COMMENT

ESTABLISHING RIGHTS WITHOUT REMEDIES?
ACHIEVING AN EFFECTIVE CIVIL GIDEON
BY AVOIDING A CIVIL STRICKLAND

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INTRODUCTION ......................................................................................893
I. AVENUES FOR ESTABLISHING A CIVIL GIDEON ...............................898
   A. Judicial Strategies .................................................................898
      1. Federal Due Process Claims .......................................899
      2. Federal Equal Protection Claims ............................903
      3. State Constitutional Claims ....................................906
   B. Legislative Strategies ............................................................908
II. EVALUATING THE GOAL IN LIGHT OF GIDEON’S FLAWS ..........911
III. FOUNDATIONS FOR CIVIL INEFFECTIVENESS
    OF COUNSEL CLAIMS ...................................................................916
IV. ALTERNATIVES TO STRICKLAND FOR A
    CIVIL RIGHT TO COUNSEL ...........................................................919
   A. Principles and Policy Goals ............................................919
   B. The Fundamental-Fairness Approach ..........................921
   C. Pre- and Post-Strickland Alternatives
      in the Criminal Context .......................................................922
CONCLUSION ..........................................................................................926

INTRODUCTION

Social justice captivated the national political discourse in the first
year and a half of the Obama Administration as the country focused on

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the issue of access to health care for the millions of Americans who cannot afford health insurance. The passage of major health care reform legislation raises the following questions: What other social justice initiatives may be on the horizon? Might the country turn its attention to access to justice for indigent litigants in the civil justice system?

In August 2006, the American Bar Association (ABA) House of Delegates passed Resolution 112A, encouraging legislatures to “provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake.” This proposal embodies the “Civil Gideon” movement, which endeavors to achieve a right to appointed counsel for indigent litigants in the civil context, similar to the Sixth Amendment right in criminal matters the Supreme Court articulated in *Gideon v. Wainwright*. Calls to expand the right to appointed legal counsel stem from the many legal needs left systemically unmet and the current legal aid system’s inability to satisfy indigent litigants’ demands for legal assistance. Many people proceed without representation in civil cases, putting themselves at a significant disadvantage when pitted against sophisticated opposing counsel who are experienced in our adversarial system of justice. Adverse outcomes are significantly more likely for unrepresented litigants.

Disparate outcomes for unrepresented litigants resulting from their lack of counsel present a fundamental challenge to a justice system founded on the principle emblazoned on the Supreme Court’s marble portico: “Equal Justice Under Law.” In response to ABA Resolution 112A, numerous state and local bar associations passed similar resolutions and established task forces with the goal of expanding the right to

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4 See *LEGAL SERVS. CORP., supra* note 3, at 12 (reporting that legal aid programs turn away one potential client for every client that their resources enable them to represent).

5 See generally Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed, 37 FORDHAM URB. L.J. 37, 46-66 (2010)* (surveying studies finding that lack of counsel is a significant variable affecting outcomes in housing, family, small-claims, and administrative agency actions).
counsel in certain civil matters. Notable among these state efforts, the California legislature—even in the face of the state’s fiscal woes—recently passed the Sargent Shriver Civil Counsel Act, which funds pilot programs through which lawyers “shall be appointed to represent low-income parties in civil matters involving critical issues affecting basic human needs.” Following on the heels of California, the American Bar Association adopted the ABA Model Access Act, intended to “assist interested legislators” to “establish[] a statutory right to counsel in those basic areas of human need identified in the 2006 Resolution and . . . provid[e] a mechanism for implementing that right.”

Despite the Civil Gideon movement’s progress, setting Gideon as the movement’s goal may not be ideal. Many commentators and practitioners lament that Gideon has not fulfilled its promise of providing competent counsel to indigent criminal defendants. One oft-cited failure is that representation by the defendant’s appointed counsel is still completely inadequate, in part because of the high threshold to find counsel ineffective on appellate review. Conscience-shocking examples abound:

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7 See Jennifer Steinhauer, New Year but No Relief for Strapped States, N.Y. TIMES, Jan. 6, 2010, at A15 (reporting on California’s projected budget deficit of twenty billion dollars).

8 CAL. GOV’T CODE § 68651(a) (West Supp. 2010).


10 See, e.g., Richard Klein, The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, 13 HASTINGS CONST. L.Q. 625, 627 (1986) (detailing how the “severity of the underfunding of those agencies providing defense counsel to the indigent seriously endangers the sixth amendment guarantee to effective assistance of counsel”).


12 See, e.g., David Cole, Gideon v. Wainwright and Strickland v. Washington: Broken Promises (“By accepting a patently unacceptable status quo as the constitutional baseline for ‘effective’ lawyering, the Court in Strickland practically guaranteed that indigent defendants would obtain effective assistance only through luck, not through a state-guaranteed right.”), in CRIMINAL PROCEDURE STORIES 101, 104 (Carol S. Steiker ed., 2006).
Courts have declined to find ineffective assistance where defense counsel slept during portions of the trial, where counsel used heroin and cocaine throughout the trial, . . . where counsel stated prior to trial that he was not prepared on the law or facts of the case, and where counsel appointed in a capital case could not name a single Supreme Court decision on the death penalty.

Critics argue that the low standard for effectiveness of counsel, which the Supreme Court established in Strickland v. Washington, not only vitiates the Sixth Amendment right to effective assistance of counsel for many criminal defendants, but also provides less incentive for states to fund indigent defense services adequately. This compounds the problem of inadequate representation by overburdening the public defender system.

Based on the experience under Gideon, legislative efforts to expand the right to appointed counsel in certain categories of civil cases may not be sufficient to guarantee indigent litigants the right to effective assistance. This Comment evaluates the standards that appellate courts might use to judge ineffective assistance of counsel in the civil context in light of current efforts to expand representation in civil cases. The bulk of Civil Gideon scholarship focuses on how a right to appointed counsel like that announced in Gideon may be achieved in the civil context without addressing whether Gideon is a desirable goal. Laura K. Abel, Deputy Director of the Justice Program at the Brennan Center for Justice, provides a rare exception to this general trend in an article listing the lessons that the Civil Gideon movement
can learn from *Gideon* itself. This Comment evaluates and expands on a footnote in Deputy Director Abel’s article identifying trends in Supreme Court jurisprudence in the criminal context that may signal an opportunity to consider alternatives to the difficulties the *Strickland* standard presents. Existing literature addressing ineffective assistance of counsel in the civil context specifically singles out the class of civil cases where states most commonly appoint counsel to indigent litigants: parental rights terminations. This Comment adds to such literature by examining alternative approaches to the establishment of a civil right to counsel in light of the broader Civil *Gideon* movement and recent developments in Supreme Court jurisprudence.

This Comment is divided into four Parts. In order to assess the standards for ineffective assistance of counsel, it is first important to understand the most likely ways to achieve a Civil *Gideon*. Therefore, Part I provides background on Civil *Gideon* efforts and concludes that legislation, as opposed to litigation, is the most likely avenue for achieving a meaningful civil right to counsel. Part II examines a potential pitfall for the Civil *Gideon* movement in light of the havoc that the *Strickland* standard has wreaked on the right established by *Gideon*. Part III assesses the foundations for recognizing a claim of ineffective assistance of counsel for civil litigants against counsel appointed through Civil *Gideon* statutes. Finally, Part IV evaluates potential standards for ineffective assistance of counsel, concluding that appellate courts ought to

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18 See Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 Temp. Pol. & Civ. RTS. L. Rev. 527, 530 (2006) (“It is imperative that any exploration of the scope of a civil right to counsel be based on an understanding of the experience with the criminal right to counsel. This article attempts to draw some useful lessons from that experience.”).

19 See id. at 547 n.176.

adopt a professional-guidelines-based approach that subjects an attorney’s performance to stricter review than \textit{Strickland}.

\section*{I. AVENUES FOR ESTABLISHING A CIVIL \textit{GIDEON}}

In his landmark opinion in \textit{Gideon}, Justice Black concluded that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems . . . to be an obvious truth.”\footnote{Gideon v. Wainwright, 372 U.S. 335, 344 (1963).} With these words, the Supreme Court overruled \textit{Betts v. Brady}, which held that the due process guarantees of the Fifth and Fourteenth Amendments did not necessarily require the state to provide attorneys to criminal defendants who could not afford them.\footnote{316 U.S. 455 (1942), overruled by \textit{Gideon}, 372 U.S. 335.} Three decades before \textit{Gideon}, the Court used “reason and reflection”\footnote{Id. at 471 (“[W]e are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case.”).} to arrive at a similar conclusion in the infamous Scottsboro trial, and such reasoning appears no less applicable in the civil context: “Even the intelligent and educated layman has small and sometimes no skill in the science of law.”\footnote{\textit{Gideon}, however, grounded the right to counsel in the Sixth Amendment, which specifically addresses “all criminal prosecutions.”} This Part examines judicial and legislative avenues for establishing a Civil \textit{Gideon} and concludes that, between these strategies, legislative efforts are the most likely avenue for progress toward a Civil \textit{Gideon}.

