

5-1-2013

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The Right to Counsel in Civil Matters: A Legal and Moral Analysis

Jessica C. Almeida

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Part I – A Legal Analysis

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.”¹ Every elementary school student in America is taught these words in when we learn about the history of The United States of America and the circumstances surrounding the document that started the American Revolution – the Declaration of Independence. As children, we are instilled with the notions that we live in a country that bases its ideals on the alienable rights of freedom, of life, liberty, and the pursuit of happiness, that we can do anything, be anything, and achieve anything and that our government will support us in these ideals.

As law students and lawyers, we are all too familiar with the words a top of the west pediment of the Supreme Court of the United States of America, “Equal Justice Under the Law.” These words were submitted to the architect of the capital buildings, David Lynn, and Chief Justice Charles Evan Hughes subsequently approved this inscription to adorn the top of the highest court in the United States.² The saying is rumored to be attributed to the 1891 case of *Caldwell v. Texas*, in which the Supreme Court held that “no state can deprive particular persons of equal and impartial justice under the law.”³

Equal Justice under the Law assumes equal access to the courts for all litigants, however, in reality and truth, especially in the civil venue, it is restricted to those who can afford it. Civil litigants, particular the poor civil litigants, face an unjust amount of difficulties when trying to access our justice system while trying to pursue their unalienable rights – life, liberty, and pursuit

¹ Declaration of Independence, July 4, 1776.

² Supreme Court Website, <http://www.supremecourt.gov/about/westpediment.pdf>; last viewed on March 16, 2012

³ *Caldwell v. Texas*, 137 U.S. 692, 697 (1981)

of happiness. Under current federal case law, citizens are not legally entitled to counsel in hearings and trials concerning termination of parental rights, civil contempt, civil confinement of the mentally ill, paternity, and housing issues, just to name a few.⁴ While our justice system has provided attorneys for defendants in criminal litigation,⁵ this right has not been extended to civil litigants,⁶ even though some of the issues they face are just as life-threatening or damaging as the prospect of serving time in jail or capital punishment. Before we can declare our justice system “equal,” further progress is needed to make sure that all litigants have meaningful access to the courts.

A. A Right to Counsel finds support in the Due Process Clause of the Constitution

What in our laws purports to guarantee a right to counsel and equal access to the courts? There is only one notion in our Constitution that was important enough to be stated twice. The Fifth Amendment protects citizens and tells the federal government that no one shall be "deprived of life, liberty or property without due process of law."⁷ The Fourteenth Amendment, ratified in 1868, uses the same eleven words, called the Due Process Clause, to describe a legal obligation of all states.⁸ These words have as their central promise an assurance that all levels of American government must operate within the law and provide fair procedures.⁹

Due Process is the judicial safeguard of people’s fundamental rights. Courts have viewed the Due Process Clauses, and sometimes other clauses of the Constitution, as embracing those

⁴ Clare Pastore, *Life After Lassiter: An Overview of State-Court Right to Counsel Decisions*, Journal of Poverty Law and Policy, July – August, 2006, pages 186 – 195.

⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963)

⁶ *Lassiter v. Department of Social Services of Durham*, 452 U.S. 18 (1981)

⁷ U.S. Const. amend. V

⁸ U.S. Const. amend. XIV

⁹ Peter Strauss, *Due Process*, Legal Information Institute, http://www.law.cornell.edu/wex/due_process; last viewed April 16, 2012.

fundamental rights that are “implicit in the concept of ordered liberty.”¹⁰ These are rights have long histories or “are deeply rooted” in American society.¹¹ Rights that the Courts have chosen to treat as fundamental include: the right to interstate travel;¹² the right to vote;¹³ the right to privacy (which includes within it a set of rights) including;¹⁴ the right to marriage;¹⁵ the right to procreation;¹⁶ the right to an abortion during the first trimester;¹⁷ the right to private education (homeschooling one's children);¹⁸ the right to contraception (the right to use contraceptive devices);¹⁹ and the right of family relations (the right of related persons to live together).²⁰

“From the very beginning, our state and national Constitutions have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every [person] stands equal before the law.”²¹ Taken together, citizens of the United States are entitled to certain fundamental rights (as enumerated above) under the 5th and 14th Amendment and are entitled to a fair and impartial hearing on these rights. “The touchstone of due process is fundamental fairness.”²² “Whatever disagreement there may be as to the scope of

¹⁰ *Palko v. State of Connecticut*, 302 U.S. 319 (1937)

¹¹ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), footnote 4

¹² *Crandall v. Nevada*, 73 U.S. 35 (1868); *Edwards v. People of State of California*, 314 U.S. 160 (1941); *Shapiro v. Thompson*, 394 U.S. 618 (1969)

¹³ *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Kramer v. Union School District*, 395 U.S. 621 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972);

¹⁴ *Katz v. United States*, 389 U.S. 347 (1967)

¹⁵ *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978)

¹⁶ *Skinner v. State of Oklahoma, ex. rel. Williamson*, 316 U.S. 535 (1942)

¹⁷ *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)

¹⁸ *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925)

¹⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)

²⁰ *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Moore v. City of East Cleveland* 431 U.S. 494 (1977)

²¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963)

²² *Id.*

the phrase ‘due process,’ there can be no doubt that it embraces the fundamental conception of a fair trial.”²³

A hearing or trial cannot be fair when one of the parties is uneducated in the complicated and complex procedures of the law. In order to be an attorney, a person must spend between three and four years studying law, pass a bar exam, pass ethics musters,²⁴ and continue their legal education each year through courses continuing legal education in order to maintain their license.²⁵ A typical law school curriculum includes courses on torts, contracts, evidence, criminal law, property, and various other skills oriented classes that educate attorneys on the proper ways to research issues, write briefs, analyze a situation, present and refute evidence, as well as discovery rules and techniques.²⁶ The common layperson has not had this experience. “Skilled counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal. [In the context of termination proceedings], *pro se* litigants cannot adequately perform any of these tasks.”²⁷ Many indigent litigants lack even the ability to read or write properly.²⁸ “The right to be heard would be, in many cases, of

²³ *Frank v. Mangum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting)

²⁴ *Comprehensive Guide to Bar Admission Requirements*, http://www.ncbex.org/assets/media_files/CompGuide/CompGuide.pdf, last viewed on April 18, 2012.

