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Volume 25 | Number 1

Article 18

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April 2013

## The Tipping Point on the Scales of Civil Justice

Dennis A. Kaufman

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### Recommended Citation

Kaufman, Dennis A. (2013) "The Tipping Point on the Scales of Civil Justice," *Touro Law Review*. Vol. 25: No. 1, Article 18.

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## THE TIPPING POINT ON THE SCALES OF CIVIL JUSTICE

*Dennis A. Kaufman\**

*The right to counsel in civil cases—metaphorically known as Civil Gideon—has gained traction in segments of the legal community, but advances have thus far been legislative, and while significant, adoption has been slow, less than cohesive or thematic and inconsistent across the country. Patchwork recognition and implementation by legislatures forms a fragile and uneven safety net. The availability of counsel is far from comprehensive. The preferred path to a comprehensive right to counsel in civil matters goes through the United States Supreme Court, but the Court refused to recognize a due process constitutional right to counsel in a civil matter in *Lassiter v. Department of Social Services* and has not spoken on the issue since.*

*The conventional wisdom within the community of Civil Gideon supporters is to avoid federal courts. Despite the conventional wisdom, a singular holding by the United States Supreme Court identifying a right to appointed counsel in civil matters in the United States Constitution would change the landscape in an instant. The question in the states would turn from “why” to “how,” as implementation of the right would be the order of the day. It is time to grapple with the conventional wisdom about right to counsel and understand that waiting for a “better” Supreme Court could result in advocates for right to counsel waiting a long time, and possibly passing up the opportunity for dramatic change.*

*A model for dramatic change is found in the Supreme Court’s*

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*switch on the constitutionality of state criminal sodomy laws from Bowers v. Hardwick to Lawrence v. Texas. As the environment within which Lawrence became law was fraught with political, legal, social, and cultural tensions, the change appeared to defy conventional wisdom. Framing a strategy for change will borrow from the change theory suggested by Malcolm Gladwell in “The Tipping Point: How Little Things Can Make A Big Difference.” Gladwell’s tipping point is a moment in time when forces converge and an idea or notion spreads like an epidemic. What factors, events, legal arguments, and actors must converge to create the tipping point? This Article will construct a strategy for getting the Supreme Court to overrule its holding in Lassiter to recognize a constitutional right to counsel in cases where the state attempts to terminate parental rights.*

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## THE TIPPING POINT ON THE SCALES OF CIVIL JUSTICE

### INTRODUCTION

The right to counsel in civil cases—metaphorically known as Civil Gideon<sup>1</sup>—has gained traction in segments of the legal community. State legislatures enact limited rights to counsel.<sup>2</sup> Academics debate and discuss the right in their traditional forums—lectures, classrooms, and law reviews.<sup>3</sup> Bar associations and other legal groups hold conferences and issue policy statements.<sup>4</sup> Lawyers litigate, proposing seemingly persuasive legal theories, although with modest success.<sup>5</sup> With very few exceptions, courts as an institution have lagged behind in recognition of the right.

The gains in right to counsel in civil matters have thus far been legislative, and while significant, adoption has been slow, less

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<sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963). The term “Civil Gideon” has become popularly used as a shorthand for the right to appointed counsel in civil matters. “Civil Gideon” is an understandable metaphor, but triggers a mental image of criminal activity and, for some, the excessive liberalism of a previous era in Supreme Court history. For advocates of the right to counsel in civil matters, it may be time to retire the *Gideon* connection. If this writing accomplishes nothing else, I would be pleased with that result.

<sup>2</sup> See Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (2006).

<sup>3</sup> For a collection of law review articles, see Paul Marvy, *Thinking About a Civil Right to Counsel Since 1923*, 40 CLEARINGHOUSE REV. 170 (2006).

<sup>4</sup> The following are examples of bar association resolutions supporting the right to counsel in civil cases: American Bar Association House of Delegates, *Task Force on Access to Civil Justice*, 112A (Aug. 7, 2006), available at <http://www.abanet.org/legal/services/sclaid/downloads/06A112A.pdf> [hereinafter *Task Force on Access to Civil Justice*]; PA Legal Services.org, PA Legal Aid Network—PA Bar Association Supports Increased Funding for Legal Services and a Limited Right to Counsel in Civil Case; and MassBar.org, Massachusetts Bar Association—House of Delegates Unanimously Supports Principle of Civil Gideon, <http://www.massbar.org/for-attorneys/publications/e-journal/2007/may/523/hod> (endorsing the ABA resolution).

<sup>5</sup> Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186 (2006).

than cohesive or thematic, and inconsistent across the country. Patchwork recognition and implementation by legislatures form a fragile and uneven safety net. Lawyers are available for appointment in some jurisdictions for matters such as child custody, orders of protection, civil contempt, involuntary commitment, and guardianship. The availability of counsel is far from comprehensive. The preferred path to a comprehensive right to counsel in civil matters goes through the United States Supreme Court. The Court refused to recognize a due process based constitutional right to counsel in a civil matter in *Lassiter v. Department of Social Services*<sup>6</sup> and has not spoken on the issue since. The conventional wisdom within the community of Civil Gideon supporters is to avoid federal courts.<sup>7</sup> The assumption underlying this cautionary admonition is that the current Supreme Court is too “conservative” for such a “liberal” idea.

Despite this conventional wisdom, a singular holding by the Supreme Court identifying a right to appointed counsel in civil matters in the United States Constitution would change the landscape in an instant. The question in the states would turn from “why” to “how,” as implementation of the right would be the order of the day. Although the process of execution would vary, the direction would be more uniform across the states. We are not without a model, as states created systems for providing counsel in criminal cases since the *Gideon* decision in 1964. This is not to infer the task would be easy; we continually work to improve indigent criminal defense services in

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<sup>6</sup> 452 U.S. 18 (1981).

<sup>7</sup> See Deborah Perluss, *Creating a Constitutional Right to Counsel in the Civil Context: Keeping the Eyes on the Prize: Visualizing the Civil Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 719, 722 (2006).

this country.<sup>8</sup> We have failed to create and implement cost-effective public defense systems that consistently meet standards of competency, let alone standards of excellence. While legitimate debate following a right to counsel holding would address the difficulty of accomplishing such a daunting task which has been left uncompleted on the criminal side for more than forty years, this alone is not a sufficient reason for burying the concept of civil right to counsel. Without the first step—establishing the legitimacy of right to counsel—the debate is academic.

It is time to grapple with the conventional wisdom about right to counsel and the Supreme Court. This is not a criticism of other strategies to make counsel available to civil litigants, nor a rejection of efforts by state legislatures and courts to continue broadening availability of counsel in civil matters. The wringing of hands about what is perceived as a hostile federal judicial environment should cease. It is time to acknowledge that waiting for a “better” Supreme Court could result in advocates for right to counsel waiting a long time, and possibly passing up the opportunity for dramatic change.

What needs to happen for the Supreme Court to change? The Supreme Court gradually advanced the right to counsel in criminal cases from *Powell v. Alabama*<sup>9</sup> to *Betts v. Brady*<sup>10</sup> to *Gideon v. Wainwright*, progressing from a case-by-case analysis to acknowl-

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<sup>8</sup> See generally A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004).

<sup>9</sup> 287 U.S. 45 (1932) (holding that criminal defendants were denied their right to counsel in violation of the Fourteenth Amendment when counsel was appointed by the court on the day of the trial effectively denying defendant aid in the preparation of trial).