\subsection*{A. Judicial Strategies}

There are three possible judicial strategies for achieving a Civil \textit{Gideon}: federal due process claims, federal equal protection claims, and state constitutional claims. Although a Civil \textit{Gideon} would suggest

\footnote{Throughout this Comment, “stricter standard than \textit{Strickland}” refers to a standard that is stricter in scrutinizing the lawyers’ conduct by requiring that conduct to reach a higher threshold to be deemed effective, not a harder test for the claimant to meet.}
a right to appointed counsel in a broad array of civil cases, the cases discussed in this Section are primarily parental rights termination cases because the interest at stake is among the weightiest in the civil justice system, making such cases especially compelling for developing a right to appointed counsel in civil cases. These litigation efforts, however, face major hurdles that may prevent them from effectively establishing a Civil Gideon.

1. Federal Due Process Claims

The forcefulness with which the Gideon Court identified the right to counsel as a “fundamental right,” applicable to the states under the Fourteenth Amendment, made the Due Process Clause a natural avenue by which to achieve a Civil Gideon. The Due Process Clauses of the Fifth and Fourteenth Amendments protect “liberty” interests with two separate guarantees—“procedural due process” and “substantive due process”—both of which may be implicated in civil cases with indigent litigants. When “governmental decisions . . . deprive individuals of ‘liberty’ or ‘property’ interests,” procedural due process places limitations on the process the government may use in order to ensure individuals have the “opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” The argument that indigent defendants are denied due process of law when they forfeit important rights in civil cases as a consequence of the absence of counsel fits well within the language of procedural due process. Substantive due process, which inquires into whether the government has sufficient justification to take away an individual’s “fundamental rights,” may also be implicated. For example, the Court has recognized that a parent’s “care, custody, and management of his or her children” is a fundamental right for the

28 See Steven D. Schwinn, The Right to Counsel on Appeal: Civil Douglas, 15 TEMP. POL. & CIV. RTS. L. REV. 603, 606 (2006) (“Because of the weight of the interest, parental rights and cases seeking to terminate parental rights have been the primary focus of Civil Gideon litigation.”).
29 See Gideon, 372 U.S. at 342-43 (“We think the Court in Betts was wrong . . . in concluding that the Sixth Amendment’s guarantee of counsel is not one of these fundamental rights. Ten years before Betts v. Brady, this Court . . . had unequivocally declared that ‘the right to the aid of counsel is of this fundamental character.’” (quoting Powell, 287 U.S. at 68)).
30 See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 545 (3d ed. 2006).
purposes of the Due Process Clause. The Court, however, largely precluded due process as a means of achieving a Civil Gideon in Lassiter v. Department of Social Services, a parental rights termination appeal.

Civil Gideon’s fate under the federal Due Process Clause could not have hinged on a less sympathetic case. In a prior proceeding, Abby Gail Lassiter lost custody of her infant child to the Durham County Department of Social Services for failing to provide proper medical care after her mother complained that Lassiter left the children “with her for days without providing money or food while she was gone.”

Between the time of that adjudication and when the state terminated Lassiter’s parental rights, Lassiter was convicted of and imprisoned for second-degree murder after using a butcher knife to repeatedly stab her victim. In the two years since the state took custody, Lassiter had not been in contact with the Department of Social Services and had not seen her child, “except for one prearranged visit and a chance meeting on the street.”

On appeal, the Supreme Court denied Lassiter’s claim that the “Due Process Clause of the Fourteenth Amendment entitled her to the assistance of counsel.” Instead, the Court established a case-by-case determination for when due process requires appointment of counsel based on the three factors identified in Mathews v. Eldridge, the seminal case establishing the test to determine what process is required under the Due Process Clause. The three factors are “the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.” The Court, however, subjected the application of the Mathews factors in this context to a presumption—drawn from post-Gideon cases that had limited Gideon’s ambitious scope—that an indigent litigant has a right to appointed counsel only

33 See 452 U.S. at 31 (holding that due process does not require “the appointment of counsel in every parental termination proceeding”).
34 See, e.g., Michael Millemann, The State Due Process Justification for a Right to Counsel in Some Civil Cases, 15 TEMPLE POL. & CIV. RTS. L. REV. 733, 739 (2006) (“Lassiter’s facts, at least the facts that the Court emphasized in its opinion, made it a bad test case.”).
35 Lassiter, 452 U.S. at 20, 23.
36 Id. at 20 n.1.
37 Id. at 22 (internal quotation marks omitted).
38 See id. at 24, 33 (concluding that the trial court did not err by failing to appoint Lassiter counsel).
40 Lassiter, 452 U.S. at 27 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
when, if he loses, he may be deprived of his physical liberty." An indigent civil litigant who wishes to claim a due process right to appointed counsel must not only demonstrate a favorable balance under the Mathews factors, but a balance sufficiently weighty to overcome this presumption. By setting the bar so high for indigent civil litigants to be appointed counsel under the Due Process Clause, the Court not only instituted the type of case-by-case judgments found to be deficient in the criminal context by Gideon but also ensured that very few civil litigants could meet the standard for constitutionally required appointment of counsel.

There are many convincing arguments that Lassiter should be overruled. Just as the Court eventually overruled Betts after twenty-one years, the time for the Court to overrule Lassiter is overdue because the factors which led the Court to overrule Betts now exist with respect to Lassiter, including “widespread academic condemnation” and the impracticalities of case-by-case determinations. Among the academic critics, Laura Abel identifies those who argue that Lassiter undermines the judicial system’s legitimacy, those who challenge the particular balance struck between the Mathews factors by the Lassiter Court, and those who point out “that the United States is anomalous in failing to guarantee a right to counsel in important civil cases.”

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41 Id. at 26-27. For post-Gideon decisions limiting the scope of the Sixth Amendment right to counsel in criminal cases, see Scott v. Illinois, 440 U.S. 367, 373-74 (1979), which limited the right to appointed counsel to cases where the defendant is “sentenced to a term of imprisonment,” and Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973), which rejected a per se right to counsel at probation revocation hearings.

42 See Lassiter, 452 U.S. at 31 (“The dispositive question . . . is whether the three Eldridge factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption . . . .”).

43 Abel, supra note 18, at 531-32.

44 Id. (“[W]here crucial interests are at issue, legal standards are imprecise and subjective, proceedings are formal and adversarial, and resources between the parties are grossly imbalanced,” undermining “the legitimacy of the justice system.” (quoting Deborah L. Rhode, Access to Justice, 69 FORDHAM L. REV. 1785, 1799 (2001))).

45 Id. at 532 (attributing to Judge Sweet the broad proposition that the third factor dictates appointment “‘whenever in forma pauperis status exists. . . . As every trial judge knows, the task of determining the correct legal outcome is rendered almost impossible without effective counsel.’” (footnote omitted) (quoting Robert W. Sweet, Civil Gideon and Confidence in a Just Society, 17 YALE L. & POL’Y REV. 503, 505 (1998))).

46 Id. (citing Paul Marvy & Debra Gardner, A Civil Right to Counsel for the Poor, HUM. RTS., Summer 2005, at 8, 8; see also 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. FOR SOC. JUST. 201, 202 (2003) (“The European Court [of Human Rights] reached the opposite conclusion [to Lassiter], holding the
While the recognition of foreign and international law in recent Supreme Court opinions may suggest a willingness by the Court to recognize the arguments of these latter critics, two factors will likely frustrate any effort to mount a direct assault on Lassiter. First, just as Lassiter came well after the high-water mark of progressive judicial opinions to which Gideon belonged, the continued conservative shift within the judiciary makes it unlikely that a majority of the Court will look favorably on a ruling that would impose significant new duties and costs on states. Second, in the absence of a Civil Gideon, legal reformers have developed other mechanisms for aiding pro se litigants that may complicate a clear balancing of the third Mathews factor, “the risk of an erroneous deprivation.” For example, pro se litigants may have access to help centers, information tables, pro se clinics, “lawyer-of-the-day” programs, assistance hotlines, informational websites and booklets provided by the court, legal aid systems, pro bono attorneys, or law school clinics. Furthermore, in an effort to aid pro se litigants, the Model Rules of Professional Conduct—and the legal ethics rules in many states based on those Rules—were amended in 2002 to allow for “limited scope” or “unbundled” representation as an alternative to costly full representation. To the extent that these measures

47 See, e.g., Roper v. Simmons, 543 U.S. 551, 575-78 (2005) (highlighting foreign and international law against the execution of juveniles as inconsistent with U.S. law); Lawrence v. Texas, 539 U.S. 558, 576-77 (2003) (citing with approval cases from the European Court of Human Rights that recognized sexual autonomy “as an integral part of human freedom in many other countries”); Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002) (citing an amicus brief from the European Union to support the proposition that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”); see also Raven Lidman, Civil Gideon: A Human Right Elsewhere in the World, 40 CLEARINGHOUSE REV. 288, 289 (2006) (citing Roper, Lawrence, and Atkins to argue that “a frontal challenge to Lassiter may be reasonable at this time”).