²⁵ Each jurisdiction varies the amount of Continuing Legal Education Credits required each year to maintain their license to practice law. In New Jersey, for example, unless otherwise exempt, every active New Jersey licensed attorney in good standing is required to complete 24 credit hours of continuing legal education every two years. Of those 24 credits, at least four must be in ethics and/or professionalism. *BCLE Reg.* 201:1

²⁶ Seton Hall University School of Law Curriculum, http://law.shu.edu/ProspectiveStudents/prospective_jd_students/curriculum.cfm, last viewed on April 19, 2012; University of South Carolina Law School Curriculum, http://law.sc.edu/registrar/downloads/forms/201141-graduation_checklist.pdf, last viewed on April 19, 2012.

²⁷ *Brief of Abby Gail Lassiter, Petitioner*, 1980 WL 340036 (U.S.), 9

²⁸ *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 Loyola University of Chicago Law Journal, 363, 367 (2005).

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.”²⁹

While indigent litigants may turn to public and legal aid offices, they are understaffed and do not even begin to cut into the problem. In Washington State, for example, a 2003 study found that more than three-quarters of all low-income households experience at least one civil (not criminal) legal problems each year. In the aggregate, low-income people experience more than one million important civil legal problems annually; low-income people face more than 85% of their legal problems without help from an attorney; removing family-related problems, low-income people receive help from an attorney.³⁰ The United States Courts are overwhelmed with a flood of *pro se* litigants, who represent as much as eighty percent of the caseloads in certain jurisdictions, and millions of others who don't get to court at all.³¹

In a 2007 right to civil counsel court case, a group of retired Washington State trial judges filed an amicus brief.³² Supporting the right to counsel in a civil matter, based on their experiences, they informed the court, “Without assistance from attorneys, *pro se* litigants frequently fail to present critical facts and legal authorities that judges need to make correct and just rulings. *Pro se* litigants also frequently fail to object to inadmissible testimony and to correct erroneous legal arguments. This makes it difficult for judges to fulfill the purpose of our judicial system – to correct and make just rulings.”³³ If the purpose of our system is to provide equal justice for all, and the arbitrators of the justice, the judges, cannot adequately determine the law

²⁹ *Powell v. Alabama*, 287 U.S. 45 (1932)

³⁰ *Washington State Civil Legal Needs Study*, http://lri.lsc.gov/sites/default/files/LRI/pdf/03/030185_1glndstudy093003.pdf, last viewed on April 19, 2012.

³¹ Justice Earl Johnson, Jr., “*And Justice for All.*” *When Will the Pledge Be Fulfilled?*, American Bar Association, Judge’s Journal, Summer, 2008.

³² *King v. King*, 162 Wash. 2d 378. (2007).

³³ *Brief of Retired Trial Judges as Amici Curiae, King v. King*, 162 Wash.2d 378 (2007).

and make rulings in situations where a *pro se* litigant fails to adequately maintain a case, this does not provide “equal justice for all.”

B. The Supreme Court’s Holding in *Lassiter*

“The link between right to counsel and procedural due process has already been recognized.”³⁴ As early as 1932, the Supreme Court recognized the importance of counsel to those unable to afford legal representation and declared it a right under the due process clause. Though the matter was criminal in nature, the rationale of the Justice Sutherland in the 7-2 opinion in *Gideon v. Wainwright* is applicable to a civil matter. “Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. 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 is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. 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. Without it, though he be not guilty, he 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, or those of feeble intellect.”³⁵

“An examination of the right to counsel in a civil case must begin, alas, with *Lassiter v.*

³⁴ Robert W. Sweet, “Civil Gideon and Confidence in a Just Society.” 17 Yale L. & Pol’y Rev. 503 (1998).

³⁵ *Powell v. Alabama*, 287 U.S. 45 (1932).

Department of Social Services of Durham County.”³⁶ The facts of the Lassiter case are as follows: Abby Lassiter lost custody of her infant son in 1975. A year later, Ms. Lassiter, an indigent, was convicted of second-degree murder of one of her other children. In 1978, the Department of Social Services of Durham County, North Carolina, petitioned to end Ms. Lassiter’s parental rights of the infant child she lost in 1975. Ms. Lassiter had appointed counsel with regard to her murder conviction, but she did not have representation at the hearing and attended alone. After listening to witnesses and to Ms. Lassiter, the court terminated her parental rights to her son. She appealed the judgment, arguing that as an indigent the state should have provided her assistance of counsel under the Due Process Clause. The North Carolina Court of Appeals rejected her argument because the invasion of her privacy as not so great as to mandate counsel. She appealed to the United States Supreme Court.

The Supreme Court upheld the decision of the North Carolina Court of Appeal and found that an indigent parent facing termination of her parental rights in a state-initiated proceeding has no categorical right to counsel.³⁷ The court found there is indeed a “presumption that an indigent litigant has a right to appointed counsel when, if he loses, he may be deprived of a physical liberty.”³⁸ However, when physical liberty is not at stake, whether due process requires the appointment of counsel depends on the weight of the factors enumerated in *Mathews v. Eldridge*. *Mathews* set forth the balancing test, still used today, that is used to determine the required level of due process protection. Specifically, the court declared that *Mathews* “propounds three elements to be evaluated in deciding what due process requires: (1) the private interests at stake; (2) the government’s interests; and (3) the risk of erroneous decision in the absence of the

³⁶ Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel*, Journal of Law and Policy, July-August, 2006, page 186 – 195.

³⁷ *Lassiter*, 542 U.S. 18, 26 – 27 (1981)

³⁸ *Id.*

desired safeguard.”³⁹ To start their analysis of the *Mathews* test, the court first held that “fundamental fairness” places the “presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty” and that “it is against this presumption that the three elements in the due process decision must be measured.”⁴⁰

Ms. Lassiter was unaided by counsel during her termination hearing. She was unable to raise objections and exclude improper evidence submitted by the state. Unopposed by a trained adversary, the attorney for the state could employ incompetent evidence and bend ordinary trial procedures. Ms. Lassiter was unable to meaningfully cross-examine the opposing party.⁴¹ Ms. Lassiter brief to the Supreme Court pointed out, “*Pro Se* litigants cannot adequately conduct investigations and pre-trial discovery. The initial step in the investigation of a termination case by parents’ counsel typically involves obtaining a copy of the agency case file. The file contains critical information...without the assistance of counsel, a parent might not even know to secure a copy of this file; the parent may be ignorant of proper discovery avenues, such as making a request for the production of evidence, scheduling a deposition, or serving a subpoena *duces tecum*. Even at trial, the parent may never view a file, or will be unable to use it as a weapon, *e.g.* as the basis of impeaching a witness.”⁴² Morally, we cannot properly say that a litigant was given a fair hearing in a matter of such importance, as losing the rights to her child, without the right to counsel to aide them in their legal strategy.