<sup>10</sup> 316 U.S. 455 (1942) (concluding that the Sixth Amendment's guarantee of counsel is not a fundamental right essential to a fair trial).

edging a constitutionally protected comprehensive right to counsel in criminal cases.<sup>11</sup> The Supreme Court underwent a significant shift in ideology from the early 1930s to 1960s, progressively becoming a more liberal institution. Even if the perceived evolution of the Court's ideology is accurate and the opposite of recent times, much can be learned by analyzing the changing environment leading up to *Gideon*.<sup>12</sup> We may learn more from recent changes, such as the revolutionary switch of the Court's view on state criminal sodomy laws from *Bowers v. Hardwick*<sup>13</sup> to *Lawrence v. Texas*<sup>14</sup> in just seventeen years. The environment within which *Lawrence* became law was fraught with political, legal, social, and cultural tensions. Given the even more conservative and fractured nature of the Supreme Court compared with the *Bowers* panel, who would have predicted state criminal sodomy laws would be struck down by a six-to-three vote? The change appeared to defy conventional wisdom.

Looking at the changing environments leading to *Gideon* and *Lawrence* can inform strategies for achieving a judicially recognized right to counsel. We may spend too much time developing and debating legal theories urging the Court to change and not enough time on the environment that permits or fosters change. Without diminishing the importance of tightly crafted and persuasive legal arguments, the arguments may not be ultimately responsible for winning the day.

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<sup>11</sup> *Gideon*, 372 U.S. at 345 (holding that the Sixth Amendment right to counsel in criminal cases applied to the states through the Fourteenth Amendment's Due Process Clause).

<sup>12</sup> See Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 40 CLEARINGHOUSE REV. 271, 271-73 (2006).

<sup>13</sup> 478 U.S. 186 (1986).

<sup>14</sup> 539 U.S. 558 (2003).



The task is to convince at least five justices to change our civil legal system to conform to a conception of fundamental fairness prevailing in other western democracies that already provide for a civil right to counsel.<sup>15</sup> Beyond legal arguments, consideration of empirical work on decision making by the Supreme Court also has a place in framing a strategy for Court acceptance of the right to counsel concept.

The goal of framing a strategy is change. Achieving the right to counsel in civil cases will demand changing existing Supreme Court precedent. Lawyers and judges fall back on familiar legal ideas such as the doctrine of stare decisis, overruling precedent, and distinguishing a case when they are discussing the idea of change. Framing a strategy for change will borrow from the change theory suggested by Malcolm Gladwell in “The Tipping Point: How Little Things Can Make a Big Difference.”<sup>16</sup> While Gladwell’s work may not satisfy those insisting on rigorous validation, its rules have found adherents in such diverse disciplines as management and climatology.

Gladwell writes of the existence of one dramatic moment at which change comes suddenly. At a point of critical mass, change can be radical and the unexpected becomes the expected. Gladwell’s tipping point is a moment in time when forces converge and an idea or notion spreads like an epidemic.<sup>17</sup> What factors, events, legal arguments, and actors must converge to create the tipping point—the

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<sup>15</sup> Raven Lidman, *Civil Gideon: A Human Right Elsewhere in the World*, 40 CLEARINGHOUSE REV. 288 (2006).

<sup>16</sup> MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000) [hereinafter *THE TIPPING POINT*].

<sup>17</sup> *Id.* at 7.

point at which the Supreme Court could defy conventional wisdom just as the Court did in *Gideon* and *Lawrence*? This Article will construct a strategy for getting the Supreme Court to overrule its holding in *Lassiter*, to recognize a constitutional right to counsel in cases where the state attempts to terminate parental rights. The overruling of *Lassiter* would not create a comprehensive right to counsel, but could be a first step in that direction.

Confronting change is difficult. We might relax the challenge if we confront change from a familiar place. For many lawyers, a familiar place for framing a litigation strategy is a weekly meeting of lawyers designed to review new and old matters. The setting is familiar to lawyers who practice in many different venues—law firms, government offices, nonprofit public interest firms, and civil legal aid organizations. The format is also familiar to members of the public as they also have sat through case strategy meetings during television portrayals of law firms in “Boston Legal” and the defunct “L.A. Law.” To reduce the dialogue, much of the legal discussion appears in summary form. Like all legal strategy discussions, options appearing to hold promise today may look like foolish choices tomorrow. Experienced counsel knows that litigation plans are ongoing discussions rather than immutable outlines.

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*It's Wednesday at 10:00 a.m. and six lawyers of Public Justice, a nonprofit public interest firm, are gathering in the conference room. The ritual is the same each week. First, ongoing cases are brought to the table for review. New client matters are then raised*

*with the purpose being to accept or reject the potential client. For the acceptances, the initial case strategy is discussed and analyzed. The freewheeling nature of the meeting usually means a nonlinear, sometimes frustratingly, nondefinitive look at what to do with the new case. The lawyers in the room are a mix of experience, some with more than thirty years of experience and others only a year out of law school. The Public Justice lawyers think of themselves as innovation tempered by experience and experience challenged by innovation. Listen to the discussions about their cases. Just when an experienced lawyer starts taking a case through a zone of comfort, one recent graduate asks a question that upsets the steady tempo rehearsed over the years. On the other side, the recent graduate excitedly presenting a new matter is reminded that the proposed litigation is so fact-intensive that discovery alone will take large chunks of Public Justice's limited litigation fund away from other worthy cases.*

*"Any new matters?" asks the experienced lawyer chairing the meeting.*

*Like a champagne bottle ready to explode, one new lawyer begins discussing a possible new client. "This could be the case we've been waiting for. It could take us to the Supreme Court and have an impact like no other."*

*The lawyer described a conversation with a law school friend working for a legal aid society in an adjoining state. Emily, a young mother who had recently lost custody of her two children following recuperation from a car accident, contacted the out-of-state lawyer. The accident was horrific, killing her husband and causing her exten-*

sive physical damage. Emily was hospitalized off and on for two years undergoing extensive reconstructive surgery. During the recovery period, Emily also experienced severe depression. Without family support, she had voluntarily surrendered custody of her two children to the county Department of Social Service. Emily understood that when she was physically and mentally able, she would regain custody of the children.

Just before Emily was to be released from the hospital, the county served her with a petition to terminate her parental rights. The petition alleged the children had been in foster care for more than two years, and that Emily had not made significant efforts to plan for reunification of the family. The petition also alleged that Emily's physical condition and need for additional rehabilitation made it difficult for her to care for two young children. Additionally, Emily's history of "mental illness" raised the likelihood that the children would be in danger. Furthermore, Emily's financial condition was dire as she had no source of income.

With great difficulty, Emily in court told the judge she did not have money to hire a lawyer and would like one to be appointed for her. The judge appointed a guardian ad litem for her children, but told Emily he had looked over the allegations in the county's petition, and this was not a case where he could appoint a lawyer.<sup>18</sup> The trial started immediately. Despite her efforts, Emily was unable to repre-

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<sup>18</sup> Only a few states do not have provisions for appointment of a lawyer in a proceeding to terminate parental rights. For example, Mississippi does not have a statutory right to counsel for a parent in termination proceedings. The Mississippi Supreme Court has held that a parent does not have a due process right to appointment of an attorney. *K.D.G.L.B.P. v. Hinds County Dep't of Human Serv.*, 771 So. 2d 907, 914 (Miss. 2000).

*sent herself successfully and the court ordered her parental rights terminated.*

*“Lassiter,” exclaimed one experienced lawyer at the table. “You’ve given us the facts of a case decided by the Supreme Court in 1981. What’s left to say?”*

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## I. THE SUPREME COURT AND THE RIGHT TO COUNSEL IN CIVIL MATTERS

*Lassiter* is the barrier to a civil constitutional right to counsel, or as one commentator labeled it, the “scourge.”<sup>19</sup> Ask why courts have failed to find a civil right to counsel and the response will point to the formidable barrier built by the Court’s decision in *Lassiter*. Although the decision was a bare majority of five, Justice Potter Stewart’s opinion left little doubt about how lower courts should treat constitutional claims to appointed counsel.<sup>20</sup> In the range of deprivations that could be visited upon a civil litigant, the complete loss of one’s children is without equal. If ever the Court would find that fundamental fairness required representation by a lawyer, a termination of parental rights would be the case.

