "In either case, the evil is the same: discrimination against the indigent."[150] Lines can be drawn, "[b]ut where the merits of the one and only appeal an indigent has as of right are decided without benefit

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[138] *See Baker*, 369 U.S. at 266–67 (1963) (Frankfurter, J., dissenting) (urging court not to enter re-districting frays).

[139] *See* Adamson v. California, 332 U.S. 46, 66–68 (1947) (Frankfurter, J., concurring) (arguing, after a lengthy analysis of American constitutional jurisprudence, that the Fifth Amendment did not apply to the states via the Due Process Clause of the Fourteenth Amendment).

[140] *See Dennis*, 341 U.S. 494, 517 (Frankfurter, J. concurring)

[141] *See, e.g., id.* at 550–56 (advocating a timid and limited interpretation of the First Amendment to protect Supreme Court's institutional reputation).

[142] 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring in judgment).

[143] *Id.*

[144] *Id.* at 23–24.

[145] *Id.* at 24.

[146] *Id.* at 25.

[147] *See id.* at 13.

[148] 372 U.S. 353 (1963) (holding that indigents have a right to counsel during state criminal appellate proceedings).

[149] *Id.* at 355.

[150] *Id.*

of counsel," an unconstitutional distinction has been wrought "between rich and poor."[151]

In *Argersinger v. Hamlin*,[152] Douglas pushed past the felony-misdemeanor line to require counsel in any case threatening imprisonment. He reasoned that "[c]ounsel is needed so that the accused may know precisely what he is doing . . . so that he is treated fairly by the prosecution."[153] A lawyer is "requisite to the very existence of a fair trial."[154] The same year, he thought the majority opinion in *Boddie* too cramped. There, the inquiry, at least for Douglas, was simple. The "more affluent can obtain a divorce; the poor cannot."[155] The "invidious discrimination [is] based on" a forbidden category—"poverty."[156] Ever aggressive, he would not limit the holding to the marriage relationship—"[f]ishing may be equally important to some communities,"[157] but "[a]ffluence does not pass muster" to determine effective access to the judiciary.[158]

John Harlan was, in all likelihood, the most penetratingly thoughtful Justice of the Warren era. He would also frequently be regarded as conservative.[159] He was Frankfurter without the pretension. Surely, the closest thing to a "judge's judge" on the tribunal. He was a writer of consummate skill and a thinker of equal determination. He dissented in *Douglas v. California*,[160] fearing the majority's hard rule would discourage states from "making some effort to redress [the effects of] economic imbalances" though the efforts fell short of eliminating such imbalances entirely.[161]

Harlan's opinion for the Court in *Boddie v. Connecticut* is one of the most elegant in our constitutional jurisprudence.[162] In it, he linked the searching, judicially oriented demand for actual fairness in process to the Court's legitimacy in carrying out its monopoly over

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[151] *Id.* at 357 (emphasis omitted).

[152] 407 U.S. 25 (1972).

[153] *Id.* at 34.

[154] *Id.* at 31.

[155] Boddie v. Connecticut, 401 U.S. 371, 384 (1971) (Douglas, J., concurring in result).

[156] *Id.* at 386.

[157] *Id.* at 385.

[158] *Id.* at 386.

[159] *See generally* Baker v. Carr, 369 U.S. 186, 330–40 (1962) (Harlan, J., dissenting) (arguing that, contrary to the majority's assertion, the Equal Protection Clause did not support a requirement that state legislatures be apportioned to guarantee that all voters have equal voice, and rather, that states are merely required to choose an electoral legislative structure that rationally comports with the needs of its citizens). Earl Warren regarded *Baker* as the most important case of his tenure.

[160] 372 U.S. 353, 360–67 (1963) (Harlan, J., dissenting).

[161] *Id.* at 361.