C. State Law in Support of A Right to Civil Counsel

Many states have disregarded the holding in *Lassiter*. Each state has its own constitution,

³⁹ *Id.* at 27 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

⁴⁰ *Id.* at 26-27

⁴¹ Brief of Abby Gail Lassiter, Petitioner, 1980 WL 340036 (U.S.), 13

⁴² *Id.* at 11 - 12

its own court system, and its own legislature. Many of those constitutions have provisions not found in the federal Constitution that afford a basis for a right to counsel in civil cases, such as “open courts” or “access to justice” guarantees. Courts in those states have interpreted their state “due process” and “equal protection” clauses more broadly than the United States Supreme Court has read the equivalent language in the federal Constitution. In recent years, legislatures in many states have been more generous than Congress in funding civil legal aid, and some also have been hospitable to the notion of legal aid as a matter of right, at least in some categories of cases.⁴³

One state supreme court flatly rejects the *Lassiter* analysis as a matter of state law, even where the state constitutional provision at issue had been held to be coextensive to the federal due process claim. The Alaska Supreme Court, in 1991, noted that state due process claims were evaluated under the *Mathews v. Elridge* balancing test, but then reached the opposite result of the majority in *Lassiter*. The state court stated that “we reject the case-by-case approach set out by the Supreme Court in *Lassiter*. Rather our view comports more with the dissent.”⁴⁴ The opinion goes into some detail about the difficulties in negotiating the court process for *pro se* litigants, the strain on court resources when they do, and the role of counsel in safeguarding other protections, such as the “clear and convincing” evidence standard.⁴⁵

California has been one of the states on the front line of providing a right to civil counsel. A study done in 2004 by The Judicial Counsel of California’s task force on self-represented litigants estimated that over 4.3 million of California’s court users were self-represented, and that

⁴³ Justice Earl Johnson, Jr., “*And Justice for All.*” *When Will the Pledge Be Fulfilled?*, American Bar Association, Judge’s Journal, Summer, 2008

⁴⁴ *In re K.L.J.*, 813 P.2d 276, 279 (Alaska 1991)

⁴⁵ *Id.* at 283-285.

the mean rate of unrepresented litigants ranged from 16% in general civil cases, 34% in unlawful retainers, and 67% in family law.⁴⁶ The California Access to Justice Commission created draft legislation that provided for a right to counsel – The State Equal Justice Act (2006).⁴⁷ It was endorsed by the Chief Justice of the California Supreme Court, Ronald M. George. Unfortunately, the statute was proposed during the financial crisis in California and did not pass due to funding issues. The statute has been revised since its original 2006 version⁴⁸ and there is hope that it will pass in the next legislative session.

In the holding of *In Re: Jay R.*, the California Court of Appeals has found that their state’s due process clause analysis does not include the Lassiter presumption, that counsel is only required when physical liberty is at stake.⁴⁹ In 1982, William R, the father of Jay R., was incarcerated and during that time, received notice that his wife intended to have the courts declare that he had abandoned his son so that her new husband could adopt him. William requested the proceedings be adjourned until he was able to be present. The court ignored his request and entered a decree of adoption for the step-father. William appealed and the California Appeals court overturned the adoption decree, holding that the “This proceeding could lead to the complete and permanent termination of one of the most compelling and fundamental rights of our citizens, that of a parent.” Noting the “first hand disadvantage of indigent parents, such a proceeding can hardly be characterized as fundamentally fair.”⁵⁰ Therefore, Due Process, under California law, mandates counsel for indigent parents in proceedings where a parent can be

⁴⁶ Clare Pastore, *Life After Lassiter: An Overview of State-Court Right to Counsel Decisions*, Journal of Poverty Law and Policy, July – August, 2006, page 188.

⁴⁷ California State Equal Justice Act 2006, http://www.brennancenter.org/content/resource/state_equal_justice_act/., last viewed April 2, 2012.

⁴⁸ California State Equal Justice Act 2008, http://brennan.3cdn.net/c8d7c0be3acc133d7a_s8m6ii3y0.pdf, last viewed on April 18, 2012.

⁴⁹ *In re Jay R.*, 197 Cal. Rptr 672 (Cal Ct. App. 1983)

⁵⁰ *Id.* At 679.

stripped of their parental rights.⁵¹

New Jersey's highest court has held that counsel is categorically required for indigent parents facing child support contempt proceedings and noting that, "however seeming simple support enforcement proceedings may be for a judge or lawyer, gathering documentary evidence, preserving testimony, marshaling legal arguments, and articulating a defense are probably awesome and perhaps insuperable undertakings to the uninitiated layperson."⁵² Plaintiffs Anne Pasqua, Ray Tolbert, and Michael Anthony were New Jersey residents and parents who were arrested for not complying with their court-ordered child support obligations. All the plaintiffs were jailed for a period of time, from eighteen (18) to seventy-three (73) days.⁵³ Plaintiffs claimed that coercive incarceration was a futile exercise because they were too destitute to pay their support obligations. Without the assistance of counsel, they could not prove their inability to pay their arrears and thus were denied a fair hearing.⁵⁴ The New Jersey Supreme Court held that, "when an indigent litigant is forced to proceed at an ability-to-pay hearing without counsel, there is a high risk of an erroneous determination and wrongful incarceration."⁵⁵ The court held that both under the Fourteenth Amendment Due Process Clause⁵⁶ and the New Jersey State Constitution, the plaintiffs were entitled to counsel as a matter of law.⁵⁷ Interestingly enough, the court cited to the balancing test in *Lassiter* as well, finding that when the test is applied to indigent parents facing incarceration in support hearings, due process requires counsel be

⁵¹ *Id.*

⁵² *Pasqua v. Council*, 892 A.2d 663 (N.J. 2006)

⁵³ *Id.* at 666

⁵⁴ *Id.* at 669

⁵⁵ *Id.* at 673

⁵⁶ *Id.* at 674

⁵⁷ *Id.*

provided because of “the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions.”⁵⁸