In 1975, Abby Gail Lassiter lost custody of her son, William, in a neglect proceeding. William was placed in a foster home. In 1976, Ms. Lassiter was convicted of second-degree murder and sen-

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<sup>19</sup> See Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 LOY. U. CHI. L.J. 363 (2005). See also Steven D. Schwinn, *Sidestepping Lassiter on the Path to Civil Gideon: Civil Douglas*, 40 CLEARINGHOUSE REV. 217, 218 (2006).

<sup>20</sup> *Lassiter*, 452 U.S. at 25 (1981) (stating that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty).

tenced to twenty-five to forty years in a state correctional facility.<sup>21</sup> In 1978, the local department of social services sought to terminate Ms. Lassiter's parental rights under North Carolina law. Ms. Lassiter was served with a petition in prison. The Department's petition alleged William had been in foster care for more than two years, Ms. Lassiter had not made substantial progress in correcting the conditions that led to William's removal, and she had not made an effort to plan for his future.<sup>22</sup>

Although Ms. Lassiter retained counsel for appeal of her criminal conviction, she did not discuss representation at the termination hearing with her lawyer.<sup>23</sup> At the start of the termination hearing, Ms. Lassiter and the trial judge discussed legal representation, but only in the context of her retaining counsel. She did not request an appointed attorney.<sup>24</sup> The trial proceeded on that same day. Although Ms. Lassiter attempted to cross examine witnesses for the Department of Social Services and present her own evidence, the record shows that she fared no better than would be expected for a lay-person struggling through an evidentiary hearing.<sup>25</sup>

On appeal to the North Carolina Court of Appeals, an attorney from the North Central Legal Assistance Program represented Ms. Lassiter.<sup>26</sup> Ms. Lassiter's lawyer urged the court to find she had a

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<sup>21</sup> *Id.* at 20.

<sup>22</sup> *Id.* at 20-21.

<sup>23</sup> *Id.* at 21.

<sup>24</sup> *Id.* at 21-22.

<sup>25</sup> *Lassiter*, 452 U.S. at 23.

<sup>26</sup> North Central Legal Assistance ("NCLA"), succeeded by Legal Aid of North Carolina ("LANC"), provided representation to low-income clients on civil matters, but not through appointment by a court. As with all such providers, NCLA did not have to accept every person who applied for assistance. The funding available to these discretionary providers lim-

Fourteenth Amendment Due Process right to appointed counsel in the termination proceeding. The court found against Ms. Lassiter, and her petition for review to the North Carolina Supreme Court was not granted.<sup>27</sup> The United States Supreme Court granted an application for certiorari. While the certiorari process remains both mysterious and well-studied, a likely reason for acceptance of the Lassiter petition was the existence of a split of opinions by two United States Circuit Courts of Appeals on the issue of the right to counsel.<sup>28</sup> Whatever else may have contributed to the Court's acceptance of the case, the result supports the adage that "bad facts make bad law."

In *Lassiter*, the Supreme Court established both a demanding standard for analyzing whether or not the Constitution commands counsel in a civil matter, and a demanding process for resolving that issue in every civil case. Ms. Lassiter argued that because the stakes were so high during a termination of parental rights proceeding—permanent loss of custody of her child—the Due Process Clause of the Fourteenth Amendment required the state to appoint counsel to represent parents who could not afford to retain a lawyer.<sup>29</sup> The traditional analysis of Due Process claims was twofold: is process due

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ited their ability to represent but a small portion of those who needed their services. LegalAidNC.org, Legal Aid of North Carolina—Client Eligibility, [http://www.legalaidnc.org/public/Learn/about\\_us/Client\\_Eligibility.aspx](http://www.legalaidnc.org/public/Learn/about_us/Client_Eligibility.aspx) (last visited Sept. 27, 2008).

<sup>27</sup> *In re Lassiter*, 262 S.E.2d 6 (N.C. 1980).

<sup>28</sup> *Lassiter v. Department of Social Services: The Right to Counsel in Parental Termination Proceedings*, 36 U. MIAMI L. REV. 337, 342 (1982) (discussing the inconsistent holdings of the Ninth Circuit [which adopted a balancing test between the interests of the state, society, and the parent in determining when an indigent defendant had a right to counsel in dependency proceedings] and the Fifth Circuit [which held that an indigent defendant had an absolute right to counsel in all dependency hearings]).

<sup>29</sup> *Lassiter*, 452 U.S. at 24.

and, if it is, how much process? Not questioning Ms. Lassiter's right to process before her child was removed from her custody, the issue narrowed to how much process was due. The majority opinion by Justice Potter Stewart created a new balancing test, in essence a "double" balancing test.

The Court first announced a presumption against appointing counsel unless a person's physical liberty was at issue. It created the presumption from the Court's own failure to find a right to counsel in anything other than criminal cases where a defendant faced imprisonment. The net result of the balancing test could only rebut the presumption in a case-by-case analysis established by the Court in *Mathews v. Eldridge*.<sup>30</sup> In *Mathews*, the Court created a cost-benefit analysis to decide how much process was due in an administrative review of a Social Security benefit denial. To discover the extent of process constitutionally required to meet the standard of "fundamental fairness," a court had to evaluate "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions."<sup>31</sup> Justice Stewart's *Lassiter* opinion analyzed the factors for any proceeding designed to terminate parental rights. Justice Stewart then added a second analytical test: "We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, will lose his personal freedom."<sup>32</sup>

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<sup>30</sup> 424 U.S. 319 (1976).

<sup>31</sup> *Lassiter*, 452 U.S. at 27 (citing *Mathews*, 424 U.S. at 319).

<sup>32</sup> *Id.*



Having announced the test for determining when a parent is entitled to an appointed lawyer, Justice Stewart applied it universally to parental rights termination proceedings by identifying the “extremely important” interest of the parents in maintaining custody of their children, the high probability of error in a fact-finding proceeding where parents are unrepresented, and the coinciding interests of the state and parents of a “correct decision.” If a reader had stopped at this point, the logical conclusion favored appointing a lawyer in a proceeding to terminate parental rights, the family court equivalent of the death penalty. The Court could have remanded the case to the state court for a review of the record to decide if the presumption against appointment of counsel in a noncriminal proceeding was overcome in Ms. Lassiter’s situation. The Court, however, found that expediency in child custody matters was “consistent with fairness,” and proceeded to complete that task itself.<sup>33</sup> What resulted was an analysis that set the tone for lower courts to follow. While acknowledging the strength of the analysis in favor of finding a due process right, Justice Stewart reached into the record and recited salient facts to complete Ms. Lassiter’s double balancing test. The hearing in the state court would undoubtedly produce evidence both favorable and unfavorable to Ms. Lassiter, but no favorable facts appear in those selected by Justice Stewart. His decision recites the facts upon which Ms. Lassiter’s claim for appointed counsel was resolved: (1) Ms. Lassiter did not have to cross examine any expert witnesses during the hearing, (2) no “especially troublesome” issues of law arose at the

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<sup>33</sup> *Id.* at 32.

termination hearing, (3) Ms. Lassiter's preferred custodian, the child's grandmother, showed "scant interest" in William after he was placed in foster care, (4) Ms. Lassiter's failure to attend a neglect hearing three years before the termination proceeding, (5) Ms. Lassiter failed to consult with her retained criminal attorney on the termination proceeding, and (6) Ms. Lassiter did not face the threat of criminal charges arising from the allegations in the termination petition.<sup>34</sup>

By going beyond merely establishing the yardstick for case-by-case determinations, the Court's factual selection and analysis sent a message that it may be impossible to overcome the presumption against appointment of counsel where a physical deprivation of liberty was not at stake. The legacy of the *Lassiter* majority opinion is not only the double balancing test, but the manner in which it was applied to Ms. Lassiter and how it could be applied in the future. Although the *Lassiter* test is couched in objective language, application of the test is highly subjective. Selection of salient facts to be inserted into the *Mathews* formula is discretionary with the court. There is nothing to prevent a court from working the equation backwards—selecting the result, and then sifting through the facts to find those that support the answer. By conducting the analysis as it did, the Court made sure that its point was driven home—*Lassiter* was, and remains a formidable impediment to a civil right to counsel.