[162] 401 U.S. 371 (1971).

techniques for binding conflict resolution.[163] Particularly when, as in divorce, "the judicial proceeding becomes the only effective means of resolving the dispute at hand,"[164] economic exclusion through the imposition of fees "raises grave problems."[165] Resort to the courts, then, "is no more voluntary in a realistic sense than [when a] defendant [is] called upon to defend his interests in court"[166] at the hands of the state. To "fulfill the promise of the Due Process Clause,"[167] such plaintiffs are, at minimum, entitled to be heard in "an opportunity . . . granted at a meaningful time and in a meaningful manner."[168] There is "no necessary connection between a litigant's assets and the seriousness" of his claim.[169]

But Harlan was careful in *Boddie* to avoid what he feared would be a too-widely opened door. "We do not decide," he warned, "that access . . . to the courts is a right that . . . in all circumstances . . . may not be placed beyond the reach of any individual . . . ."[170] Instead, he wrote, "we hold only that a State may not . . . pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so."[171] A serious commitment to due process for all could not countenance this. Beyond that, Harlan was unwilling to say more. But he was also unwilling to pretend that the divorce case before him could be squared with any sensible notion of equal justice.

Justice Brennan, concurring, thought that *Boddie* could not be so easily, or accurately, constrained. More overtly committed to a Warren Court agenda of egalitarianism,[172] Brennan argued that the "[s]tate has an ultimate monopoly [over] all judicial process and [its] attendant enforcement machinery"[173]—at least "if disputes cannot be successfully settled between the parties."[174] Divorce, in this sense, is

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[163] *See id.* at 375–76 ("The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain.").

[164] *Id.* at 376.

[165] *Id.*

[166] *Id.* at 376–77.

[167] *Id.* at 379.

[168] *Id.* at 378 (alteration in original) (emphasis omitted).

[169] *Id.* at 381.

[170] *Id.* at 382–83.

[171] *Id.* at 383.

[172] *See generally* Goldberg v. Kelly, 397 U.S. 254, 269–71 (1970) (holding that welfare recipients were entitled to a pre-termination evidentiary hearing before their benefits could be terminated); Baker v. Carr, 369 U.S. 186, 197–98 (1962) (holding that Tennessee's failure to reapportion seats in the General Assembly implicated a constitutional cause of action upon which appellants were entitled to a trial and decision).

[173] *Boddie*, 401 U.S. at 387 (Brennan, J., concurring).

[174] *Id.*

no different than "any other right arising under federal or state law."[175] Nor, he thought, should the case be addressed simply as a matter of due process. "Connecticut does not deny a hearing to everyone in these circumstances," only to those who "fail to pay certain fees."[176] Instead, Brennan observed that "[c]ourts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike."[177] Perhaps his concurring colleague, Justice Douglas, concluded too readily that all poverty distinctions are "invidious."[178] But when a state, via fee, "determines . . . whether [one] gets into court at all," the Constitution intervenes.[179]

These large judicial figures played ample roles in this nation's opening chapters attempting to square increasingly robust and meaningful notions of equality and fairness with historical patterns of economic exclusion and deprivation. They were unwilling to pretend, across an array of fronts, that dramatic differences in condition had no actual and determinative impact on constitutional compliance. Moving past a veil of formalism and facade, they demanded steps be taken to greater align constitutional aspiration with practical realities of government process. Still, they recognized their ordered responses to be small ones. Each, in disparate ways, sought to infuse greater access and procedural vibrancy without forcing dramatic and unilateral change. They did not believe, it is obvious to state, that their modest measures would be the end of a march toward the fulfillment of a command of equal justice. Sadly, on this front, they were wrong.

IV. A DERIVATIVE RIGHT TO COUNSEL IN CIVIL CASES

The Due Process Clauses of the Fifth and Fourteenth Amendments demand, without a doubt, that those seeking to "settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[180] I have attempted to argue that in a broad array of civil actions, a meaningful and effective opportunity to participate will also include a derivative right to the appointment of counsel for the indigent. Otherwise, the majestic promise of due process of law becomes empty and hollow, mocking constitutionalism rather than fulfilling it. This would not mean that a

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[175] *Id.*

[176] *Id.* at 388.

[177] *Id.*

[178] *See id.* at 386 (Douglas, J., concurring).

[179] *Id.* at 389.

[180] Little v. Streater, 452 U.S. 1, 6 (1981) (quoting *Boddie*, 401 U.S. at 377).

lawyer must be provided by the state in all cases. When judicial fora and standards can be rendered readily navigable by pro se litigants, no right of representation is triggered. But when the absence of counsel works to debar the actual and effective use of the judicial forum, due process of law is denied.