Pennsylvania’s Supreme Court requires counsel for indigent putative fathers in paternity actions, noting that “a paternity proceeding often becomes an adversary contest between a complainant, backed by the resources of a skilled attorney, and the uncounselled accused father. Under these circumstances, the contest is undeniably tilted in favor of the complainant. Since many indigent defendants may be illiterate and unfamiliar with the courtroom procedure, that imbalance is exacerbated further.”⁵⁹ The court reviewed and took into consideration the *Mathews* and *Lassiter* holdings, and, “nonetheless [were] convinced that an evaluation of the *Mathews v. Eldridge* factors support the conclusion that denial of counsel for indigent defendants in civil paternity actions in Pennsylvania is inconsistent with due process.”⁶⁰ Further, the court concluded that, “the presence of counsel at the paternity proceeding helps insure the correctness of a paternity adjudication. Thus, not only the defendant's interest but also the state's interest is best served by a hearing at which a defendant accused of parentage is represented by an attorney.”⁶¹

D. The American Bar Association’s Crusade for a Right to Civil Counsel

The American Bar Association (“ABA”) is a voluntary, national membership organization of the legal profession. Its more than 260,000 members (as of 1980) come from every state, territory, and the District of Columbia. Since its inception over 100 years ago, the Association has taken an active improvement in the administration of justice and the judicial

⁵⁸ *Id.* at 672

⁵⁹ *Corra v. Coll*, 451 A.2d 480, 487 (Pa. Super Ct. 1982).

⁶⁰ *Id.* at 483

⁶¹ *Id.* at 487 - 488

process.⁶² The ABA has long held as a core value the principle that society must provide equal access for justice and give meaning to those words inscribed above the entrance to the United States Supreme Court – “Equal Justice Under the Law.”

The organization has taken the availability of counsel to all citizens to heart. In 1920, the ABA created its first ever-standing committee – The Standing Committee on Legal Aid and Indigent Defense. In 1965, the ABA House of Delegates endorsed federal funding of legal services for the poor when they realized that charitable funding would never adequately meet their needs. In the 1970’s, the ABA played a prominent role in the creation of the federal Legal Services Corporation to assume responsibility for the legal services program created by the federal office of Economic Opportunity. Since the 1980’s, the ABA has been a powerful and persuasive voice in the fight to maintain federal funding for civil legal services.⁶³

In 1983, the ABA adopted they key goal, “to promote meaningful access to legal representation and the American System of Justice for all persons, regardless of their economic needs or social condition.” When they adopted this goal, the House of Delegates offered the following objectives for obtaining the goal:

1. Increase funding for legal services to the poor in civil and criminal cases.
2. Communicate the availability of affordable legal services and information to moderate-income persons.
3. Provide effective representation for the full range of legal needs of low and middle income persons.
4. Encourage the development of systems and procedures that make the justice system easier for all persons to understand and use.

To further these objectives, in August of 2006, the House of Delegates to the American Bar Association took a historic step toward achieving the Association’s objective to, “assure

⁶² *Amicus Brief of the American Bar Association, Lassiter v. Department of Social Services*, 1980 WL 340036 (U.S.), 1.

⁶³ <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>, last viewed March 3, 2012.

meaningful access to justice for all persons” by adopting a resolution urging “federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.”⁶⁴

This action marked the first time the ABA officially recognized a governmental obligation to fund and supply effective legal representation to all poor persons involved in the type of high stakes proceedings within the civil justice system that place them at risk of losing their homes, custody of their children, protection from actual or threatened violence, access to basic health care, their sole source of financial support, or other fundamental necessities of life. The ABA resolution came on the heels of a growing consensus, following a decades-long, wide-ranging effort by a dedicated cadre of ABA members and other national advocates, that the time was ripe to bring to light the critical need for a civil right to counsel in this country.

“Equal Justice under law is not just a caption on the façade of the Supreme Court building. It is perhaps the most inspiring ideal of our society...It is fundamental that justice should be the same, in substance and availability, without regard to economic status.” Justice Lewis Powell, former President of the ABA. “The ABA has long held as a core value the principle that society must provide equal access to justice, to give meaning to the words inscribed above the entrance to the United States Supreme Court – “Equal Justice Under Law.”⁶⁵

E. International Law Provides an Example for the United States

Other nations around the globe have already recognized the need for counsel for civil litigants. Starting with France in 1852 and continuing with Italy in 1865 and Germany in 1877,

⁶⁴ *Id.*

⁶⁵http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf

most continental European nations had created statutory rights to counsel for indigent civil litigants by the end of the nineteenth century or early in the twentieth. As early as 1937, in one of the few European countries where lawmakers had not enacted such a right, the Swiss Supreme Court found a right to free counsel for poor people in civil cases based on that nation's constitutional guarantee that “all Swiss are equal before the law.”⁶⁶

Expenditures of public resources to address the legal needs of the poor in the United States compare poorly with funding in many other industrialized nations. At the lower end, Germany, Ireland, Canada, and Finland invest over three times as much of their gross domestic product as the United States. At the upper end, England spends twelve times as much of its Gross Domestic Product.⁶⁷

The Treaty of Lisbon, which is a governing documents of the European Union, states that among its fundamental rights, “All civil litigants are afforded a fair hearing.”⁶⁸ The European Union Court of Human Rights, whose judgments affect all twenty-seven countries in the European Union, has held that under certain circumstances, civil litigants could not have a fair hearing if they are unrepresented by counsel.⁶⁹

In the words of Federal District Court Judge, Robert Sweet (a former litigator at Skadden Arps), “We need a Civil *Gideon*,⁷⁰ that is, an expanded constitutional right to counsel in civil matters. Lawyers, and lawyers **for all**, are essential to the functioning of an effective justice

⁶⁶ Mauro Cappelletti, James Gordley & Earl Johnson Jr., *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (2nd ed. 1981).

⁶⁷ Comparisons compiled from data in “National Reports” prepared for the 2005 International Legal Aid Group (ILAG) conference in Killarney, Ireland, available at www.ilagnet.org.

⁶⁸ *Treaty of Lisbon*, 2009.

⁶⁹ *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser A) (1979), 2 Eur. H.R. Rep. 305.

⁷⁰ Civil Gideon has been used as shorthand and as a slogan for the civil right to legal services endeavor.

system.”⁷¹ Only then, will our justice system truly be equal.