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*"Looks like the judge in Emily's case followed Lassiter and*

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<sup>34</sup> *Id.* at 32-33.

*decided the net weight of the Mathews v. Eldridge analysis did not overcome the presumption that appointed lawyers are reserved for cases where people can end up in jail."*

*"Emily lost her children forever. I'd say that's worse than going to jail. Many people face losing not only their kids, but their livelihood or their home in civil court. Many just don't have the money to hire a lawyer. That's a problem."*

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## II. THE PROBLEM

Who needs a lawyer? Depending on whom you ask, the answer ranges from everyone to no one. While the popular media never avoids the opportunity to report an inane or greedy lawsuit, non-organizational consumers of legal services use lawyers in civil matters to improve the quality of their lives. Quantitatively and qualitatively, the civil legal needs of the poor have been measured and proven to be not only substantial in number, but on matters critical to maintaining even a subsistence standard of living.<sup>35</sup> With much wringing of hands, the needs have been reviewed and debated in academia and within the legal profession.<sup>36</sup> To conclude that low-income families and individuals cannot afford representation to meaningfully partici-

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<sup>35</sup> See LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2007), *available at* <http://www.lsc.gov/JusticeGap.pdf>. Also available is a sampling of legal needs assessments located at <http://www.lri.lsc.gov/needsassessment/needsassessment.asp>. Statewide and regional surveys uniformly find that fifteen to twenty percent of the civil legal needs of low-income households are being met through staffed legal services organizations, volunteer lawyer programs sponsored by bar associations, and other organizations that make lawyers available to the poor.

<sup>36</sup> See Helaine M. Barnett, *Justice for All: Are We Fulfilling the Pledge?*, 41 IDAHO L. REV. 403 (2005).

pate in our court system should startle few. Solutions abound: more money for civil legal services organizations, more pro bono legal services by the private bar, more consumer friendly courts, more readily available information to facilitate self-representation, and more room at the bar for non-lawyer representation. Unfortunately, more talk about access to justice is what mostly abounds.<sup>37</sup>

When creating solutions to meet legal needs, there is no uniform definition of access to justice, as the concept has at least two meanings. First, access is a procedural notion. Lawyers, being procedural mavens, are likely to refer to this conception of access under most circumstances. The procedural nature of access to justice promises little more than opening the front door to the courthouse. While a great theme for a Law Day speech by a judge or bar association president, this mode of access is little comfort to a pro se litigant. Once inside, the problem is maneuvering through the halls of justice to find a positive or just outcome. That is where the system often falls apart for the untrained, self-represented litigant.<sup>38</sup> Faced with confusing rules and practices, one solution for the pro se litigant would be to employ the services of a lawyer to achieve the second form of access—a just outcome. Lawyers-for-litigants is not the only method for responding to the civil legal needs of low-income persons and may not be the most effective.<sup>39</sup> While self-represented litigants

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<sup>37</sup> Deborah L. Rhode, *The Constitution of Equal Citizenship for the Good Society: Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1790 (2001).

<sup>38</sup> Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 *JUST. SYS. J.* 163, 163-64 (2003); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 1989 (1999).

<sup>39</sup> DEBORAH L. RHODE, *ACCESS TO JUSTICE* 79-102 (2004). Ms. Rhode discusses alternate

appear in all courts, the number is significantly higher in courts that handle family law matters.<sup>40</sup> Several surveys revealed self-representation in seventy-five to eighty percent of the cases in family courts.<sup>41</sup> Empirical studies, however, have noted that represented litigants in courts and benefit claimants in administrative proceedings have a significantly greater chance of obtaining a favorable outcome.<sup>42</sup> For example, in a meta-analysis of published studies on client outcomes when represented or not, all concluded that favorable outcomes were more likely with lawyer representation, although the strength of the correlation varied.<sup>43</sup> The right to counsel movement has embraced representation by lawyers as a solution.<sup>44</sup>

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forms of legal help such as limited representation or unbundling, consumer-friendly courts, group legal services, and self-help materials.

<sup>40</sup> Deborah J. Chase, *Pro Se Justice and Unified Family Courts*, 37 FAM. L. Q. 403, 404 (2003).

<sup>41</sup> *Id.* at 404.

<sup>42</sup> See generally Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001); William D. Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989 (1977).

<sup>43</sup> Rebecca L. Sandefur, *Lawyer, Non-Lawyer and Pro Se Representation and Trial and Hearing Outcomes* (June 30, 2006) (unpublished paper, available at <http://ssrn.com/abstract=913426>).

<sup>44</sup> The "Civil Gideon movement" consists of those in and out of the legal profession who support the concept of providing lawyers under certain circumstances to low-income people with a civil legal issue. As with most social and political movements, there is little formality to the organization and action taken by members. Although loosely organized, the National Coalition for a Civil Right to Counsel was formed in 2004 following a workshop at the annual conference of the National Legal Aid and Defenders Association in Seattle, Washington. As of this writing, Coalition membership numbers about 150 with participants from thirty-five states, Canada and England. Coalition participants meet monthly by telephone conference call to strategize and share information. The Coalition maintains a listserv and continues to present workshops at national legal conferences. Recently, the Civil Right to Counsel Leadership and Support Initiative was formed as a partnership among five organizations that have taken an active role in both the Coalition and other activities designed to recognize right to counsel nationally and in the states. [CivilRighttoCounsel.org](http://www.civilrighttocounsel.org), [http://www.civilrighttocounsel.org/who\\_we\\_are/about\\_the\\_coalition/](http://www.civilrighttocounsel.org/who_we_are/about_the_coalition/) (last visited Oct. 22, 2008).

### III. “LET ME TELL YOU ABOUT THE VERY RICH. THEY ARE DIFFERENT FROM YOU AND ME.”

The converse of F. Scott Fitzgerald’s observation about the rich in “The Rich Boy, All the Sad Young Men,”<sup>45</sup> appropriately describes the legal needs of the poor—they are very different. Without venturing into a debate about the importance or urgency of legal matters of the non-poor, the essence of the disparity is that the law touches the lives of low-income individuals and families in many different ways, often with greater frequency.<sup>46</sup> While waiting in a legal aid office, a thirty-five-year-old man on public assistance was asked about his experience with the law and answered, “For me the law is all over. I am caught, you know; there is always some rule that I’m supposed to follow, some rule I don’t even know about that they say. It’s just different and you can’t really understand.”<sup>47</sup>

<sup>45</sup> F. SCOTT FITZGERALD, *ALL THE SAD YOUNG MEN* 5 (James L. W. West III ed., 1926).

<sup>46</sup> The American Bar Association commissioned a national study of legal needs of low and moderate income households in 1994. The summary concludes that low and moderate households have about the same number of legal needs and in similar areas. A closer review indicates a significant difference and some gaps in the survey methodology. For example, the report used broad areas to describe legal needs such as housing and personal finance/consumer. But events reported under each of these categories could range from negative to positive. A housing legal need could be either a closing for the purchase of a home or a summary eviction from a rented apartment. Data tables indicate both incidence and prevalence of “unsafe rental housing” was 250 to 350% greater for low income households than moderate income households. Even within the broad categories, significant differences appeared when data was reported at various income levels. For example, low-income households with a yearly income of \$15,000 to \$25,000 had approximately twice as many consumer, housing and family law related legal needs than households with income of \$45,000 to \$60,000. earners. See A.B.A. CONSORTIUM ON LEGAL SERV. AND THE PUBLIC, LEGAL AND CIVIL JUSTICE—A SURVEY OF AMERICANS MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994), available at <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf>. [hereinafter A.B.A. CONSORTIUM ON LEGAL SERV.].