That is, of course, rather easily (and circularly) stated. And it is not my purpose here to exhaustively outline the categories of controversies or interests that should compel affirmative access to counsel. It is, rather, to make the broader claim that the due process guarantee, in the judicial context, necessarily includes a derivative right to effective access essential to the asserted legitimacy of the work of American courts. As in non-judicial contexts, there may be a wide menu of methods to assure meaningful participation by those without means. What cannot be done, consistent with any serious scheme of procedural fairness, is simply to ignore or reject claims to meaningful access with the back of the judicial hand. *Lassiter* allows that, but due process of law doesn't.

In this sense, the right to counsel is a component of procedural fairness. It is triggered not merely by the type of case or interest at stake—paternity, divorce, child custody, contract, civil commitment—but by the *manner* of the potential deprivation. Accordingly, though I am strongly drawn to proposals like the American Bar Association's civil Gideon resolution—which calls for a right to counsel in cases involving "basic human needs," such as "shelter, sustenance, safety, health or child custody"[181]—a derivative constitutional right to counsel likely proceeds from the opposite direction.[182] It explores the fairness of the state's proffered forum, if

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[181] ABA TASK FORCE ON ACCESS TO CIVIL JUSTICE, *supra* note 13, at 1.

[182] I think I would say the same thing about the excellent "Sargent Shriver Civil Counsel Act" recently enacted in California. CAL GOV'T CODE § 68651 (West Supp. 2010). As enacted, the law directs the California Judicial Council to develop one or more pilot projects, which will be designed to

> address the substantial inequities in timely and effective access to justice that often give rise to an undue risk of erroneous decision because of the nature and complexity of the law and the proceeding or disparities between the parties in education, sophistication, language proficiency, legal representation, access to self-help, and alternative dispute resolution services.

Id. § 68651(b)(1). In determining the which pilot projects to pursue, the Judicial Council is to consider:

> (A) The likelihood that representation in the proposed case type tends to affect whether a party prevails or otherwise obtains a significantly more favorable outcome in a matter in which they would otherwise frequently have judgment entered against them or suffer the deprivation of the basic human need at issue.
>
> (B) The likelihood of reducing the risk of erroneous decision.

counsel is not assured. That entails an examination of the complexity of the procedures employed, the difficulty of the legal standards implicated, the likely necessity for expert analysis, the sophistication of the litigant, whether the opposing party is represented by counsel, and the like. *Airey*'s progeny, for example, have indicated that "the provision of legal aid . . . must be determined . . . [by] the particular facts and circumstances . . . , the complexity of the relevant law . . . and the applicant's capacity to represent him or herself effectively."[183] The focal point, though, is whether it is realistic, or merely cynical, to assume that the judicial forum can be successfully navigated by a litigant without the assistance of a lawyer.

Federal cases interpreting the massively underemployed *in forma pauperis* statute[184] point in the right direction. In *Tabron v. Grace*,[185] for example, the Third Circuit indicated that, in an indigent prisoner § 1983 case, once a trial court determines a claim has potential merit, a court's decision to appoint counsel should be driven by the following factors:

(1) The plaintiff's ability to present the case

(2) The difficulty of the legal issues

(3) The degree to which factual investigation will be necessary and the litigants' ability to conduct such investigation

(4) The plaintiff's ability to retain counsel on his own

(5) The extent to which the case is likely to turn on credibility determinations, and

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> (C) The nature and severity of potential consequences for the unrepresented party regarding the basic human need at stake if representation is not provided.
>
> (D) Whether the provision of legal services may eliminate or reduce the potential need for and cost of public social services regarding the basic human need at stake for the client and others in the client's household.
>
> (E) The unmet need for legal services in the geographic area to be served.
>
> (F) The availability and effectiveness of other types of court services, such as self-help.

Id. § 68651(b)(5).

[183] Steel & Morris v. United Kingdom, 2005-II Eur. Ct. H.R. 7, 28 (2005) (citations omitted) (granting counsel for indigent defendant in civil libel case brought by McDonalds).

[184] 28 U.S.C. § 1915(e)(1) (2006) ("The court may request an attorney to represent any person unable to afford counsel."); *see also* United States v. 1604 Oceola, 803 F. Supp. 1194, 1198 (N.D. Tex. 1992) (observing that, when deciding whether to request an attorney to represent an indigent party, a court should consider the type and complexity of the case and the abilities of the individuals bringing the case).