⁷¹ Robert W. Sweet, “*Civil Gideon*” and *Justice in the Trial Court (The Rabbi’s Beard)*, 42 THE RECORD 915, 924 (Dec. 1997). (emphasis added).

Part II – A Moral Analysis

John Finnis is known for his work in moral, political and legal theory, as well as constitutional law. He is Professor of Law at University College, Oxford and at the University of Notre Dame and teaches courses in Jurisprudence, in the Social, Political and Legal Theory of Thomas Aquinas.⁷² Finnis was educated at St. Peter's College and the University of Adelaide, where he was a member of St. Mark's College, where he obtained his LL.B. Finnis was a Rhodes Scholar, and matriculated at University College, Oxford, where he obtained his D.Phil. for a thesis on the concept of judicial power in 1962.⁷³

His work, *Natural Law and Natural Rights* (1980) confronts moral skepticism by using contemporary analytical tools to provide basic accounts of values and principles, community and "common good," justice and human rights, authority, law, the varieties of obligation, unjust law, and the question of divine authority.⁷⁴ "Natural Law (in the context of ethics, politics, law, and jurisprudence) simply means the set of true propositions identifying basic human goods, general requirements or fight choosing, and the specific moral norms deducible from those requirements as they bear on particular basic goods."⁷⁵

According to Finnis, there are exactly seven equally fundamental, basic values (or basic forms of human good): knowledge, life, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion. Finnis maintains that it is self-evident that these are all

⁷² The University of Notre Dame Law School, Staff and Faculty, <http://law.nd.edu/people/faculty-and-administration/teaching-and-research-faculty/john-finnis/>; last viewed on April 12, 2012.

⁷³ Oxford Law Staff and Professors, <http://www.law.ox.ac.uk/profile/john.finnis>, last viewed on April 12, 2012.

⁷⁴ Oxford University Press, <http://www.us.oup.com/us/catalog/23805/subject/LegalTheory/?view=usa&ci=9780198761105>, last viewed on April 12, 2012.

⁷⁵ John Finnis, *Natural Law and Natural Rights*, page 280.

equally and intrinsically valuable and that the pursuit of these values exhausts the ultimate reasons one could have for action.⁷⁶

Finnis also discusses the nine requirements of practical reasonableness: to form a rational plan of life, to recognize the importance of each of the seven basic values, to show impartiality among persons, to maintain some detachments from one's specific projects, not to abandon one's commitments lightly, to pursue the good efficiently, not to chose directly against any basic value, to seek the good one one's communities, and to refrain from acting as one ought not to act. In order to pursue one's own good successfully, one must satisfy these requirements. All the requirements are inter-related and capable of being regarded as aspects of one another.⁷⁷

Finnis' theory of natural law explains that in the attempt to satisfy these nine requirements of practical reasonableness that leads one to pursue the good of others. For example, the pursuit of the basic value of friendship naturally leads to the related requirement that one seek the good of one's communities. Consequently, the requirements of practical reasonableness lead to the moral "good" requirements.⁷⁸ Finnis purports that an understanding of morality, justice, law, authority, and obligation must rest ultimately on a proper understanding of human good or well-being.⁷⁹ "Natural Law (in the context of ethics, politics, law, and jurisprudence) simply means the set of true propositions identifying basic human goods, general

⁷⁶ William H. Wilcox, *Natural Law and Natural Rights - John Finnis: Book Review*, 68 Cornell L. Rev 409 (March, 1983).

⁷⁷ John Finnis, *Natural Law and Natural Rights*, page 105

⁷⁸ *Id.* at 126

⁷⁹ William H. Wilcox, *Natural Law and Natural Rights - John Finnis: Book Review*, 68 Cornell L. Rev 409 (March, 1983).

requirements or fight choosing, and the specific moral norms deducible from those requirements as they bear on particular basic goods.”⁸⁰

The first of these true propositions, the requirements of practical reasonableness, is a coherent plan of life.⁸¹ It is unreasonable to just live from moment to moment, following immediate cravings or just drifting from one commitment to another.⁸² Every person should have a harmonious set of purposes and orientations and form a rational plan to their life. This requires both direction, control of impulses, and the undertakings of specific projects. A person needs to constantly reform habits, and abandon old projects in favor of adoption of new ones, as an overall part of honoring your commitments (another of the tenants of practical reasonableness).⁸³ There should be no waste of opportunities, nothing irrational or meaningless.⁸⁴

Finnis believes we should see our life as a whole, not just as moments. We should treat our life plan as a blueprint or a recipe, but we should be prepared for the many unforeseeable contingencies that may come up in our path. In our country, the judicial system is something that affords a person the opportunity to deal with the “unforeseeable” that come up in our coherent life plans. If you are being unjustly sued, your child’s other parent is attempting to take him or her away from you, or your are being wrongly evicted from your apartment, the unforeseeable events may have a remedy – a hearing or a trial. In order for a person to develop their coherent life plan and be able to make accommodations for the unforeseeable, they need to be able to rely on the instrument that our country put in place for them. In order for that hearing or trial to be fair and a true remedy, then all persons should be afforded a right to counsel at that hearing. In

⁸⁰ John Finnis, *Natural Law and Natural Rights*, page 87

⁸¹ *Id.* at 103.

⁸² *Id.*

⁸³ *Id.* at 104.

⁸⁴ *Id.* at 105.

order for someone's life plan to be coherent and harmonious, they should be able to take advantage of the justice system.

Finnis also speaks of not wasting opportunities and making sure everything we do has a meaning towards our coherent life plan.⁸⁵ When we do have our day in court, we should be represented and not make it a waste of our time, our opponent, or the justice system. It would be irrational for all involved to have an unrepresented litigant attempt to prove his or her case (or disprove the opposition's case, as it may be). A coherent life plan cannot include the unjust taking of something that belongs to someone else or something that someone else is entitled to. It would make our justice system meaningless and incoherent.

Finnis' second requirement of practical reasonableness is that there must be no arbitrary preferences among the values.⁸⁶ The key word in this portion of his theory is "arbitrary." Finnis recognizes that any commitment to a coherent life plan may involve some degree of concentration on one or more of some of the basic forms of the good. "It is one thing to have no 'taste' for scholarship or friendship, but quite another thing to think or speak as if these were not real forms of the good."⁸⁷ You must not just dismiss the other goods, but recognize that "knowledge [or any other good you might want to dismiss] are to be treated as a form of excellence and that error, illusion, muddle, superstition, and ignorance are evils that one should not wish for or plan for, or encourage in oneself or others."⁸⁸ If you dismiss any of the other goods without a coherent plan, you will be stunting or mutilating oneself and those in one's case by not allowing them to experience those goods.⁸⁹ "Not everyone is the same. No one should

⁸⁵ *Id.* at 104.