49 See Russell Engler, And Justice For All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks, 67 FORDHAM L. REV. 1987, 1999-2006 (1999) (describing the limited-assistance programs provided to pro se litigants by sources inside and outside of the courthouse).

in fact diminish the risk of erroneous deprivations, federal courts may find that, where such measures are available, court decisions not to provide indigent civil litigants with counsel more easily satisfy the Mathews balancing test. At the very least, federal courts may be reluctant to issue a broad right-to-counsel ruling that would stifle state experimentation before evaluating the effectiveness of such a measure.

2. Federal Equal Protection Claims

Another federal litigation option available to the Civil Gideon movement is to mount an equal protection end run around Lassiter. Traditionally, the Equal Protection Clause operates by subjecting a law to heightened scrutiny when it discriminates between members of a suspect class. If a suspect class is not involved, the law is given a virtual green light under rational basis review, compared to the virtual red light a law would receive should a court subject it to strict scrutiny. The traditional approach, however, is not a promising avenue by which to achieve a Civil Gideon because the Supreme Court does not recognize wealth as a suspect classification, and therefore courts require that classification to be only rationally related to a legitimate governmental purpose.

The Court’s denial of suspect classification status to wealth, however, does not completely foreclose an equal protection litigation strategy. The “fundamental interest branch of equal protection law” provides a much more promising avenue for achieving a Civil Gideon because it

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51 Focusing on the second Mathews factor, Michael Millemann argues that, to the extent that limited-scope representation reduces the costs of providing representation, it would “thereby reduce the State’s disinterest in providing counsel. In the Mathews balance of interests, this could help to tip the balance in favor of a right to counsel.” Millemann, supra note 34, at 738. But because the Lassiter Court characterized states’ fiscal interests in avoiding the costs associated with providing counsel as “relatively weak” to begin with, limited-scope representation would likely have a larger negative impact under the third Mathews factor—risk of erroneous deprivation—than it would have a positive effect under the second factor. See Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 31 (1981) (“[T]he State . . . has a relatively weak pecuniary interest . . . .”).

52 See CHEMERINSKY, supra note 30, at 669-70.

53 See id. at 671-72.

54 See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) (“[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . . .”).

focuses on equal access to opportunities provided by the government. Although “undertheorized and poorly understood,” this prong of equal protection jurisprudence applies a “presumption of unconstitutionality . . . where a liberty concern meets an equality concern, even if neither the interference nor the inequality standing alone would be enough to create such a presumption."

Notably, equal-access-to-justice victories have already been achieved under the fundamental interest prong. In M.L.B. v. S.L.J., the Court held that a state requiring litigants to procure a trial transcript as a prerequisite to appeal must provide trial transcripts to indigent parents when they appeal adverse judgments in parental rights terminations. The Court recognized that in access-to-justice cases like M.L.B., “[d]ue process and equal protection principles converge.” A state need not provide indigent parents the opportunity to appeal because there is no due process right to a civil appeal. However, a state providing for appeals must ensure equal access to the appellate process, regardless of ability to pay, where the “character and intensity of the individual interest at stake” are strong, as in parental rights terminations. Applying the logic of the M.L.B. decision in the Civil Gideon context, it could be argued that because the government allows individuals to have counsel in civil cases, and especially because the state affirmatively grants a monopoly to lawyers in providing legal services, the state must make reasonable efforts to ensure that access to

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56 See id. at 1413-14 (discussing the notion that certain government programs, if established, must be “equally available” to all).
57 Id. at 1415; see also Nelson Tebbe, Deborah Widiss & Shannon Gilreath, Debate, The Argument for Same-Sex Marriage, 159 U. PA. L. REV. PENNUMBRA 21, 25 (2010), http://www.pennumbra.com/debates/pdfs/Marriage.pdf (Tebbe & Widiss, Opening Statement) (“Equal access . . . recognizes a harm may exist even if the relevant conduct is not protected by due process and even if the exclusion is not based on a suspect classification.”). Tebbe and Widiss use voting rights cases as an example of a fundamental interest argument. Tebbe & Widiss, supra note 55, at 1417-19. Even though the “Constitution is not commonly thought to guarantee a right to vote in presidential or state elections,” and wealth classifications do not usually trigger strict scrutiny, the Court invalidated poll taxes as unconstitutional because restrictions on voting implicate a fundamental interest. See id. at 1417-19 (citing Harper v. Va. Bd. of Elections, 383 U.S. 663, 667-68 (1966)).
59 Id. at 120 (alteration in original) (quoting Bearden v. Georgia, 461 U.S. 660, 665 (1983)).
60 Id.
establishing rights without remedies?

the services of this professional monopoly is available on an equal basis, at least where an individual’s fundamental rights or fundamental interests are at stake in the litigation.\(^6\)

Although the equal access argument appears to be the most promising federal litigation strategy for achieving a Civil Gideon, the Supreme Court recently denied certiorari in a case that squarely addressed the issue.\(^6\) Rhine v. Deaton involved a Texas parental rights termination suit brought against an infant’s biological mother by his temporary foster parents, distinguishing it from the state-initiated parental rights termination in Lassiter.\(^6\) Texas gives parents a statutory right to appointed counsel in which the state initiates a parental rights termination.\(^6\) At issue in the case was whether Texas violated the Equal Protection Clause by granting indigent parents appointed counsel in state-initiated proceedings while denying the same right to indigent parents in private termination suits.\(^6\) Access to appellate courts was also at issue in the case because the mother was unable to pay $405 for the trial transcript, and therefore the appellate court could not review most of the issues she raised.\(^6\) Even though the state

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\(^6\) One commentator argues that equal protection claims may serve as a basis for achieving a Civil Gideon by first establishing a right to appointed counsel in civil appeals, a “Civil Douglas” (named after Douglas v. California, 372 U.S. 355, 357 (1965), which recognized a right to counsel on the first appeal from a criminal conviction). See Schwinn, supra note 28, at 604 (“Just as Douglas foreshadowed the categorical right to counsel at trial in Gideon forty-three years ago, Civil Douglas would certainly foreshadow the categorical civil right to counsel, Civil Gideon.” (footnote omitted)). Schwinn concludes that the equal protection analysis used in the line of decisions culminating in M.L.B. is a promising avenue for establishing a Civil Douglas, and ultimately a Civil Gideon, because the inquiry focuses on the “priority of equality in process.” Id. at 609. This focus is in contrast to emphasizing the “underlying interests at issue,” which is the focus of the Lassiter presumption currently inhibiting a due process route to Civil Gideon. Id.


\(^6\) See Mary Alice Robbins, Cert Sought over Right to Counsel in Parental-Rights Termination Case, TEX. LAW., July 13, 2009, at 5, 5 (describing the history of the privately initiated termination suit in which certiorari was sought).


\(^6\) See Robbins, supra note 63, at 5 (stating that the Court had the option to appoint counsel in private suits, but was not required to do so as it was under section 107.013 in state-initiated proceedings).

\(^6\) In re Interest of J.C., 250 S.W.3d 486, 489 (Tex. App. 2008) (“We cannot review Tracy’s first three issues in the absence of a reporter’s record.”). Although the court recognized an indigent litigant’s right to a transcript, as the Supreme Court held in
appellate court lacked a trial record from which to weigh the Mathews factors under Lassiter, it denied her claim to appointed counsel. In a rare move, the Court invited the Texas Solicitor General to file a brief on behalf of the state addressing whether the Court should take up the case; Texas’s brief recommended that the Court deny certiorari. If Texas’s brief in Rhine is an indication of state government opposition to a broad-based ruling in favor of the right to counsel on equal protection grounds, then it is possible that an equal protection litigation strategy may hurt the Civil Gideon cause. If states cannot distinguish between litigants when deciding who will receive a statutory right to appointed counsel, state legislatures may respond to an equal protection ruling by repealing existing statutory rights or reconsidering the expansion of the right to counsel in other contexts.

3. State Constitutional Claims

The barriers to a federal litigation strategy suggest that litigation of right-to-counsel issues may fare better in state courts than federal courts because state courts are free to interpret state constitutions to provide greater protection than the federal Constitution. In Lassiter, the Court recognized that states might reach different conclusions on the propriety of providing attorneys to indigent defendants in civil cases. State appellate court decisions have produced some limited success in expanding the right to counsel in parental rights termination cases. Some state courts reject Lassiter on state procedural due process grounds and extend the right to appointed counsel to private

M.L.B., the issue was not raised on appeal. See id. at 488 n.3 (noting that the mother did not appeal the trial court’s order requiring her to pay for the reporter’s record).

See id. at 489 (“Because Tracy’s parental rights were terminated pursuant to a private termination suit, she possessed no mandatory statutory right to appointed counsel . . . .”).

See Brief for the State of Texas as Amicus Curiae at 5, Rhine v. Deaton, 130 S. Ct. 1281 (2010) (No. 08-1596) (explaining that there is no justification for creating an exception to allow the petition to raise federal claims that were not decided in state court, and that the claims are insubstantial).