<sup>47</sup> Austin Sarat, “. . . *The Law Is All Over*”: Power, Resistance, and the Legal Consciousness of the Welfare Poor, 2 *YALE J.L. & HUMAN.* 343 (1990). The quoted comment was relayed to the author by Spenser, a thirty-five-year-old man on public assistance, during an interview at a legal aid office. *Id.*

Given the opportunities for encountering legal issues, the poor stand to experience quantitative and qualitative differences in their need for accessing the justice system. The poor lead lives more regulated by the law than any other economic class. They are “surrounded and entrapped by legal rules as well as by officials and institutions which claim authority to say what the law is and what the rules mean.”<sup>48</sup> The legal problems encountered by low-income individuals and families can be a threat to basic subsistence or survival needs, since legal rules position them closer to disastrous consequences than people with higher incomes. The rules bring the poor into frequent conflict with governmental agencies that middle and upper class families will never or infrequently encounter. For a person receiving public assistance or certain social insurance payments as a source of income, the rules regulating receipt and maintenance of the income are numerous, sometimes complex and often invasive. Government officials deciding under complex statutes or regulatory schemes create legal issues demanding resolution at administrative hearings and court proceedings. For a middle class person, navigating employer-provided health insurance plans can be frustrating, but eligibility and continuation rules for Medicaid, a program for low-income consumers, rival the tax code for complexity. Low-income households renting shelter are likely to contend with health and safety concerns in the dwellings they can afford, along with the constant threat of shelter loss because of its disproportionately high cost.<sup>49</sup>

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<sup>48</sup> *Id.* at 346.

<sup>49</sup> See CTR. FOR HOUS. POL’Y, HOUSING PROBLEMS OF THE WORKING POOR (2004), available at [http://www.nhc.org/pdf/pub\\_nc\\_04\\_04.pdf](http://www.nhc.org/pdf/pub_nc_04_04.pdf).

Frequent trips to landlord-tenant court are common for the poor.<sup>50</sup> Government subsidized housing programs add another layer of potential legal difficulties with their regulatory schemes.

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*“Unrepresented people before the courts or administrative agencies is a problem, but what can we do about it? If we take Emily’s case, we can go all the way back to the Supreme Court, but what are the chances of the court overruling Lassiter? Especially this conservative Court! Conventional wisdom is to avoid the Supreme Court. The overwhelming number of states fixed this problem for parents by statute. Why should we give the Court an opportunity to repeat its Lassiter holding?”*

*“Don’t be so sure about the conventional wisdom,” one young lawyer replied. “Weren’t you the one who told us about Velazquez?”*

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#### IV. CONVENTIONAL WISDOM—A LESSON FOR AND FROM LEGAL SERVICES LAWYERS

The Supreme Court is a place where conventional wisdom is confounded more times than might be expected. An example of the Supreme Court’s reaction to efforts to reduce the effectiveness of lawyers for poor civil litigants defies conventional wisdom. Since the mid-1960s, civil legal services organizations for the poor were funded primarily by discretionary grants from the federal govern-

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<sup>50</sup> Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUS. POL’Y DEBATE 461, 467 (2003).



ment.<sup>51</sup> In 1995, a hostile majority in Congress sought to either abolish or reduce federal funding. A political compromise maintained funding at seventy-five percent of the previous year, but added significant restrictions on the use of funds. To receive federal funding, a civil legal services organization had to agree to abide by limitations on clients represented and the manner in which lawyers could represent clients.<sup>52</sup> For example, congressionally funded legal service programs could not bring class actions for their clients, even if that meant suing on many identical individual cases causing an administrative burden on the courts. Another statutory restriction barred legal services organizations from accepting court ordered awards of attorney fees imposed on defendants.<sup>53</sup>

Another statutory limitation prohibited legal services groups from using any other funding, from whatever the source, to circumvent the restrictions.<sup>54</sup> In the same Congress, efforts were underway to overhaul the forty year-old Aid to Families with Dependent Children ("AFDC") program, the heart of federal cash assistance to low-income families.<sup>55</sup> Congressionally funded lawyers were prohibited from challenging the welfare reforms, even if the resulting reforms were blatantly unconstitutional.<sup>56</sup> Who else but knowledgeable legal

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<sup>51</sup> 42 U.S.C. § 2996 (2000).

<sup>52</sup> J. Dwight Yoder, *Justice or Injustice for the Poor?: A Look at the Constitutionality of Congressional Restrictions on Legal Services*, 6 WM. & MARY BILL RTS. J. 827, 834-35 (1998). See also Recent Legislation, *Constitutional Law—Congress Imposes New Restrictions on Use of Funds by the Legal Services Corporation—Omnibus Consolidated Rescissions and Appropriations Act of 1996*, Pub. L. No. 104-134, 110 Stat. 1321, 110 HARV. L. REV. 1346 (1997).

<sup>53</sup> Yoder, *supra* note 52, at 838.

<sup>54</sup> *Id.*

<sup>55</sup> Jason DeParle, *The Ellwoods; Mugged by Reality*, N.Y. TIMES, Dec. 8, 1996, at 64.

<sup>56</sup> Yoder, *supra* note 52, at 836.

services attorneys would bring litigation challenging the new welfare laws? If legal services lawyers were prohibited from challenging welfare reforms in the courts, Congress could save its reforms.

A survey of the immediate reaction of civil legal services lawyers would have likely revealed a substantial degree of outrage at the prospects of representing clients without the full panoply of tools available to other lawyers, including those representing their client's adversaries in court. Legal services lawyers saw the potential ethical dilemmas looming as the congressionally imposed restrictions would infringe on their ability to competently represent their clients.

Experienced and talented legal services lawyers began plotting litigation strategies to attack what they perceived as unconstitutional conditions placed on congressional funds. Another faction of legal services lawyers, many with years of experience and a professional lifetime of commitment to work for low-income families expressed a cautionary message. They argued that challenging Congress in the courts had two potentially fatal results—the existence of litigation alone could convince Congress to end funding; and prevailing on such challenges in a conservative Supreme Court was likely impossible.<sup>57</sup> While many nationally recognized leaders on civil legal services stayed on the sidelines, litigation ensued challenging several restrictions, most notably the prohibition against using congressional funds to represent clients challenging welfare reform laws.<sup>58</sup> With inconsistent support from within the legal services

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<sup>57</sup> *Id.* at 861.

<sup>58</sup> William Mellor, *Rule of Law: Want Welfare Reform? First Fight Legal Services Corporation*, WALL ST. J., Feb. 1, 1995, at A13. See also *Legal Services Corp. v. Velazquez*,

community for the litigation, lawyers sympathetic to the goals of civil legal services, yet outside the core community, defied conventional wisdom and set a litigation course for the Supreme Court.

What happened? With litigation pending, Congress did nothing. It did not seek statutory retribution by ending funding for civil legal services as feared. In fact, during the pendency of the litigation, funding by Congress increased.<sup>59</sup> The conventional wisdom about the Supreme Court reaction also proved mistaken. By a five-to-four vote, with Justice Anthony Kennedy writing for the majority, the Court in *Legal Services Corporation v. Velazquez*<sup>60</sup> held that prohibiting congressionally funded lawyers from arguing the illegality of welfare reform in court violated the First Amendment by regulating private speech and insulating federal law from legitimate judicial challenge.<sup>61</sup>

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*“Conventional wisdom can stifle change, sometimes even an attempt to change. As with much conventional wisdom, it may be time to challenge its foundations and conclusions,” commented one young lawyer.*

*“Let’s start by looking at the right to counsel in a broader context—access to the courts. Having a lawyer gives meaning to access. In that context, the Supreme Court hasn’t dealt with access in*

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531 U.S. 533 (2001).

<sup>59</sup> From its recent low-point in fiscal year 1998, LSC funding has increased every year. *Velazquez* was commenced in calendar year 1997 and concluded in 2001. See LEGAL SERV. CORP., FISCAL YEAR 2009 BUDGET REQUEST 6 (2008), available at <http://www.lsc.gov/pdfs/budgetrequestfy2009.pdf>.

<sup>60</sup> 531 U.S. at 533.