⁸⁶ *Id.* at 105 – 106.

⁸⁷ *Id.* at 106.

⁸⁸ *Id.*

⁸⁹ *Id.*

demand a subject of child of theirs should conform willy-nilly to the modes of excellence they have set for themselves.”⁹⁰ Just because you are a lawyer and discount religion, does not mean you should encourage others to do the same. Because all the goods have a place in our society, all of them fit in the order of our community and are interwoven, and without one, the others are not as strong or complete. If you are to deny your friend, child, or supervisee the right to explore, understand, or develop one of the other goods, it will diminish the other six, and therefore diminish the very good you feel is superior to the others.

In terms of a civil right to counsel, indigent litigants should have access to counsel so that during a trial or hearing, they have a fair chance and so that they may continue to live (the first, not in rank, but in the order he presents them, of Finnis’ goods), be alive, outside prison walls, with their kids, in good health, and to be able enjoy the things that make them happy in life, such as pure play or things in the matrix of aesthetic experience, have friendships to strengthen the community around them and live in peace and harmony. If we were to accept that we have a right to counsel ONLY to keep us from being incarcerated or from capital punishment, we would be ignoring the other, just as important reasons for a fair or impartial hearing – to make sure your property is not unjustly taken from you, to make sure you have a right to your parental rights, to ensure you don’t pay child support on a child that isn’t yours, etc. We must protect all of the goods in order to flourish, and not just one of them (life).

The Supreme Court of the United States currently puts life, and not even all aspects of life, paramount to the other goods by only providing litigants who are being threatened with loss of life (capital punishment) or liberty (jail time) with a right to counsel. However, Finnis purports that we want to protect life and freedom, through our laws, so that we can enjoy play,

⁹⁰ *Id.*

sociability, aesthetic experience, and religion. Having a right to counsel in civil litigation protects life and knowledge, and by preserving the sanctity of those two goods, we will also be protecting the five. Finnis tells us it is not our place to deprive anyone of any of the goods, so by the Supreme Court only providing a right to counsel in certain situations, they are “stunting or mutilating” those who find other goods more important.

From having no arbitrary preference of the goods, Finnis moves to no arbitrary preference among persons.⁹¹ His third requirement of practical reasonableness tells us that we should not prefer one person over another. “Other persons’ survival, their coming to know, their creativity, their all-round flourishing, may not interest me, may in any event be beyond my power to affect – but have I any reason to deny that survival, knowledge, creativity, and flourishing are really good and are fit matters of interest, concern, and favour, by those persons and by all who have to do with them?”⁹²

Finnis asks us to recall the Golden Rule – “do to (or for) others what you would have them do to (or for) you. Put yourself in your neighbor’s shoes. Do not condemn others for what you are willing to do yourself. Do not (without special reason) prevent others getting for themselves what you are trying to get for yourself.”⁹³ A moral, rational person will realize that this is a requirement of reason.

If we were to allow a person to appear in court without a lawyer, to go up against someone with training and experience in the law, this almost certainly shows a preference for one person over another. Judicial Counsel of California’s task force on self-represented litigants estimated that in 2004, over 4.3 million of California’s court users were self-represented, and

⁹¹ *Id.* at 106 – 107.

⁹² *Id.* at 106.

⁹³ *Id.*

that in most cases, the self-represented lost, especially in family court.⁹⁴ Are we to assume that every one of those *pro se* litigants did not have the stronger case? Or are we as a society preferring those who can afford counsel over those who cannot? If you could afford a lawyer, but your opponent could not, would you “put yourself in your neighbor’s shoes” and forego counsel? Of course not – that is not rational. But, if we are to be concerned with the ensuring all persons in our community access to “survival, knowledge, creativity and flourishing,” we should ensure that if someone is threatened with the possibility of losing meaningful access to any of the basic goods, they should have the same opportunity as someone who can afford an attorney would.

Of course, there are those who would respond that by ensuring that all indigent litigants have equal access to the courts, we prefer the indigents over those who can afford an attorney. Obviously, there is a cost associated with providing counsel to all parties and that cost, as it is in criminal litigation, would be passed onto the tax payers (Finnis would call this the entire community). But this is not an arbitrary preference of one person over another. It is the moral and correct thing to do – we must not prevent others from getting for themselves what you are trying to get for yourself. If the situation was reversed and the indigent could afford an attorney – wouldn’t you, logically, want the same access if you were unable to afford counsel in your litigation?

Finnis essentially combines the fifth and sixth requirements of practical reasoning – “to maintain some detachment” from one’s specific projects and to “not abandon one’s commitments lightly.”⁹⁵ Finnis feels that you need to strike a balance between fanaticism (being too attached to your specific projects) and not committing to something (dropping out, apathy, unreasonable

⁹⁴ Clare Pastore, *Life After Lassiter: An Overview of State-Court Right to Counsel Decisions*, Journal of Poverty Law and Policy, July – August, 2006, pages 186 – 195.

⁹⁵ John Finnis, *Natural Law and Natural Rights*, page 109

failure, or refusal to get involved with anything). “One must have a certain detachment from all the specific and limited projects one undertakes. There are often evil consequences of succumbing to the temptation to give one’s particular project the overriding and unconditional significance which only a basic value can claim.”⁹⁶ However, you should “do something sensible and worthwhile.”⁹⁷ “This is simply the requirement that having made one’s general commitments, one must not abandon them lightly. One should look for better and new ways of carrying out their commitments.”⁹⁸

As lawyers, we want to prevail each time we represent a client. Lawyers get paid to be successful. We want to be the one who walks away with the better deal, the one whose client doesn’t serve prison time, the prosecutor who gets the conviction. However, our job as attorneys does not start and stop with winning a case. We also serve as counselors of the law. For example, a client who comes to you and wants legal advice – in order to give that advice, you need knowledge of the law and the true knowledge that comes from a fair and balanced system. You cannot rely on law that is shaped by litigants who appear in court unrepresented and therefore, are unable to put up a defense. The truth of the law doesn’t appear from these types of encounters. The law should not be made by allowing evidence that doesn’t deserve to be admitted to be allowed to be contemplated by a jury, or a *pro se* client that doesn’t understand the value or an expert witness to present a case without one. We cannot become fanatical that only our side is the correct one and not learn the truth of the law. We can win cases or prevail over others simply because we have a desire to win and will do it at all costs – especially over an unrepresented litigant.