See Schwinn, supra note 28, at 608 n.37 (“If states are concerned about the disparity in statutory right-to-counsel under different statutory schemes of the same general type (e.g., schemes terminating parental rights), they may simply revoke the statutory right to counsel in all statutory schemes of that type to avoid the disparate treatment and equal protection problems.”).

See Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 34 (1981) (“The Court’s opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.”).
termination proceedings. 71 Several state courts have reached the same result on state equal protection grounds. 72 Based on these successes, one optimistic commentator concluded that “it should be reasonably possible to substantially expand the right to counsel in civil cases through litigation in state courts based on the due process provisions of state constitutions.”

Beyond parental rights termination proceedings, however, state appellate courts have been reluctant to recognize a right to appointed counsel on constitutional grounds. In a recent case before the Alaska Supreme Court—for which the ABA submitted an amicus brief 74—the court refused to take up the issue of whether an indigent mother was entitled to an attorney in a custody proceeding in which the other party was represented by a private attorney. 75 Despite prior progressive court opinions expanding the right to counsel in custody proceedings where the opposing party was represented by a public agency, 76 the Alaska Supreme Court dismissed the case after focusing on unrelated mootness grounds. 77 In contrast, the Washington Supreme Court addressed the right-to-counsel issue head on, holding that due process did not require the trial court to appoint counsel to a wife in a divorce proceeding in which the lower court granted primary residential care of the child to the husband. 78 Prior to that decision, a Washington

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71 See Millemann, supra note 34, at 748-56 (recounting right-to-counsel decisions based upon state constitutional grounds in Alaska, California, Florida, and Kansas); Schwinn, supra note 28, at 607 n.35 (noting state appellate decisions recognizing a right to counsel in private terminations in Alaska, California, Maine, and Montana).

72 See Millemann, supra note 34, at 736 n.21 (listing several state court decisions finding a right to counsel based on equal protection in adoption cases, including cases from Illinois, Iowa, North Dakota, and Oregon).

73 Id. at 765.

74 See Brief of the American Bar Association as Amicus Curiae in Support of Appellee Siv Jonsson at 1, Office of Pub. Advocacy v. Alaska Court Sys., No. S-12999 (Alaska Nov. 19, 2008), 2008 WL 5585565, at *1 (stating the ABA’s support for the appointment of counsel in civil cases, where basic human needs are at stake).


76 See Flores v. Flores, 598 P.2d 893, 895, 896 n.12 (Alaska 1979) (holding that due process required courts to appoint counsel in “cases involving child custody where an indigent party’s opponent is represented by counsel provided by a public agency”).

77 See Alaska Supreme Court Declines to Rule on Right to Counsel, supra note 75.

78 See King v. King, 174 P.3d 659, 661-63 (Wash. 2007) (“The interest at stake here is not commensurate with the fundamental parental liberty interest at stake in a termination or dependency proceeding.”).
appellate court “reversed orders modifying a parenting plan and holding the pro se mother in contempt, but declined to order appointment of counsel in the custody modification proceedings.” 79 Similarly, the high courts in Maryland and Wisconsin declined to address right-to-counsel issues in custody cases. 80 Although the Washington Supreme Court decision is the only decision discussed above that squarely denied a right-to-counsel claim on state constitutional grounds, the tendency of other courts to avoid the issue on justiciability grounds suggests a reluctance within state judiciaries to expand the right to appointed counsel.

B. Legislative Strategies

Legislative strategies for achieving a Civil Gideon appear better positioned than judicial strategies because of the volume of statutes providing for appointed counsel and the current state and local efforts to expand the civil right to counsel—inspired by ABA Resolution 112A. When the Court decided Lassiter, thirty-three states and the District of Columbia already had statutes requiring counsel in parental rights termination cases. 81 Laura Abel and Max Rettig’s article compiles a thorough list of statutes currently on the books, finding that “[o]ver the past few decades, states have passed hundreds of laws . . . guaranteeing the right to counsel in a wide variety of civil cases.” 82 Of the family law matters where Abel and Rettig identify right-to-counsel statutes, the most common statutory grants of counsel are for children involved in dependency proceedings, 83 parents defending against state-initiated parental rights termination proceedings, and parents in dependency proceedings. 84 Although rare, Abel and Rettig also identify states that


80 See Frase v. Barnhart, 840 A.2d 114, 115 (Md. 2003) (finding a mother’s right-to-counsel claim in a custody case moot); Engler, supra note 79, at 702 (citing Kelly v. Circuit Court, No. 04-2999 (Wis. Apr. 6, 2005) (declining to reach the Civil Gideon issue in denying the petition for original jurisdiction of a declaratory judgment action)).


83 See id. (“Federal law requires states receiving federal child abuse prevention and treatment funding to appoint a representative for children involved in abuse or neglect proceedings.”).

84 See id. at 246 n.6 (citing ASTRA OUTLEY, PEW COMM’N ON CHILDREN IN FOSTER CARE, REPRESENTATION FOR CHILDREN AND PARENTS IN DEPENDENCY PROCEEDINGS 7 (2003), available at http://www.pewfostercare.org/research/docs/Representation.pdf)
grant a right to counsel in domestic violence proceedings, divorces and annulments, private termination proceedings, paternity proceedings, proceedings regarding visitation or permanency for children in foster care, and child custody, support, and visitation proceedings. In addition to family matters, most states have statutes granting a right to appointed counsel in involuntary civil commitment cases, and a few states have statutes addressing particular medical treatments, such as judicial bypass proceedings for minors seeking abortions.

The scope of current efforts drawing inspiration from ABA Resolution 112A is not limited to the three most common categories of current state right-to-counsel statutes that Abel and Rettig identify. Favoring an “incremental approach” to expanding the right to appointed counsel in cases where “basic human needs are at stake,” the ABA defines “basic human needs” cases as involving either shelter (e.g., eviction proceedings), sustenance (e.g., “denials of or termination of government payments or benefits”), safety (e.g., “proceedings to obtain or enforce restraining orders”), health (e.g., claims to Medicare, Medicaid, or private insurance for “access to appropriate health care for treatment of significant health problems”), or child custody. Numerous state and local bar associations are following the ABA’s lead, establishing committees and task forces to recommend ways to expand the right to counsel in their jurisdictions. Notable among these efforts is a report issued by the Boston Bar Association Task Force on Expanding the Civil Right to Counsel, which recommends that the legislature fund pilot programs to establish rights to counsel for civil cases that are quasi-criminal (such as immigration and juvenile

(“Six states require that counsel be appointed for indigent parents in all dependency proceedings, thirty-nine require that counsel be provided for indigent parents in at least some dependency proceedings, three require that counsel be provided for indigent parents in termination-of-parental-rights cases only, and three do not have statutes ‘explicitly’ providing for the appointment of counsel for parents in any dependency or termination-of-parental-rights cases.”).
cases in which litigants risk being deprived of their physical liberty), as well as family and housing cases.  

Funding is the most significant obstacle facing these legislative efforts, but it is not an insurmountable challenge. A recent Texas study estimates that legal aid services produce “$457.6 million in spending, $219.7 million in output (gross product), and 3,171 jobs,” in addition to generating “approximately $30.5 million in yearly fiscal revenues to State and local governmental entities, which is well above their approximately $4.8 million in contributions.”

Civil Gideon legislation efforts may have economic and societal benefits because they “(1) reduce the need for safety-net programs, rearrests of juvenile offenders, the time children spend in foster care, and the incidence of domestic violence; (2) improve clients’ health; and (3) bring federal funding into a state.”  

Legislators’ awareness of the larger social benefits and cost-saving potential of Civil Gideon legislation has already positively influenced the debates over the right to counsel in several state legislatures.

The most significant piece of legislation passed as a result of these efforts is California’s Sargent Shriver Civil Counsel Act, which finances pilot programs proposed by legal aid organizations by increasing court fees for prevailing parties by ten dollars. The Act directs the pilot programs to provide counsel to indigent litigants in selected courts “in civil matters involving housing-related matters, domestic-violence and civil harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, or actions by a parent to obtain sole legal or


92 Laura K. Abel & Susan Vignola, Economic and Other Benefits Associated with the Provision of Civil Legal Aid, 9 SEATTLE J. FOR SOC. JUST. 139, 155 (2011).

93 See id. at 158 (“Legislators in Arkansas, Montana, and Texas were motivated to expand the right to counsel in child welfare cases by evidence that providing parents with counsel would reduce the days that children spend in expensive foster care.”); cf. William Glaberson, Judge’s Budget Will Seek Big Expansion of Legal Aid to the Poor in Civil Cases, N.Y. TIMES (N.Y. ed.), Nov. 29, 2010, at A21 (reporting that a task force created by New York’s chief judge “makes a detailed argument that providing more lawyers for people with low incomes would be cost-efficient for the state”).

Establishing Rights Without Remedies? 911

physical custody of a child.”

The Act also directs the judiciary to conduct studies to determine the effectiveness of the pilot programs, the results of which are sure to “be closely watched by access-to-justice advocates across the country.” If California’s progress is any indication of the Civil Gideon movement’s trajectory, the most likely avenue for expanding the right to counsel is through legislative strategies.