[185] 6 F.3d 147 (3d Cir. 1993).

(6) Whether the case will require expert testimony.[186]

Such a list, of course, is neither exhaustive nor unfailingly illuminating. And it would not mean that the importance of the interest at stake is irrelevant to the due process determination. *Mathews v. Eldridge*, it will be recalled, turns on "the private interest . . . affected by the official action," the "risk of an erroneous deprivation" of the private interest, and the "fiscal and administrative burdens" additional procedures would entail.[187] Some matters may be sufficiently insignificant to be deemed beyond the call of a right to counsel. Screening methods may be appropriate to assure the effective deployment of limited public resources. Deference toward good-faith state and federal efforts to assure adequate representation would surely be sensible.[188] But if a Fifth or Fourteenth Amendment liberty or property interest is implicated, and if the state or federal courts are available for the resolution of disputes by those who can afford counsel, the right to a fair hearing should not be rendered "meaningless" or "of little avail" because so many can't afford to pay the fare.

CONCLUSION: A BREACH OF JUDICIAL DUTY

The failure to constitutionalize the *question* of access to civil justice is not merely a want of generosity, faddishness, political correctness, or even compassion. It directly undermines the legitimacy of a public dispute-resolution system dependent upon the promise of due process of law. It abandons a central component of the American judiciary's foundational search for actual, rather than nominal, fairness. It relegates much of the judiciary's charge to a pretense "hardly acceptable" as an underpinning for the exercise of judicial power.[189] Nothing is closer to the core of judicial function than the assurance of the basic fairness of the courts' own processes. It is, as Justice Harlan wrote, only through a penetrating demand for effective and meaningful participation in our "social enforcement

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[186] *See id.* at 156–57; *see also* Parham v. Johnson, 126 F.3d 454, 457 (3d Cir. 1997) (listing similar factors).

[187] 424 U.S. 319, 335 (1976).

[188] *See, e.g.*, Steel & Morris v. United Kingdom, 2005-II Eur. Ct. H.R. 7, 29 (2005) ("[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 *vis-à-vis* the adversary." (citations omitted)).

[189] *See* Boddie v. Connecticut, 401 U.S. 371, 375 (1971) ("Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things.").

mechanism" that we can "hope to maintain an ordered society that is also just."[190] Thus, examining whether all litigants enjoy a right to meaningfully participate in the judicial process is a central part of judges' obligation. It is not simply a question for others.

To make the point from a different direction, think of the Supreme Court's testy opinion in *Legal Services Corp. v. Velazquez*.[191] There, the Justices invalidated a congressional attempt to limit the ability of Legal Services lawyers to pursue certain arguments—including challenging the constitutionality of certain welfare laws.[192] Writing for the majority, Justice Kennedy observed that "[t]he restriction imposed by the statute . . . threatens severe impairment of the judicial function."[193] He further noted:

> [t]he disability is inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case. By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power.[194]

The heavy-handed welfare-reform law in *Velazquez* surely impaired both norms of due process and freedom of expression. But, as the opinion revealed, it also transgressed a constitutionally mandated separation of powers. It invaded the core judicial competency, and judicial responsibility, to assure that the avenues of information "upon which courts must depend for the proper exercise of the judicial power" are effectively opened. When courts allow the civil justice system to operate in ways that, for indigent litigants, reduce the demand for a "fair trial" and "meaningful hearing" to a "worthless thing,"[195] they likewise restrict the data necessary to property and effectively adjudicate. It is not made more constitutionally palatable because judges have a closer, more pervasive, and directly informed picture of the resulting exclusion.[196]

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[190] *Id.*

[191] 531 U.S. 533 (2001).

[192] *See id.* at 546–49.

[193] *Id.* at 546.

[194] *Id.* at 545.

[195] Griffin v. Illinois, 351 U.S. 12, 17 (1956).