<sup>61</sup> *Id.* at 536-37.

*an ideological manner like other branches of government."*

*"That statement challenges conventional wisdom."*

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## V. LAWYERS AND ACCESS TO JUSTICE

There is no dearth of popular and scholarly commentary on the liberal-conservative ideological dynamic operating in the Supreme Court,<sup>62</sup> including studying the alleged decisional effects of political party affiliation of judges and their appointing presidents.<sup>63</sup> Raising itself to the level of a national pastime, critics and pundits from all points on the ideological spectrum praise or condemn the Court for decisions appealing to their position. A cottage industry arose following the decision in *Bush v. Gore*,<sup>64</sup> alternately congratulating the Court for demanding fairness for the electoral process or excoriating it for selecting the next President in the majority's political image.<sup>65</sup>

The ideological dimensions of the debate on the right to coun-

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<sup>62</sup> It would be impracticable to list all of the books, newspaper stories, and commentaries devoted to looking at the Justices of the Court through ideological or political lenses. One respected scholar, however, produced a work of fairly wide distribution. See CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005). Examples of scholarly works include, Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007), and Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999).

<sup>63</sup> See, e.g., William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* (University of Chicago Law School Working Paper No. 404, Apr. 14, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1126403](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126403).

<sup>64</sup> 531 U.S. 98 (2000).

<sup>65</sup> For examples regarding the differences of opinion in the wake of *Bush v. Gore*, see Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613 (2001), and Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535 (2001).

sel have been voiced in the political arena and resoundingly declared as a liberal notion. Government financed attorneys for those unable to afford a lawyer in a criminal case has been identified as a liberal legacy of the Court under the leadership of Chief Justice Earl Warren. As illustrated above, discretionary government funding of lawyers for civil litigants has been on the political battleground since its introduction in President Lyndon Johnson's War on Poverty in the 1960s.<sup>66</sup>

The Supreme Court, however, has not treated access issues ideologically, but decisions have broadened the availability of lawyers. Despite ideological skirmishes in other branches of government, the Court has taken a position that there is nothing inherently liberal or conservative about using the judicial system to resolve disputes. The Court recognized the importance of using the judiciary—not only as a place for the orderly resolution of disputes, but as a reflection of values at the heart of our constitutional order.

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . .<sup>67</sup>

Lawyers and their role in the administration of justice are some familiar subjects before the Supreme Court. Despite the *Lassiter* decision, the Court's decisions on access issues reveal an understanding that lawyers, especially public interest lawyers, facili-

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<sup>66</sup> ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW AND SOCIAL POL'Y, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 7 (2007), [http://www.clasp.org/publications/legal\\_aid\\_history\\_2007.pdf](http://www.clasp.org/publications/legal_aid_history_2007.pdf).

<sup>67</sup> *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

tate access. For example, the Court has rejected regulation of the profession that hampers the public's ability to access legal services. In *NAACP v. Button*,<sup>68</sup> the Court invalidated a statute prohibiting solicitation of clients as it interfered with efforts of civil rights organizations and their lawyers to help potential plaintiffs seek court remedies against racially discriminatory practices.<sup>69</sup> The prohibition infringed on the First Amendment associational right of lawyers and clients to connect and initiate court challenges to discriminatory actions.<sup>70</sup> The Court reached a similar result where a private, cooperating lawyer for the American Civil Liberties Union was constitutionally protected in his efforts to help a client to access courts to challenge a requirement that female recipients of state funded medical assistance undergo sterilization.<sup>71</sup> The Supreme Court extended these principles to strike down lawyer advertising restrictions.<sup>72</sup> In these cases the Court found and reiterated that lawyers have a First Amendment right to provide information on legal services to potential clients. At the heart of the solicitation and advertising arguments is the access to justice theme. The public has an interest in obtaining the assistance of a lawyer to access the justice system. The Court has removed the impediments to a lawyer's conveying truthful information to the public to facilitate access.

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<sup>68</sup> 371 U.S. 415 (1963).

<sup>69</sup> *Id.* at 428-29.

<sup>70</sup> *Id.*

<sup>71</sup> *In re Primus*, 436 U.S. 412, 414-17, 420-21 (1978).

<sup>72</sup> *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 470-71 (1988); *Zauderer v. Office of Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 655-56 (1985); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 448-49 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1974).

An additional dynamic underlying the lawyer advertising and solicitation arguments is the unique understanding of the role of lawyers and the courts held by the justices. There is no avoiding the fact that all the Supreme Court Justices are lawyers. Whatever each may have done before appointment to the Court, a special understanding of the role of their chosen profession cannot be ignored. Justice Harry Blackmun wrote:

We recognize, of course, and commend the spirit of public service with which the profession of law is practiced and to which it is dedicated. The present Members of this Court, licensed attorneys all, could not feel otherwise. And we would have reason to pause if we felt that our decision today would undercut that spirit.<sup>73</sup>

Recognizing the role of lawyers in the administration of justice was at the center of Justice Anthony Kennedy's majority opinion in *Velazquez*, discussed above.<sup>74</sup> Given the politically charged nature of congressional funding for civil legal services, an ideologically responsive Court could have upheld the restriction on funded lawyers challenging welfare reform efforts. Instead, Justice Kennedy wrote protectively of his profession and the judicial system: "Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the tra-

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<sup>73</sup> *Bates*, 433 U.S. at 368.

<sup>74</sup> *Velazquez*, 531 U.S. at 536-37 (holding that a "restriction . . . prohibit[ing] legal representation funded by recipients of LSC moneys if the representation involves an effort to amend or otherwise challenge existing welfare law. . . . prevents an attorney from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application . . . . violates the First Amendment.").

ditional role of the attorneys . . . .”<sup>75</sup> Continuing protection of the judicial system, Justice Kennedy directed his attention to the law that prohibited a lawyer from speaking to a court: “The statute is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider.”<sup>76</sup> Significantly, Justice Kennedy addressed the access difficulty created by Congress:

The restriction on speech is even more problematic because in cases where the attorney withdraws from a representation, the client is unlikely to find other counsel. The explicit premise for providing LSC attorneys is the necessity to make available representation “to persons financially unable to afford legal assistance.” There often will be no alternative source for the client to receive vital information respecting constitutional and statutory rights bearing upon claimed benefits.<sup>77</sup>

Unabashedly conservative organizations directly attacked another form of civil legal services funding in *Phillips v. Washington Legal Foundation*<sup>78</sup> and *Brown v. Legal Foundation of Washington*.<sup>79</sup> Since the late 1970s, states created mechanisms by which the interest earned on money held in lawyers’ trust accounts funded civil legal

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<sup>75</sup> *Id.* at 54.

<sup>76</sup> *Id.* at 546.

<sup>77</sup> *Id.* (quoting 42U.S.C. § 2996(a)(3)).

<sup>78</sup> 524 U.S. 156, 162 (1998).

<sup>79</sup> 538 U.S. 216, 227-28 (2003). The Legal Foundation of Washington, the organization that administers the state of Washington’s Interest on Lawyer Trust Account (“IOLTA”) program, is not to be confused with the Washington Legal Foundation, one of the organizations spearheading the litigation challenging the constitutionality of IOLTA programs. Washington Legal Foundation, <http://www.wlf.org> (last visited Oct. 23, 2008).



services for the poor.<sup>80</sup> Interest on client funds in these accounts often amounted to less than it would cost to calculate and pay the clients. Collectively, the interest could provide substantial funding for legal services. In 2003, \$134 million was distributed to fund civil legal services nationally.<sup>81</sup> Disagreeing with the thrust of the legal services provided by interest on lawyer trust account (“IOLTA”) funded legal services groups, conservatives, libertarians, and advocates of free enterprise sought to invalidate state-sponsored programs, claiming they violated the Takings Clause of the Fifth Amendment to the United States Constitution. The Supreme Court rebuffed these efforts in *Phillips* and *Brown*.<sup>82</sup> The decisions resulted in maintaining a funding scheme that increased access to lawyers for the poor in civil matters.