II. EVALUATING THE GOAL IN LIGHT OF GIDEON’S FLAWS

Although the right to appointed counsel is likely to expand as the Civil Gideon movement’s legislative strategy gains momentum, the lessons learned from nearly five decades of experimentation in indigent criminal defense leaves some open questions: What is the nature of the right the Civil Gideon movement intends to give indigent civil litigants? What should be the remedy when that right is violated? In the criminal context, courts afford indigent defendants who are appointed attorneys a claim of ineffective assistance as recourse when they have been deprived of their Sixth Amendment right to counsel. An examination of current statutory rights in the civil context reveals that many courts in parental rights termination cases adopt essentially the same standard for effectiveness of counsel used in criminal cases, “often without analysis of its applicability in a non-criminal context.” This Part analyzes the standard the Supreme Court developed in the criminal context and concludes that its leniency in finding effective assistance of counsel may frustrate the benefits the Civil Gideon movement seeks.

Even before Gideon, the Supreme Court recognized that where a criminal defendant was entitled to appointed counsel, he also had a right to effective assistance of counsel. In the trial of nine young black men charged with the rape of two young white women while traveling on a freight train through Alabama, the trial court attempted to appoint the defendants’ counsel by “appoint[ing] the whole bar of Scottsboro (six men) to represent them. Only one attorney agreed to do so, and he did so only on the morning of trial.” The defendants, who had previously escaped a lynch mob when first arrested, were sen-

95 CAL. GOV’T CODE § 68651(b)(1) (West Supp. 2010).
96 Williams, supra note 94.
97 Calkins, supra note 20, at 212.
99 Cole, supra note 12, at 106.
tenced to death. The Supreme Court held not only that the defendants were entitled to appointed counsel under the Due Process Clause of the Fourteenth Amendment but that they had been deprived of this right—despite the trial court’s attempt to appoint counsel—because the “designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid.” Post-\textit{Gideon}, the Court echoed the concern about effectiveness of counsel in a line of cases addressing government interference with the ability of lawyers to mount effective defenses. Not until 1984 did the Court address the standard for “actual ineffectiveness,” noting that it occurs when counsel “[deprives] a defendant of the right to effective assistance, simply by failing to render ‘adequate legal assistance.’”

When the Court finally took up the issue, the facts of the case, like the unsympathetic facts in \textit{Lassiter}, made \textit{Strickland v. Washington} “probably the worst possible case to set forth the parameters for effective assistance of counsel.” Professor David Cole describes the disturbing history behind the case that would unfortunately establish the limits upon the Sixth Amendment right to appointed counsel in criminal cases:

On a two-week crime spree in September 1976, David Leroy Washington robbed and killed a minister because he was a homosexual; robbed and killed a woman in her home while her three elderly sisters-in-law watched while bound and gagged, and then shot all three of the sisters-in-law in the head; and kidnapped a man, stabbed him repeatedly, and eventually killed him.

Prior to defining a constitutional ineffective assistance of counsel standard, the Court noted that Washington appeared to be the source of many of his appointed attorney’s difficulties at the trial level—

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100 See \textit{id.} (“The defendants, taken off the train at Scottsboro, narrowly escaped a lynch mob, but were then promptly sentenced to death within a matter of days, as thousands stood outside the courthouse door and cheered.”).

101 \textit{Id.}

102 \textit{Powell}, 287 U.S. at 53.

103 See \textit{Strickland v. Washington}, 466 U.S. 668, 686 (1984) (“Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”).

104 \textit{Id.} (quoting \textit{Cuyler v. Sullivan}, 446 U.S. 335, 344 (1980)).


106 \textit{Cole, supra note 12, at 108.}
leading the attorney to experience a “sense of hopelessness about the case.” As a result of this “hopelessness,” the attorney did not make much of an effort in preparing evidence of mitigating circumstances for the sentencing phase of trial, at which Washington was sentenced to death. On appeal of his death sentence, however, Washington challenged the appointed trial counsel’s effectiveness, alleging several specific claims concerning his attorney’s preparation and performance at the sentencing phase of trial.

Addressing these issues, the Supreme Court established a two-prong test for evaluating ineffective assistance of counsel appeals, with the burden of proof for both elements resting on the defendant. First, the defendant must demonstrate “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” The standard for measuring this “performance” prong is “reasonableness under prevailing professional norms.” But the Court did not stop there; it also established a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Second, the Court established a “prejudice” prong, requiring the defendant to show “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” The Court acknowledged that the Strickland test is “highly deferential” in order to

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107 Strickland, 466 U.S. at 672. The Court noted that, despite his counsel’s advice, Washington confessed to the murders, waived his right to a jury trial, and pleaded guilty to all charges. Id.

108 See Cole, supra note 12, at 109-10 (characterizing Washington’s defense attorney’s explanations for failing to conduct presentencing investigation as “inconsistent”).

109 See Strickland, 466 U.S. at 675 (“[Washington] asserted that counsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner’s reports or cross-examine the medical experts.”).

110 See id. at 687 (“Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.”).

111 Id.

112 Id. at 688. The Court declined to adopt more specific performance guidelines, such as the ABA Criminal Justice Standards. See id. at 688-89 (stating that these are only “guides” for a reasonableness determination). Justice O’Connor, writing for the majority, concluded that such guidelines may be informative but would hamper the independent professional judgment of counsel and “distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause” if incorporated as standards for measuring effectiveness of counsel. Id. at 689.

113 Id. at 689.

114 Id. at 694.
prevent postconviction second-guessing in the interest of finality.\footnote{See id. at 689-90 (“The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.”).} With respect to the facts in \textit{Strickland}, the Court held that the attorney’s conduct was within the “range of professionally reasonable judgments,” and even if counsel had more effectively presented mitigating factors, the resulting sentence would have remained the same because of the overwhelming aggravating factors against Washington.\footnote{See id. at 699-700 (deciding against the defendant on both prongs).}

Scholarly criticism of the \textit{Strickland} standard has been scathing.\footnote{See Thomas, supra note 105, at 547 (“Scholars have concluded that the \textit{Strickland} approach is a cynical dead end, designed to affirm all but the most deeply flawed convictions.”).} Foremost among \textit{Strickland}’s critics, Professor Richard Klein notes that courts do not attach a similar “strong presumption” in favor of reasonable performance when reviewing the conduct of other professionals, such as physicians, surgeons, accountants, and architects.\footnote{See Klein, supra note 10, at 640-41 (comparing the \textit{Strickland} standard to ones used for other types of expert testimony).} Furthermore, the presumption makes little sense “[i]n light of the widespread acknowledgment of the existence of a crisis in the quality of representation provided to indigent defendants.”\footnote{Richard Klein, \textit{The Constitutionalization of Ineffective Assistance of Counsel}, 58 Md. L. Rev. 1433, 1432 (1999).} With respect to the “prejudice” prong, \textit{Strickland} also invites courts to engage in historical revisionist speculation, yet Professor Klein complains that it is often difficult to speculate as to the effect a competent attorney may have had on a case’s outcome.\footnote{See Klein, supra note 10, at 641 (“The absence of effective representation may well have had an effect on the entire proceeding that was so pervasive that it is not possible to accurately determine the degree of prejudice.”).} The difficulty is compounded when the record on appeal does “not reveal weaknesses in the prosecutor’s case because of counsel’s incompetence.”\footnote{Klein, supra note 119, at 1467.} In other words, an attorney’s incompetence may be the reason there is insufficient evidence on the record for an appellate court to spot incompetence in the first place. Thus, \textit{Strickland} establishes a Catch-22 for those who need the right to effective counsel the most: by considering the weight of the evidence against a defendant, the “prejudice” prong either allows courts to ignore an attorney’s egregious errors or prevents them from
realizing that such errors occurred.\textsuperscript{122} Finally, although the \textit{Strickland} Court was motivated by concerns of finality and efficiency, it has "created the worst of all possible outcomes": the standard "has proved virtually impossible to meet" but "[b]ecause the standard is fairly open-ended . . . it does little to forestall the filing of ineffectiveness claims."

Not only does the \textit{Strickland} standard create individual injustices for many defendants by effectively vitiating their Sixth Amendment right to counsel, but it also contributes to the main systemic failure of the \textit{Gideon} mandate: inadequate funding for indigent defense.\textsuperscript{124} Due in large part to \textit{Strickland}'s low bar for attorney competence, only 6 of 103 ineffectiveness claims succeeded in the California Supreme Court from January 1, 1989, to April 21, 1996, and the United States Court of Appeals for the Fifth Circuit upheld only 6 of 158 during the same time period.\textsuperscript{125} By "uncritically [accepting] the status quo as 'effective,' \textit{[Strickland]} creates no incentive for states to improve on existing standards of legal representation for the poor."\textsuperscript{126} If the bar for effective counsel were set higher, and claims of ineffective assistance of counsel consequently were upheld with greater frequency, states might respond by improving indigent defense to avoid the cost of reprosecuting cases.