⁹⁶ *Id.* at 110.

⁹⁷ *Id.*

⁹⁸ *Id.*

In the same vein, we must also be zealous advocates for our clients. However, we should “look for better and new ways of carrying out those commitments.” If we have an unrepresented litigant on the other side of the litigation, we should be creative in trying to come up with ways to ensure that justice is served by all parties. We may suggest that we take the matter to an unbiased arbitrator or mediator – where the rules of evidence are more relaxed, but the truth can still be determined. We can practice honestly and without bending any rules that we know the unrepresented litigant won’t understand.

Finnis’ sixth requirement of practical reasoning is to “pursue the good efficiently.”⁹⁹ Finnis believes that “One should bring about good in the world, in their own life and in the life of others.”¹⁰⁰ Finnis is very specific that we must “not waste one’s opportunities by using inefficient methods. One’s action should be judged by their effectiveness, by their fitness for purpose, by their utility, and consequence.”¹⁰¹

Our justice system has been crafted and developed to be efficient and work for the good of all people. At least, those who can afford an attorney. An attorney spends many years learning the law, the rules of the court and evidence, and the skills, such as the ability to cross-examine a witness or negotiate a settlement, so that they can use them at a hearing or in a courtroom. An attorney has the know-how to go before a trier of fact with his case prepared, ready to stand at the podium to find justice with for the one he represents. An attorney has been taught how to do legal research, how to prepare discovery responses, how to write a motion in limine to limit what the other party can bring in. If an unrepresented litigant doesn’t know what evidence to exclude,

⁹⁹ *Id.* at 110 - 126

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

what to object to, what to even ask for in discovery requests, how does that provide for an efficient justice system? How can we ever be sure that the truth is being discovered?

Several judges have discussed this problem in articles referenced in the dispositive portion of this paper – how they dread when unrepresented litigants come before them in court – because of the ineffective distribution of justice. There are seminars for judges to take and books for them to read on how to proceed with a *pro se* litigant. When can a judge object or make the case for the unrepresented litigant? Can a judge instruct a *pro se* litigant on how to properly request a file from DYFUS? How far should a judge let the experienced attorney take bending the rules of the court because the *pro se* litigant doesn't know to object? If we are striving to protect someone's basic goods, it is not being done efficiently by forcing indigent litigants to proceed *pro se* in cases and the arbitrators of justice – judges – are stepping up to the front lines to make it known that it's not “efficient” for *pro se* litigants to fight without help.

Finnis also addresses what can be considered cost-effective while discussing the sixth practical requirement. “Where a choice must be made, it is reasonable to prefer human good...where a choice must be made, it is reasonable to prefer basic human goods (such as life) to merely instrumental goods (such as property.)”¹⁰² “Where damage is inevitable, is it reasonable to prefer stunning to wounding, wounding to maiming, maiming to death.”¹⁰³ Obviously, there will be a cost to providing indigents with counsel in civil matters, however, as Finnis says, we must prefer human goods – the ability to raise your child, for instance, over the burden of higher taxes (property). Additionally, we as a society must weight what is more important – paying a tax or making sure someone is able to have a roof over their head or health

¹⁰² *Id.* at 116

¹⁰³ *Id.*

insurance? Higher taxes is a “stun.” Access to housing, education, and your parent/child could be considered “wounding, maiming, or even death.” A cost-benefit analysis will demonstrate that providing counsel to indigent litigants far outweighs the cost of denying anyone meaningful access. An “alternate technique” could be to only provide counsel in certain matters which are the most important, such as shelter, good health, safety, access to food and water, the ability to have children, and the ability to raise those children and slowly incorporating the right to counsel for all civil litigation.

Is accumulating wealth part of a coherent life plan? Finnis asks us to recall the Christian parable of the man who devoted all his energies to gathering riches, with a view toward nothing more than drinking or eating them up.¹⁰⁴ One who riches, who had no plan to better the community, should be reinvesting them in the community to make it good for all. As Finnis says, you can’t take it with you when you go. The small amount in raised taxes that providing counsel to civil litigants would benefit the community as a whole.

“Not to choose directly against any basic value (or respect for every basic value in every act)”¹⁰⁵ is the 7th requirement that Finnis lays out. The basic goods of course, being, knowledge, life, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion. “All acts should be done as a means of promoting or protecting, directly, or indirectly, one or more of the basic goods.”¹⁰⁶

It is easy for legal scholars to see how providing a right to counsel in civil litigation protects the goods of knowledge and life. Finnis’ starts his description of the basic forms of good

¹⁰⁴ *Id.* at 105.

¹⁰⁵ *Id.* at 118.

¹⁰⁶ *Id.*

with Life.¹⁰⁷ “The term life here signifies every aspect of the vitality which puts a human being in good shape for self-determination. Hence, life here includes bodily health and freedom from the pain that betokens organic malfunctioning or injury.”¹⁰⁸ Finnis includes in this good, the “transmission of life by the procreation of children” and “the desire and decision to cherish and educate the child.”¹⁰⁹ Life is the beginning of all the forms of good. Our founding fathers, in the Declaration of Independence, found life to be of the utmost important (along with liberty, and the pursuit of happiness). The Supreme Court, under *Gideon*, protects citizens when their life and freedom is at stake by providing them with counsel to protect them from unjustly having that life taken away from them. However, they have declined to understand and define the protection of life outside of the scope of the death penalty and incarceration. Finnis argues that the good of life contains more than being alive – but also includes good health, safety, access to food and water, the ability to have children, and the ability to raise those children.

If life is to be defined, as Finnis does, in a more robust way than what our current laws do, we are forced to accept that a life is more than just breathing. It is the ability to have a healthcare, to go see a doctor when you are ill and to have access to medication, the ability to have children, to raise those children, to be safe, and not hungry or thirsty. With a broader definition of life, which many argue that our founding fathers intended by inserting “life, liberty, and the pursuit of happiness” into our Declaration of Independence, we should be able to have a legal right to these claims. The right to life, as defined by Finnis, needs to be protected. We have a right to a hearing on all the issues that make life meaningful, and the right to a hearing should also include the right to representation on matters that make up life.