[196] *See* Tennessee v. Lane, 541 U.S. 509, 532 (2004) (dealing with an Americans with Disabilities Act claim over access to court buildings, and stating that, "[the] duty to accommodate is perfectly consistent with the well-established due process principle that, 'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts."). *Lane* further stated:

The wages of judicial abdication are, no doubt, enormous. Denials of meaningful access are, of course, individual and particularized. Litigants, or potential ones, effectively lose their ability to assert or protect various legally recognized interests. To those specific indigents, injuries occur that would not have been sustained if they were given the tools necessary to deploy the process created to assure their interests. Those wounds can be tragic. But it is also impossible to ignore the broader, systemic loss. Huge numbers of poor and near poor Americans are, in effect, turned away from the state schemes designed to resolve their legal disputes. What we characterize as "equal justice under law" is riddled with a massive exception, an undermining asterisk. As every lawyer and judge knows, neither the billable hour nor the contingent fee covers the waterfront of American legal disputes. We leave millions unrepresented, frequently, on the most pressing issues of life. We do so recognizing that the consequences resulting from such legal contests may be more far-reaching, more devastating, and more permanent than many categories of criminal cases for which counsel is appointed.[197] We do this claiming, extolling, and allegedly exporting an undergirding fealty to equal justice under law. The system of justice we deploy is powerfully, systematically, and tragically at odds with what we say we are.

Nor do we compare favorably with our fellows. The American Bar Association reports that "[m]ost European and Commonwealth countries have had a right to counsel in civil cases for decades or even centuries . . . ."[198] In rulings that bind over forty nations and 400 million people, the European Court of Human Rights has determined that indigents fail to receive "a fair hearing" unless represented by counsel provided at public expense.[199] Great Britain spends sixteen

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> [T]his duty to accommodate is perfectly consistent with well-established due process principle that "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts . . . . Each of these cases [recognizing affirmative obligations necessary to facilitate access to courts] makes clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts.

Id. at 532–33 (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).

[197] *See* Douglas J. Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After* Lassiter v. North Carolina, 15 FAM. L.Q. 205, 221 (1981) ("*Lassiter*, for all practical purposes, stands for the proposition that a drunken driver's night in the cooler is a greater deprivation of liberty than a parent's permanent loss of rights in a child.").

[198] ABA TASK FORCE ON ACCESS TO CIVIL JUSTICE, *supra* note 13, at 3.

[199] *See, e.g.*, Steel & Morris v. United Kingdom, 2005-II Eur. Ct. H.R. (ser. A), at 7, 43 (holding that denial of legal counsel in a defamation lawsuit deprived the applicants of the

times as much as we do per capita on legal services for the poor, New Zealand spends six times as much, and Canada spends three times as much.[200] We advertise our commitment to equal justice more proudly and more vocally than any other nation. Sadly, we are satisfied with mere advertising. American jurists have found the inconsistency between our declared constitutional standards of inclusion and the realities of persistent marginalization to be acceptable and untroubling. Most of their peers from other industrial democracies have not. We shall have a difficult time explaining that to our children and to ourselves.

It is true, thankfully, that determined efforts to demand, lobby for, organize to secure, and, of course, to selflessly provide, an American right to civil counsel span the nation.[201] They have done so for decades.[202] Activists, scholars, bar leaders, legal services providers,

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opportunity to effectively present their case before a court); Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A), at 14 (1979) (holding that Ireland's failure to provide counsel in a child-custody case resulted in a mother's inability to effectively exercise her right of access to the court); *see also* J.G. v. Minister of Health & Cmty. Servs., [1999] 3 S.C.R 46, 48 (Can.) (finding a constitutional right to state-funded counsel during loss-of-custody proceedings initiated by the State); *cf. also* Johnson, *supra note* 18, at S88–91 (discussing how other democratic countries have greater access to justice for the poor than the United States); Francis William O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L.J. 1 (1967) (discussing how the Swiss Constitution guarantees the right to counsel in civil, but not criminal cases).

[200] RHODE, *supra* note 12, at 374.