The \textit{Strickland} standard also effectively precludes litigation challenging counsel competence based on objective factors surrounding the representation. In a companion case to \textit{Strickland}, United States \textit{v. Cronic}, the Court held that "only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel’s actual performance."\textsuperscript{127} The facts at hand, extrinsic to the appointed counsel’s actual performance—such as his youth, inexperience with jury trials or with the subject matter at hand, and that the government had prepared the

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\textsuperscript{122} See Klein, \textit{supra} note 10, at 645 (“When there have been the\textsuperscript{most} egregious failings by counsel is exactly when the record may indeed be barren of any indication of reasonable doubt. Yet, it is those very situations where courts now need not even proceed to attempt to discover the failings of counsel.”).

\textsuperscript{123} Cole, \textit{supra} note 12, at 114.

\textsuperscript{124} For criticisms of state indigent defense funding, see STANDING COMM. ON LEGAL AID & INDIGENT DEF., \textit{supra} note 11, at 7-9, which examines testimony about underfunded indigent defense services throughout the country. See also Stephen B. Bright, \textit{Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake}, 1997 ANN. SURV. AM. L. 783, 816-21 (“The most fundamental reason for the poor quality or absence of legal services for the poor in the criminal justice system is the refusal of governments to allocate sufficient funds for indigent defense programs.”).

\textsuperscript{125} Cole, \textit{supra} note 12, at 117.

\textsuperscript{126} \textit{Id.} at 114.

case for four-and-a-half years while the attorney was appointed twenty-
five days before trial—bore on the adequacy of his representation but
were not “circumstances that in themselves make it unlikely that res-
pondent received the effective assistance of counsel.” 128  Cronic “made
any systemic challenges to the adequacy of counsel under the Sixth
Amendment based on the inadequacy of funding and resources vir-
tually impossible, and effectively required case-by-case adjudication of
Sixth Amendment claims.” 129

III. FOUNDATIONS FOR CIVIL INEFFECTIVENESS OF COUNSEL CLAIMS

In light of the negative effects Strickland has had on the right to
appointed counsel for criminal defendants, the Civil Gideon movement
should consider how failures in the process will be remedied to ensure
that Civil Gideon will not become a hollow right.  Before identifying al-
ternative standards for ineffectiveness of counsel, however, this Part
explores the grounds for an ineffective assistance of counsel claim
against appointed counsel in civil cases.

Unlike the ineffectiveness claim brought in Strickland, claims in
the civil context will not be grounded in the Sixth Amendment.  Un-
der normal circumstances, where civil counsel is not appointed, a
malpractice suit is the only remedy available to a civil litigant who be-
lieves that a lawyer’s negligence resulted in an adverse judgment. 130
Although Federal Rule of Civil Procedure 60(b)—and its analogs in
state procedural rules—provide relief from judgment for “mistake, in-
advertence, surprise, or excusable neglect,” 131  these rules generally
apply only to cases in which defendants seek relief from default judg-
ments. 132  A civil attorney’s gross negligence is usually imputed to the
client based on agency law principles. 133  Imputing the attorney’s inef-

128 Id. at 648, 665-66.
129 Cole, supra note 12, at 116.
conduct falls substantially below what is reasonable under the circumstances, the
client’s remedy is against the attorney in a suit for malpractice.”).
132 See Jack H. Friedenthal et al., Civil Procedure 612 (4th ed. 2005) (“In
practice . . . the rule most frequently is invoked successfully in the default setting or
when the plaintiff’s suit was dismissed for failure to prosecute and judgment was en-
tered by mistake since the party fully intended actively to litigate the dispute.” (foot-
notes omitted)).
133 See Link, 370 U.S. at 634 (“[E]ach party is deemed bound by the acts of his lawyer-
agent and is considered to have ‘notice’ of all facts, notice of which can be charged
upon the attorney.” (quoting Smith v. Ayer, 101 U.S. 320, 326 (1879))).
fective representation to the client, however, does not seem appropriate when an indigent litigant did not freely select her attorney but rather was appointed one by the court.

If a Civil Gideon is achieved through litigation, at either the state or federal level, the right to effective assistance of counsel will likely follow from the Supreme Court’s current right-to-counsel jurisprudence. The Court has long recognized “that the right to counsel is the right to the effective assistance of counsel.”\(^\text{134}\) Currently, when the case-by-case balance of the Mathews factors under Lassiter compels a court to appoint counsel, “presumably there is a federal constitutional right to effective assistance of counsel.”\(^\text{135}\) Therefore, if courts granted the expansion in the Due Process Clause or the Equal Protection Clause, they will likely acknowledge the corollary right to effective counsel.

Achieving recognition of a right to effective assistance of counsel may be more difficult if Civil Gideon rights are formed through legislation. The argument could be made that because the statutory rights are not grounded in the Constitution—as they would be if judicially created—there is no right to effective assistance of counsel. The Supreme Court has denied the right to effective assistance of counsel in discretionary criminal appeals when there is no Sixth Amendment right to appointed counsel, even when the lower court used its discretion to appoint counsel.\(^\text{136}\) Similarly, “a series of inconsistent California appellate court decisions” in the 1980s and 1990s sometimes declined to recognize a parent’s right to effective assistance of counsel where counsel was appointed pursuant to statute.\(^\text{137}\)

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\(^\text{135}\) Calkins, supra note 20, at 196; see also Nicholson v. Williams, 203 F. Supp. 2d 153, 254-56 (E.D.N.Y. 2002) (holding that when mothers in dependency hearings are entitled to counsel according to Lassiter’s application of the Mathews factors, ineffective assistance of counsel violates their constitutional rights).

\(^\text{136}\) See Calkins, supra note 20, at 196 n.87 (“Because there is no constitutional right to counsel for a discretionary appeal, there is no right to effective assistance of counsel to prosecute a discretionary appeal.” (citation omitted) (citing Wainwright v. Torna, 455 U.S. 586, 587-88 (1982), and Ross v. Moffitt, 417 U.S. 600, 610 (1974))). Likewise, until Attorney General Holder vacated the decision, former Attorney General Mukasey’s decision in In re Compean held that “[b]ecause the Constitution does not confer a right to counsel . . . in [alien] removal proceedings, . . . there is no constitutional right to effective assistance of counsel in such proceedings.” 24 I. & N. Dec. 710, 726 (A.G. 2009), vacated, 25 I. & N. Dec. 1 (A.G. 2009).

\(^\text{137}\) See Patton, supra note 20, at 229-31 (“Although the California courts appear to have determined that there is no right to effective assistance of counsel for statutorily appointed attorneys, the legislature has recently provided that right: ‘All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel.’” (quoting CAL. WELF. & INST. CODE § 317.5(a) (West 2008))).
eventually amended the statute to require competent counsel. Notably, in *In re Arturo A.*, the court concluded that “it is reasonably well established that reversal based on ineffective assistance of counsel is not available when the right to counsel was only statutory.” The *In re Arturo A.* court, however, appears to be an exception among state courts when it comes to recognizing a right to effective assistance of counsel when a statute mandates appointed counsel. The majority position recognizes that a “statutory right is meaningless unless it is the effective assistance of counsel to which the [party] is entitled.”

Apart from statutory interpretation, there are due process grounds for recognizing ineffectiveness claims when counsel is appointed by statute. In *Nicholson v. Williams*, a class action upholding a preliminary injunction against a city child-services administration for its conduct in dependency cases, the United States District Court for the Eastern District of New York concluded that New York violated the Due Process Clause by providing mothers ineffective counsel in supposed compliance with a state statutory right to counsel. The court reasoned that when New York “undertake[s] the role of good samaritan in providing counsel to the needy, inducing their reliance and preventing others from assisting, the State and City must carry out the role they have assumed with propriety.” The court found that the provision of counsel for abused mothers was “largely a sham” because it cruelly supplies attorneys who can not, and do not, properly represent [them]. They do not investigate. They do not consult with their client. They are not available for consultation. Their very existence delays hearings and proper prompt resolution of cases in Family Court, resulting in unnecessary separation of mothers and children and in unnecessarily prolonging those separations. The result is a practice and policy by the State and City of New York violating the substantive and procedural constitutional rights of many abused mothers and their children.