¹⁰⁷ *Id.* at 86

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

Finnis' second basic good is the pursuit of knowledge. "It is good to find out...seems applicable not merely to oneself and the questions that currently holds one's attention, but at large – in relation to an inexhaustible range of questions and subject matters."¹¹⁰ Knowledge is not just for the sake of knowing, but being able to know and being able to find out the truth.

It is argued that the truth of the law is worth pursuing; this is self-evident. As laid out above, it is not easy to become a lawyer. You must do well in high school, do well in undergraduate, take the LSAT, apply and be admitted into law school (which is not always an easy feat). While in law school, you must take a multitude of different classes, spanning between three and four years. At the end of the journey, you must take the multi-state professional responsibility exam, then take the bar exam (and not just one bar, but a bar for every jurisdiction that you intend to practice in). And finally, after years of expensive education, years of study, you can call yourself a lawyer. It is not as easy road to become a lawyer. I have yet to meet a lawyer who calls this process enjoyable – so why would we want to go up against a less than worthy adversary and not discover the truth? If a person goes through the educational system to become a lawyer, it should mean we are dedicated to the law and the quest to find the truth. If a lawyer were to say that it was fair going up against a pro-se litigant, they would be discounting all the hard work it took to get them to the place they are today.

The legal framework, the laws of evidence, trial advocacy, the skills of legal research and writing – this is what allows us to attain the truth in civil litigation. Without this structure, that has been developed, litigated, argued, and finally agreed upon, we would not be able to learn the truth. For example, the hearsay rule¹¹¹ that we learned about in our Evidence classes. At first, it

¹¹⁰ *Id.* at 92

¹¹¹ Hearsay is information gathered by one person from another person concerning some event, condition, or thing of which the first person had no direct experience.

seems unfair that you would not be able to admit the evidence, even if it is believed to be the truth. However, we then learn why hearsay is so dangerous – you don't know the person who actually spoke the word's state of mind, you cannot determine if they were truthful when speaking, and you cannot properly evaluate their motives for speaking those words. An unrepresented civil litigant, who is unfamiliar with hearsay and the rules of evidence, may not object to the statements of others being admitted. Those words then become what the trier of fact bases his or her opinion on – while the truth would dictate otherwise.

Finnis goes through great pains to establish that one good is not more important than any of the others and that they are equally fundamental.¹¹² However, one can argue that he himself elaborates and speaks in much greater detail on certain goods, such as knowledge and life. While he purports play and aesthetic experience to be on the same footing as knowledge, he gives us much more to think about when discussing knowledge and life. Some scholars (and myself, to be truthful) feel that life and knowledge are more important than the other goods (Aquinas). As attorneys, it may seem that protecting life and knowledge are paramount to the other goals – however, Finnis purports that we want to protect life and freedom, through law, so that we can enjoy play, sociability, aesthetic experience, and religion. Having a right to counsel in civil litigation as protects not only life and knowledge, but by preserving the sanctity of those two goods, we will also be protecting the five. We must not, however, protect knowledge and life if it damages the play, sociability, aesthetic experience, and religion.

¹¹² *Id.* at 92

“To seek the good in one’s community”¹¹³ is the eighth of Finnis’ practical requirements. We must “favour and foster the good in one’s community.”¹¹⁴ Many of our most concrete moral responsibilities and duties have their basis in working toward the good of the community.¹¹⁵

To seek the common good in our community means to promote social conditions that will allow all people to find flourish, have access to and obtain and goods, and then, be able to give back to the community, further improving it for everyone. By having no arbitrary preference among persons, yourself included, you will do what is best for everyone.

If we are to seek the good in the community, we must first make sure that all citizens are able to have access to the basic goods (values) so that they may do good. This includes food, clothing, health, jobs, education, and the ability to practice whatever religion they may choose. This will allow society to grow and develop. If someone is being denied the right to any of the goods, they should be able to access the justice system and have a meaningful hearing or trial to access them. A meaningful hearing or trial, by definition, should mean having skilled counsel to fight for you to have those rights. If someone truly isn’t entitled to those rights, then the hearing or trial should be fair and equitable, balanced.

“There must be some set (or sets) of conditions which need to be met if every member of the community is to attain his or her own objectives.”¹¹⁶ For the good of the community, all members should be able to obtain at least what is needed for them to live. If for some reason, everyone is not able to have access to the basic goods, they will not thrive and be able to reach their fullest potential. It is each of our own duties to ensure they can do that. We can make sure

¹¹³ *Id.* at 125

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 156

that if people do not have access to goods they are legally entitled to, that they can access the justice system to assist them in obtaining them.

The final of Finnis' requirements for practical reasonableness is to "refrain from acting as one ought not to act."¹¹⁷ We must follow one's conscience and listen ourselves. "One should not do what one judge's or thinks or feels should not be done." Our conscience will lead us to well-being, if we appreciate and have access to the goods. "If one is not as fortunate in one's inclinations or upbringing, then one's conscience will mislead one unless one strives to be reasonable and is blessed with a pertinacious intelligence alters to the forms of human good."¹¹⁸

It is evident that among us are "sadists" or "inhumane fanatics"¹¹⁹ who do not recognize the goods and the requirements of practicable reasonableness. Even though these people exist and try to deny others access to the goods, we must allow people to have a mechanism to access them, and through a fair and impartial hearing or trial, where indigent litigants are represented by skilled counsel, will we be able to ensure that we take care of all people. We, as a society, and more specifically as attorneys, need to protect the goods from those with less fortune and ensure that they have a foundation to be able to reach them. Finnis theorizes that the basic values and the principles expressing them are the only guides we have.¹²⁰ If these are the only guides we have, we need to be able to ensure access to them, for everyone. Once everyone has access, then we can have flourishing individuals, where everyone can contribute and make the overall community a harmonizing place.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 125

¹¹⁹ *Id.* at 113

¹²⁰ *Id.* at 119

Conclusion

As our nation heads into the 21st century, we must analyze our nation's legal foundations and our own moral compass. Providing a right to counsel for indigent litigants in civil litigation is supported by many state constitutions, statutes, and case law. Natural Law supports that people should have access to the "goods" that allow them to thrive and be productive members of society.

The Supreme Court of the United States should reexamine the stringent test laid out in *Lassiter*, taking into account the laws and case holdings of the states, as well as the basic premise that citizens should have meaningful access to the basic goods of life that are required for us to thrive – shelter, family, and healthcare.