The Supreme Court has been sensitive to issues relating to physical access to courts. In *Tennessee v. Lane*,<sup>83</sup> the majority and concurring opinions interpreted the Americans with Disabilities Act (“ADA”) as to protect the right of a litigant to have physical access to the courtroom.<sup>84</sup> Analysis of the statute took the majority into the realm of constitutional access issues. Writing for the majority, Justice Stevens acknowledged the Court’s commitment to constitutionally protected access to courts under the Due Process Clause of the

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<sup>80</sup> The American Bar Association Commission on IOLTA provides background information on IOLTA programs in all states. ABANet.org, What is IOLTA?—ABA, <http://www.abanet.org/legalservices/iolta/ioltback.html>.

<sup>81</sup> NLADA.org, NLADA: Civil Legal Services—IOLTA & Other Funding, [http://www.nlada.org/Civil/Civil\\_IOLTA/IOLTA\\_IOLTA/IOLTA\\_IOLTA\\_Home](http://www.nlada.org/Civil/Civil_IOLTA/IOLTA_IOLTA/IOLTA_IOLTA_Home).

<sup>82</sup> See *Brown*, 538 U.S. at 240; *Phillips*, 530 U.S. at 160, 162-63.

<sup>83</sup> 541 U.S. 509 (2004).

<sup>84</sup> *Id.* at 533-34.

Fourteenth Amendment to guarantee criminal defendants the right to be present at all phases of trial and the right of civil litigants to have a meaningful opportunity to be heard, the Sixth Amendment to guarantee a criminal jury trial, and the First Amendment to guarantee public access to trials.<sup>85</sup>

While cases cited in *Lane* were criminal in nature, the Court has favorably decided access issues in civil matters. In *Boddie v. Connecticut*,<sup>86</sup> the Court found that imposing a court fee on a poor litigant to obtain a divorce violated the Due Process Clause of the Fourteenth Amendment.<sup>87</sup> In *Little v. Streater*,<sup>88</sup> the Court held that the failure of the state to pay for blood grouping tests for a poor defendant in a paternity proceeding also violated due process.<sup>89</sup> Although the Court refused to find a constitutional right to counsel in a parental termination case, it has found that due process requires a state to pay an indigent person's fee to prepare a record on appeal such as in the case *M.L.B. v. S.L.J.*<sup>90</sup> In *Christopher v. Harbury*,<sup>91</sup> the Supreme Court restated the right of access to courts, but acknowledged how the Court unsettled the constitutional location of the right.<sup>92</sup>

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<sup>85</sup> *Id.* at 523.

<sup>86</sup> 401 U.S. 371 (1971).

<sup>87</sup> *Id.* at 374.

<sup>88</sup> 452 U.S. 1 (1981).

<sup>89</sup> *Id.* 16-17.

<sup>90</sup> 519 U.S. 102, 107 (1996).

<sup>91</sup> 536 U.S. 403 (2002).

<sup>92</sup> In a footnote in *Christopher*, Justice Souter summarized access to court cases on the location of the right in the Constitution as grounded in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection Clause. *Christopher*, 536 U.S. at 415 n.12. Access issues also come before the Court in criminal cases. In the context of criminal de-

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*“The Court has an impressive record supporting access. This may be optimistic, but can we use that to argue for a true right to counsel?”*

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## VI. THE DIMENSIONS OF A CIVIL RIGHT TO COUNSEL

Constructing a strategy to convince the Supreme Court to recognize a constitutional right to counsel in civil matters needs a preferred ending. For Emily, that ending is returning to the trial court represented by a lawyer and regaining custody of her children. Although the lawyers at Public Justice would be obligated to proceed in a manner to achieve that goal, they would undoubtedly be able to confront the policy implications triggered by a reversal of *Lassiter*.<sup>93</sup> With the *Lassiter* issue before the Court, two questions arise: (1) how far could the Court venture into the general issue of a right to counsel

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defendants' Sixth Amendment rights, the Supreme Court has reached across popular conceptions of ideological labels to expand defendants' rights. For example, in a series of cases that included *United States v. Booker*, 543 U.S. 220, 226-27 (2005), *Blakeley v. Washington*, 542 U.S. 296, 313-14 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), “conservative” Justices Scalia and Thomas joined “liberal” Justices Stevens, Ginsburg, and Souter to find that a criminal defendant is entitled to a jury determination of whether his guilt is beyond a reasonable doubt of every element or fact used to increase penalties in a criminal case. This eventually led to a finding of unconstitutionality of the mandatory application of the United States Sentencing Guidelines, that for years had been a favorite of conservative judges and congressional members.

<sup>93</sup> It is beyond the scope of this Article to consider the ethical, moral, and practical issues a lawyer faces when representing an individual client in a potential law reform setting versus obtaining a result that would be a favorable outcome only for a particular client. For a discussion on moving beyond client-centered representation, see Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297 (1996), Amy M. Reichbach, *Lawyer, Client, Community: To Whom Does the Education Reform Lawsuit Belong?*, 27 B.C. THIRD WORLD L.J. 131 (2007), and Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947 (1992).

in a civil case, and (2) what are the policy implications of the right beyond Emily's case?

What could or should be expected from the Court when faced with a *Lassiter* fact pattern? The alternative decisions could range from a narrow holding addressing Emily's rights to Emily's case as a platform for announcing a comprehensive right to counsel. Even if the questions presented for review were confined to simply overruling *Lassiter* on the facts, the Court would likely explore where a right to counsel in a termination case would lead. Any overruling would open the door. Confined to loss of custody, the right to counsel might logically extend to temporary custodial changes, foster care placement, and proceedings where the state is not a party such as custody battles between parents and other relatives,<sup>94</sup> and visitation rights of parents. While familial relationships are protected under notions of liberty in the Due Process Clause, the clause also protects property rights. Once courts venture into the right to counsel in proceedings to protect property rights, the possibilities expand exponentially.

In August 2006, the American Bar Association House of Delegates approved the following resolution:

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance,

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<sup>94</sup> New York extended its statutory right to counsel for poor litigants to actions for a divorce, although the statute limits appointed counsel's role in the divorce solely to custody. N.Y. JUD. LAW § 35(8) (McKinney 2000 Supp. 2007).

safety, health or child custody, as determined by each jurisdiction.<sup>95</sup>

As cited in the accompanying Report to the House of Delegates, the ABA acknowledged its amicus brief in *Lassiter* and its continuing support for funding civil legal services as antecedents to the resolution.<sup>96</sup> The resolution, however, extends far beyond either the ABA's position in *Lassiter* or a call for funding a system of discretionary legal services for low-income persons. While not specifying the originator or the source of the right at the state and federal level, the ABA resolution extends the right to counsel in significant disputes over property. The right could extend to evictions and foreclosures, administrative and judicial proceedings affecting welfare, disability, unemployment compensation, and pension benefits, depending on how broadly "basic human needs" are defined.<sup>97</sup> Emily's case would not place the Court in a position to announce a right as broad as the ABA resolution, but the resolution may foretell extension efforts in the future.

## VII. BEYOND THE LAW

For the most part, the legal arguments offered in support of Emily's right would be similar to those made by Ms. Lassiter's lawyers in 1981. Although returning to the Court would offer an opportunity to refine the arguments, the Due Process Clause of the Fourteenth Amendment is the core grounding for a civil right to counsel in

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<sup>95</sup> *Task Force on Access to Civil Justice*, *supra* note 4, at 1.

<sup>96</sup> *Id.* at 2-3.