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138 Id.
140 See Calkins, *infra* note 20, at 197 n.91 (listing state cases that recognize ineffectiveness claims for counsel appointed in accordance with state statutory provisions).
141 Id. at 197.
142 See 203 F. Supp. 2d 153, 165, 256-57 (E.D.N.Y. 2002) (“Offering counsel to a mother accused of neglect, and then hamstringing that counsel in such a way that the mother is likely to receive inadequate representation impairs the litigant’s Sixth Amendment right to effective counsel.”).
143 Id. at 257.
144 Id. at 253-54.
If the Civil *Gideon* movement wishes to avoid demoralizing experiences with statutory expansions of the right to appointed counsel like that discussed in *Nicholson*, it must establish grounds for litigants to challenge the effectiveness of counsel. Given California’s experience, it is best if the legislation granting a statutory right to counsel also provides that such counsel must be effective.¹⁴⁵

IV. ALTERNATIVES TO *STRICTLAND* FOR A CIVIL RIGHT TO COUNSEL

Unfortunately, most jurisdictions that provide appointed counsel in parental terminations either expressly adopt *Strickland* or impliedly follow it, with the predictable result that these “courts decline to find ineffectiveness.”¹⁴⁶ As the Civil *Gideon* movement begins achieving results, however, courts should reevaluate the propriety of applying a standard that is based on the Sixth Amendment and is intended for the criminal context. Procedural safeguards unique to the criminal context, and the criticism *Strickland* has received even in that context, make applying the *Strickland* standard inappropriate in the civil setting.¹⁴⁷ Chief among the criminal procedural safeguards absent in the civil setting is the high standard of proof—proof beyond a reasonable doubt, rather than by preponderance of the evidence. Additionally, in parental rights terminations, “[w]ith few exceptions . . . the parents are not judged by a jury; and there are often significant exceptions to the application of the rules of evidence.”¹⁴⁸

After articulating the principles and policy goals for a standard by which to evaluate the effectiveness of counsel, this Part evaluates several possible alternatives to the *Strickland* standard that may be better suited to the civil context.

A. Principles and Policy Goals

Two principal goals and two secondary goals inform the standard for ineffectiveness of counsel. The central question in *Strickland* is whether an indigent litigant’s appointed lawyer will effectively subject

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¹⁴⁵ For a discussion of another state that codifies effective assistance of counsel in its statutory grant of appointed counsel, see Calkins, supra note 20, at 198 n.97. “Minnesota’s statute provides for effective assistance of counsel in termination proceedings.” *Id.* “The child, parent, guardian or custodian has the right to effective assistance of counsel in connection with a proceeding in juvenile court.” *Id.* (citing MINN. STAT. ANN. § 260C.163(3)(a) (West 2003)).

¹⁴⁶ Calkins, supra note 20, at 214-15.

¹⁴⁷ See *id.* at 229 (“Termination proceedings, while formal, do not have all of the procedural safeguards of criminal proceedings.”).

¹⁴⁸ *Id.*
the opposition’s case or defense to the type of adversarial testing “that our system counts on to produce just results.”\textsuperscript{149} Put another way, the \textit{Strickland} Court’s main concern was the accuracy of outcomes. Independent of “just results,” however, is also the value of ensuring that outcomes “are obtained only through fundamentally fair procedures.”\textsuperscript{150}

In his article, Professor Klein notes that the Presidential Commission on Law Enforcement and the Administration of Justice recognized that “[f]air treatment of every individual—fair in fact and also perceived to be fair by those affected—is an essential element of justice and a principal objective of the American criminal justice system.”\textsuperscript{151} Indeed, Professor Tom Tyler’s research on procedural justice supports this proposition by demonstrating that “people care about the decision-making process. They consider evidence about representation, neutrality, bias, honesty, quality of decision, and consistency. People’s concerns about decision making are not simply instrumental.”\textsuperscript{152} If ineffective assistance of counsel “becomes one of the many indignities visited upon someone” who comes in contact with the civil justice system,\textsuperscript{153} it may undermine the legitimacy of the judicial process, discouraging compliance with court orders and encouraging people to resort to self-help.\textsuperscript{154}

In addition to the principal goal of achieving justice, Susan Calkins, a former associate justice of the Maine Supreme Court, identifies two related “secondary goals” in \textit{Strickland}: preventing “‘proliferation of ineffectiveness challenges’”\textsuperscript{155} and “efficiently processing claims.”\textsuperscript{156} These secondary goals are grounded in the judiciary’s interest in finality, which the \textit{Strickland} Court characterized as “profound.”\textsuperscript{157} Ironically, as Professor Cole suggests, \textit{Strickland} in practice partially undermines this finality by articulating a “fairly open-ended” standard that is difficult

\textsuperscript{150} Id. at 711 (Marshall, J., dissenting).
\textsuperscript{151} Klein, \textit{supra} note 10, at 642 (alteration in original) (quoting \textsc{President’s Comm’n on Law Enforcement \\& Admin. of Justice, The Challenge of Crime in a Free Society}, at viii (1967)).
\textsuperscript{152} \textsc{TOM R. TYLER, WHY PEOPLE OBEY THE LAW} 175 (1990).
\textsuperscript{154} See \textsc{Tyler, supra} note 152, at 172 (“If people have an experience not characterized by fair procedures, their later compliance with the law will be based less strongly on the legitimacy of legal authorities.”).
\textsuperscript{155} See Calkins, \textit{supra} note 20, at 230 (quoting Strickland v. Washington, 466 U.S. 668, 690 (1984)).
\textsuperscript{156} Id.
\textsuperscript{157} \textit{Strickland}, 466 U.S. at 693-94.
to meet, yet vague enough that it fails to discourage criminal defendants from claiming ineffectiveness of counsel on appeal.\footnote{Cole, supra note 12, at 114.}

B. The Fundamental-Fairness Approach

In her article on appellate standards for ineffectiveness claims in parental rights termination cases, Associate Justice Calkins explores an alternative to \textit{Strickland} that Oregon courts developed and several other states adopted either explicitly or implicitly.\footnote{See Calkins, \textit{supra} note 20, at 216-18 (examining the standard established in \textit{State ex rel. Juvenile Department of Multnomah County v. Geist (In re Geist)}, 796 P.2d 1193 (Or. 1990)).} Although this test appears to be stricter than \textit{Strickland}, it is probably not a viable alternative for broad application in the civil context because it raises the bar on effectiveness through an even more amorphous standard than \textit{Strickland}, similarly threatening legitimate interests in the finality of judgments.

As Associate Justice Calkins explains, in \textit{State ex rel. Juvenile Department of Multnomah County v. Geist}, the Oregon Supreme Court adopted “a standard which seeks to determine whether a termination proceeding was ‘fundamentally fair,’” and referred to the \textit{Strickland} standard as ‘more stringent.’”\footnote{\textit{Id.} at 216-17 (quoting \textit{Geist}, 796 P.2d at 1201, 1203).} In contrast to the \textit{Strickland} Court’s focus on outcomes, the Oregon Supreme Court appears to have recognized the legitimate interest in procedural justice when it stated “that the essence of fundamental fairness is the right to be heard at a meaningful time and in a meaningful manner.”\footnote{\textit{Id.} at 217.} With respect to attorney performance, the court stated that “[a]lthough no client has a constitutional or statutory right to a ‘perfect’ defense, fundamental fairness requires that appointed counsel exercise professional skill and judgment.”\footnote{\textit{Geist}, 796 P.2d at 1203 (citation omitted) (quoting Krummacher v. Gierloff, 627 P.2d 458, 464 (Or. 1981) (in banc)).} Although this standard is similar to the adequate-counsel inquiry \textit{Strickland} established, the presumption of attorney competence is noticeably absent in \textit{Geist}.\footnote{See Calkins, \textit{supra} note 20, at 223 (“\textit{Strickland} calls for a ‘strong’ presumption that counsel’s performance was adequate, with a ‘highly deferential’ review of the attorney’s performance, whereas \textit{Geist} does not mention any presumption of adequacy.” (footnote omitted) (quoting \textit{Strickland v. Washington}, 466 U.S. 668, 689 (1984))).} Also similar to \textit{Strickland}, Oregon’s standard purports to require the claimant to show prejudice.\footnote{\textit{See id.} at 218 (“\textit{Geist} requires a showing that the attorney’s performance denied the parent a fair trial and is sufficiently poor to call the trial court’s decision ‘into se-
peals cases, as well as opinions from several other state courts that have adopted the fundamental-fairness approach. Associate Justice Calkins concludes that, in practice, the fundamental-fairness standard’s prejudice prong is less demanding on claimants, and therefore the test in operation is stricter on attorney error than is Strickland.

The strength of the fundamental-fairness standard, however, is also its weakness with regard to potential widespread adoption: “It can . . . be seen as more flexible because it is less doctrinaire than the Strickland standard.” By applying a more amorphous test, the fundamental-fairness standard may be better at achieving justice, both substantive and procedural, than Strickland. But these gains may come at the cost of the “secondary goals” Associate Justice Calkins identifies. The flood of ineffectiveness claims that became the norm in criminal appeals may besiege the civil justice system if courts adopt a standard that is more vague than Strickland. Although interest in finality should not be placed above the goal of achieving justice, courts are not likely to look favorably on the fundamental-fairness standard if it opens the floodgates to ineffectiveness claims, especially if the expansion of the right to civil counsel brings additional cases into the civil justice system.

C. Pre- and Post-Strickland Alternatives in the Criminal Context

Standards that either existed before the Supreme Court established the current Strickland standard or were developed by states that declined to adopt Strickland offer viable alternatives for the civil con-

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165 See State ex rel. State Office for Servs. to Children & Families v. Thomas (In re Stephens), 12 P.3d 537, 543-44 (Or. Ct. App. 2000) (applying the fundamental-fairness standard to find the father’s counsel inadequate due to a lack of preparation and a failure to advocate a theory for the father against termination); State ex rel. State Office for Servs. to Children & Families v. Rogers (In re Eldridge), 986 P.2d 726, 731 (Or. Ct. App. 1999) (finding the mother’s counsel’s inadequacy fundamentally unfair in part because counsel’s attempts at working with her were “half-hearted, at best”).