[201] *See, e.g.*, *An Obvious Truth*, *supra* note 23, at 1 (presenting a conference dedicated to advocating a right to civil counsel in New York). *See also generally* American Bar Association, http://www.abanet.org (last visited Jan. 25, 2010); Brennan Center for Justice, Civil Justice, http://www.brennancenter.org/content/section/category/civil_justice/ (last visited Feb. 2, 2010) (explaining the Center's efforts to close the "justice gap" by expanding the types of civil cases in which indigents have access to counsel); EqualJusticeLibrary.org, http://www.equal justicelibrary.org (last visited Jan. 25, 2010); National Coalition for a Civil Right to Counsel, http://www.civilrighttocounsel.org (last visited Feb. 2, 2010) ("The National Coalition for a Civil Right to Counsel is committed to ensuring meaningful access to the courts. We work to expand recognition and implementation of a right to counsel in civil cases."); National Legal Aid & Defender Association, http://www.nlada.org/About/About_HistoryDefender (last visited Feb. 2, 2010) (describing the history of the right to counsel and the problems that persist with the current system); Public Justice Center, http://www.publicjustice.org (last visited Feb. 2, 2010) (describing the Center as an organization that "seeks to enforce and expand the rights of people who suffer injustice because of their poverty"); Sargent Shriver National Center on Poverty Law, http://www.povertylaw.org/about-us (last visited Feb. 2, 2010) ("The mission of the Sargent Shriver National Center on Poverty Law is to provide national leadership in identifying, developing, and supporting creative and collaborative approaches to achieve social and economic justice for low-income people.").

[202] *E.g.*, Abel, *supra* note 23; 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); Mark D. Esterle, Gideon's Trumpet *Revisited: Protecting the Rights of Indigent Defendants in Paternity Actions*, 24 J. FAM. L. 1 (1985); Earl Johnson, Jr., *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. SOC. JUST. 201 (2003); Rachel Kleinman, *Housing* Gideon*: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507 (2004); Paul Marvy & Debra Gardner,

students, consumers, judges, legislators, and ordinary citizens campaign against the odds to secure a system of justice that more closely matches the values that we claim define our constitutional character. I am a devoted fan of these undertakings. I have, to be candid, participated in them—less effectively, no doubt, than one would wish—throughout much of my career. These advocates have come to expect little from our courts and from the judges who run them, and for good reason. State justices have principally inquired no further than "what will we be forced to do by our federal counterparts?" Federal judges, of course, are answerable to a United States Supreme Court that has consistently shown itself unmoved by the claims of those at the bottom, and that includes members openly derisive of concern for the interests of the poor.[203] In fact, it is now

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A Civil Right to Counsel for the Poor, HUM. RTS., Summer 2005, at 8; 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); Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503 (1998); 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); Robert J. Derocher, *Access to Justice: Is Civil Gideon a Piece of the Puzzle?*, BAR LEADER, July–Aug. 2008, at 11.

[203] Justice Thomas, dissenting from the Court's decision in *M.L.B v. S.L.J.*, argued that he would overrule *Griffin v. Illinois* and the Court's "fetish for indigency." 519 U.S. 102, 134 (1996) (Thomas, J., dissenting) (quoting Douglas v. California, 372 U.S. 353, 359 (1963) (Clark, J., dissenting)). He was not, apparently, being ironic. Justice Scalia, dissenting in *Brown v. Legal Foundation of Washington*, from an opinion taking the extraordinarily modest step of upholding Interest on Lawyer Trust Accounts (IOLTA) programs, stated:

> Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended. One must hope that that is the case. For to extend to the entire run of Compensation Clause cases the rationale supporting today's judgment—what the government hath given, the government may freely take away—would be disastrous.

538 U.S. 216, 252 (2003) (Scalia, J., dissenting); *see also* William P. Marshall, *The Empty Promise of Compassionate Conservatism: A Reply to Judge Wilkinson*, 90 VA. L. REV. 355 (2004) (discussing Justice Scalia's opinion in *Legal Foundation of Washington*). And Chief Justice Roberts famously opened his confirmation hearings by declaring himself a mere "neutral umpire," stating that:

> Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath.

Roberts: 'My Job Is to Call Balls and Strikes and Not to Pitch or Bat,' CNN, Sept. 12, 2005, http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/index.html. After a distinguished

possible to worry that by focusing so much effort on the bar, on law schools, or in the halls of our legislatures, to press the cause of equal justice, we have managed to help insulate American judges from a breach of obligation that undermines the integrity of their processes as it wounds the nation. Judges are not immune from the huge chasm that exists between our asserted commitment to equal justice and the pervasive and continuing harsh reality of our economic exclusion. They're responsible for it.

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career representing the nation's most economically and politically powerful, Roberts' "neutrality" is apparently unmoved by the exclusion of millions from the effective operation of the civil justice system.