166 See, e.g., Johnson v. J.K.C., Sr. (In re Interest of J.C., Jr.), 781 S.W.2d 226, 228 (Mo. Ct. App. 1989) (adopting a “relaxed” standard for ineffective assistance of counsel claims in civil proceedings requiring attorneys to be “effective in providing a meaningful hearing”).

167 See Calkins, supra note 20, at 233 (“[T]he fundamental-fairness standard seems likely to raise the level of attorney competence because it makes counsel more responsible for ensuring that the parents receive a fair trial.”).

168 Id.
text by establishing a stricter test for effectiveness while still preserving the judiciary’s interest in finality. Pre-Strickland, the majority of courts adopted some form of the two-prong test.\textsuperscript{169} Although most “applied a kind of ‘malpractice’ standard” for the performance prong, some “adopted instead a ‘guidelines’ approach, in which they tested the lawyer’s conduct against a set of minimal duties or guidelines.”\textsuperscript{170} Scholarly commentators “virtually universally preferred the guidelines approach, because it was more susceptible to objective application and gave clear notice to attorneys and courts as to what was demanded.”\textsuperscript{171} Regarding the prejudice prong, “[t]he vast majority of the courts . . . required a showing that the counsel’s deficient performance impaired the defense in a material way,” and some put the burden for the prejudice prong on the government rather than the defendant, “maintaining that once a defendant showed that his attorney’s performance was deficient, the government bore the burden of showing that the deficiency did not affect the result, much as the government must show ‘harmless error’ when defendants identify other constitutional defects in their prosecution.”\textsuperscript{172}

Hawaii serves as an example of a state that declined to adopt Strickland. Pre-Strickland, Hawaii followed the majority position on the two-prong approach, requiring the defendant to show that counsel made “specific errors or omissions . . . reflecting counsel’s lack of skill, judgment or diligence” and “that these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.”\textsuperscript{173} After Strickland, the Supreme Court of Hawaii decided to continue this approach on state grounds after noting that “the Strickland test has been criticized as being unduly difficult for a defendant to meet.”\textsuperscript{174} Although Hawaii was not among the minority of jurisdictions to place the burden of demonstrating absence of prejudice on the government, the burden on the defendant to show “withdrawal or substantial impairment of a potentially meritorious defense” appears easier to satisfy than the “but for” causation required by Strickland. The “performance” standard is not significantly different from that in Strick-

\textsuperscript{169} See Cole, supra note 12, at 111 (“[T]he vast majority [of courts] . . . adopted a test that looked at two considerations: the attorney’s performance; and the effect of the attorney’s performance, often referred to as ‘prejudice.’”).
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 112.
\textsuperscript{173} State v. Antone, 615 P.2d 101, 104 (Haw. 1980).
\textsuperscript{174} State v. Smith, 712 P.2d 496, 500 n.7 (Haw. 1986).
land, but, like Oregon’s Geist standard, Hawaii’s approach does not establish a presumption of attorney competence that the defendant must overcome. Therefore, the same criticism concerning finality applies: the vagueness of the standard for competence will not discourage losing parties from filing ineffectiveness claims on appeal.

Establishing a standard for ineffectiveness claims based on professional guidelines—a pre-Strickland approach that commentators favored at the time—is the best alternative to Strickland for ineffectiveness claims in the civil context for three reasons. First, articulating minimum standards will help raise the bar for effective advocacy, while avoiding the finality problems of other approaches. By providing objective standards by which to measure counsel’s performance, courts will provide better notice to potential appellants about what courts consider to be inadequate representation. Although the Strickland Court feared that using a guidelines-based approach would discourage lawyers from providing aggressive and zealous advocacy for their clients, prior accounts of abysmal lawyering in the absence of any such standard and the current virtual impossibility of a successful ineffectiveness claim suggest that indigent litigants would be no worse off under a guidelines approach than they are now. Even if standards discourage some lawyers from doing little beyond the bare minimum, at least such a minimum would be defined.

Second, like the ABA Standards for Criminal Justice used by pre-Strickland courts as guidelines for assessing attorney performance, there are several “civil-side standards, developed by the American Bar Association, the National Legal Aid and Defender Association and other standard-setting bodies, that can serve as a useful guide to states.”

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may be appointed to represent indigent litigants, and that the ABA and similar organizations should develop such standards as the Civil Gideon movement progresses. In this vein, the ABA recently published *Standards for the Provision of Civil Legal Aid*, which contains standards for practitioners that courts could use to fashion a guideline alternative to *Strickland*.

Third, recent Supreme Court opinions suggest that the current Court may be more accepting of a guidelines-based approach than was the *Strickland* Court. In a series of death penalty appeals—*Williams v. Taylor*, *Wiggins v. Smith*, and *Rompilla v. Beard*—the Supreme Court revived the notion “that the ABA Standards for Criminal Justice should be used as norms for determining what is objectively reasonable representation.” All of the cases involved “a challenge to trial counsel’s investigation in a capital case,” and the Supreme Court found ineffective assistance of counsel in all three. In all three opinions, the majority “quoted extensively from the ABA standards” in arriving at its determination of inadequate representation. Significantly, Justice O’Connor, who authored the majority opinion rejecting a guidelines approach in *Strickland*, authored the *Wiggins* opinion and “provided the essential fifth vote in *Williams*,” strongly suggesting that “the Court intentionally changed course.”

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176 See Abel, *supra* note 18, at 549 (recognizing that “there are no national standards for some types of civil cases in which counsel are currently appointed” and asserting that “[a]ny expansion of the right to counsel in civil cases should be accompanied by the development of standards for counsel in that kind of case”).


178 See *id.* at 209-68 (articulating standards for, among other things, client participation, investigation, legal counseling, negotiation, and litigation strategy).


183 *Id.* at 146-47.

184 *Id.* at 147.

185 *Id.* at 149-50. Blume and Neumann also note that all three cases were governed by a provision of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (2006), meaning that “[i]n order to grant the writs of habeas corpus, the Court had to conclude that the lower state courts’ decisions that trial counsel’s performance had not been objectively unreasonable were themselves objectively unreasonable.” Blume & Neumann, *supra* note 182, at 151. Such a finding appears to depart from the “strong presumption” of attorney competence articulated in *Strickland*.
Although the Court appeared to retreat from its support of the ABA guidelines in the recent opinion in *Bobby v. Van Hook*, the Court did not close the door to an effectiveness of counsel approach that uses ABA guidelines. In a per curiam opinion, the Court held that the Sixth Circuit erred by treating the 131-page ABA guidelines, published in 2003, as instrumental in finding that a death row inmate’s lawyer provided ineffective assistance of counsel in a 1985 sentencing hearing. Apart from the anachronism of the approach, the Court took issue with the appellate court’s treatment of “the ABA’s 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital counsel ‘must fully comply.’” The Court, however, noted that it was not ruling on a “less categorical” use of the ABA guidelines, leaving open the possibility that a guidelines-based approach to effectiveness of counsel will continue to develop. If these cases signal a change in the direction of the Court’s jurisprudence on effectiveness of counsel claims, then the Civil *Gideon* movement may be positioned to circumvent *Strickland*.

**CONCLUSION**

In the summer of 2010, the ABA adopted the Model Access Act, a model statute intended to aid states in passing legislation to expand access to appointed counsel according to the goal set forth by ABA Resolution 112A four years ago. Although not preclusive of litigation strategies, this Model Act strongly suggests that expanded access to counsel in civil cases will arrive through legislation rather than litigation. As *Gideon*’s experience suggests, however, states’ adoption of this type of act will not be a panacea for indigent civil litigants. Appellate standards for effectiveness of counsel will play an important role in determining the extent of the right and the amount of funding a state needs to provide this type of counsel to litigants. A guidelines-based

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187 See id. at 17.
188 See *id.* (quoting Dickerson v. Bagley, 453 F.3d 690, 693 (6th Cir. 2006)) (citing Van Hook v. Anderson, 560 F.3d 523, 526 (6th Cir. 2009)).
189 See *id.* at 17 n.1.
190 See *Blume & Neumann*, supra note 182, at 164 (“Williams, Wiggins, and Rompilla mark a significant step forward in ineffective assistance of counsel litigation.”).
191 See AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES, MODEL ACCESS ACT § 3(A) (2010), available at http://www.abanet.org/law/services/sclaid/downloads/104_Revised_FINAL_Aug_2010.pdf (“[P]ublic legal services shall be available at State expense, upon application by a financially-eligible person, in any adversarial proceeding . . . in which basic human needs . . . are at stake.”).
standard, used by many courts pre-Strickland and in recent Supreme Court death penalty cases, is the best alternative for ensuring that the interests of justice are served in a way that does not unduly tax the judicial system with a flood of civil appeals. Fortunately, the Civil Gideon movement is still in its infancy, giving the ABA an opportunity to shape the coming debate in order to achieve an effective Civil Gideon.