<sup>97</sup> *Id.* at 1.

the states. Intuitively, returning to the Supreme Court with virtually the same legal arguments may not be a formula for success unless the Supreme Court found that something else mattered. By training, lawyers are inclined to offer rule-driven explanations for decision making by the Supreme Court or any other court. Political scientists, on the other hand, offer any number of theories on judicial decision making. These theories are often short on following precedent, but have heavy doses of political ideology, fiscal, and other policy implications.<sup>98</sup> While the Court hears a fair number of politically and socially charged cases offering the opportunity for looking beyond the rule of law, the vast majority of cases on the Court's docket each term do not ignite ideological debates.<sup>99</sup> Although Congress and other legislative bodies have viewed lawyers for low-income litigants through an ideological lens, the Court has not treated issues relating to lawyers and the administration of justice with ideologically-driven opinions.<sup>100</sup>

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<sup>98</sup> The debate on the influence of legal arguments and other considerations—political, fiscal, social, cultural, etc.—in decision-making by courts, especially the Supreme Court, is extensive in both scholarly and public forums. Supreme Court decision making is divided into two spheres, often spinning furiously away from each other. Lawyers, judges, and legal scholars live on the first sphere, representing the legal or internal model of decision making. The external model of decision making, growing from the Legal Realist movement, maintains that judicial decisions result from other than solely rules and precedent. Court decisions result from political preference, though as used by the externalists, “politics” does not only refer to political parties, although it can reflect positions taken by political parties. Politics refers to principles, values, and policy preferences. For example, scholarly works on this debate have entered the mainstream. See RICHARD A. POSNER, *HOW JUDGES THINK* (2008); LAWRENCE S. WRIGHTSMAN, *THE PSYCHOLOGY OF THE SUPREME COURT* (2006).

<sup>99</sup> WRIGHTSMAN, *supra* note 98, at 111-14 (discussing the Legal Model to judicial decision making and how judges must consider the facts of a case based on the plain language of statutes or by applying precedent, and therefore avoid decisions based political perspectives; it is noted that there are issues where external factors are necessary in order to render a decision).

<sup>100</sup> Following the congressional imposition of restriction in the type of clients and cases that could be funded by federal grants, states debated similar restrictions on the use of grants

Ideology aside, a ruling recognizing a constitutional right to counsel in civil matters could have significant fiscal and policy implications. A Supreme Court decision overruling the *Lassiter* holding may not add significant direct costs since the vast majority of states already provide counsel in these matters. It is likely, however, that the Supreme Court would be attuned to the costs of extending the right to other civil matters in future decisions. In that vein, the ABA estimated the cost of appointed counsel for low-income individuals in civil matters who would be eligible under its resolution at one-hundred dollars per eligible client each year.<sup>101</sup> How many people would be financially eligible for appointed counsel? Neither the ABA resolution nor the Supreme Court in *Gideon* drew a bright line for financial eligibility, leaving that task to the states.<sup>102</sup> If, for ex-

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by their legislatures. An example of this is the restricted use of state funding for civil legal services in the state of Washington. See WASH. REV. CODE §2.53.030(b)(2) (West 2008):

Any money appropriated by the legislature for civil representation of indigent persons shall be administered by the office of civil legal aid established under RCW 2.53.020, and shall be used solely for the purpose of contracting with qualified legal aid programs for legal representation of indigent persons in matters relating to: (a) Domestic relations and family law matters, (b) public assistance and health care, (c) housing and utilities, (d) social security, (e) mortgage foreclosures, (f) home protection bankruptcies, (g) consumer fraud and unfair sales practices, (h) rights of residents of long-term care facilities, (i) wills, estates, and living wills, (j) elder abuse, and (k) guardianship.

Additionally, funds cannot be used to engage in class actions or represent undocumented aliens.

<sup>101</sup> The ABA Report tackles the thorny question of system cost, concluding that an expenditure of \$100.00 per eligible person would be sufficient. As the resolution defers financial eligibility requirements to the originating entity, it is impossible to determine the cost at even the cited amount. Legal Services Corporation funded organizations must establish eligibility at 125 to 200% of the federal poverty line, adjusted annually. Funding for these organizations, however, is proportionate to the number of people living at or below the poverty line in the geographic area served. Eligibility for criminal defense services varies by state, but often have a more flexible standard, such as New York's "unable to afford counsel," set forth in N.Y. CRIM. PROC. LAW § 210.15 (McKinney 2008).

<sup>102</sup> States have used a variety of standards, often not tied to a particular income or asset

ample, financial eligibility were parallel to standards established for Legal Services Corporation funded representation,<sup>103</sup> the number of eligible clients would range from fifty to ninety million, or a total cost between five and nine billion dollars per year. The estimate may be inadequate; maybe grossly inadequate. Given both the cost and adequacy of the state systems for providing public defense in criminal matters, any court faced with imposing a constitutional right to civil counsel would have reason to pause.<sup>104</sup>

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amount, but rather to discretionary guidelines such as “unable to afford counsel.” On eligibility for representation under *Gideon*, see, Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L. J. 571 (2005) (asserting that the Supreme Court has not defined “what it means to be indigent,” and that such a definition would “equalize the right to appointed counsel across the fifty states.”)

<sup>103</sup> See PubDB3.census.gov, U.S. Census Bureau—Current Population Survey, available at [http://pubdb3.census.gov/macro/032007/pov/new01\\_200.htm](http://pubdb3.census.gov/macro/032007/pov/new01_200.htm). The LSC income eligibility test is established by grantee legal aid organizations, ranging from 125% to 200% of the federal poverty guidelines.

ABA CONSORTIUM ON LEGAL SERV., *supra* note 46, at 15-16.

<sup>104</sup> Funding for the public criminal defense system has not been reliably quantified. The National Legal Aid and Defenders Association answers an inquiry on cost on its website:

How much is spent on indigent defense in the United States?

Nobody knows for sure. The last nationwide study was completed in 1982 and is no longer valid. The U.S. Department of Justice did try conducting such a study again in 1999, but ran into insurmountable data collection problems. Two years of effort yielded only a study of the costs of indigent defense in the 100 largest counties.

Among the findings:

\* Within those counties, \$1.2 billion was spent in 1999, to handle an estimated 4.2 million cases.

\* This constitutes 3% of the total criminal justice expenditures in those counties in 1999 (\$38 billion; over \$65 billion was spent nationwide).

\* These 100 counties account for 42% of the US population, 44% of people with incomes below the poverty level, and a slight majority of the crimes in the US.

NLADA.org, Defender Resources,  
[http://www.nlada.org/Defender/Defender\\_Public/Defender\\_Public\\_Home#spent](http://www.nlada.org/Defender/Defender_Public/Defender_Public_Home#spent). COMM’N  
ON THE FUTURE OF INDIGENT DEFENSE SERV.: FINAL REPORT TO THE CHIEF JUDGE OF THE  
STATE OF NEW YORK 17 (2006) (extrapolating that public defense costs in New York amount



Other fiscally related factors could influence a right to counsel decision. For example, state and national legal need surveys have found that many legal problems experienced by low-income individuals go unresolved through formal processes, often because a lawyer was available.<sup>105</sup> The availability of appointed lawyers could increase the number of legal matters presented to formal structures for resolution. Simple legal matters could morph into complex litigation once lawyers became involved, thus driving up the cost. A counter argument implicates the lawyer's responsibility in law or as an ethical proscription to avoid frivolous litigation. A lawyer's evaluation of a matter may result in discontinuing or discouraging continued litigation, or to promote early settlement.<sup>106</sup>

The cost of providing counsel in civil matters, however, is one-half of the fiscal picture. The cost of funding lawyers to provide representation would be offset by the fiscal benefits of successful outcomes and the sometimes intangible cost associated with unrepresented parties in parental right terminations and other civil cases. In the broader context, legal representation in matters proposed by the ABA representation is sometimes quantifiable. For example, the New York Interest on Lawyer Account Fund ("IOLA"), a key source of funding for civil legal services, tracked the benefits obtained for clients of its grantees. IOLA reported that in 2006, benefits to clients from child support, alimony, public assistance, unemployment com-

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to about \$360 million annually).

<sup>105</sup> ABA CONSORTIUM ON LEGAL SERV., *supra* note 46, at 41.

<sup>106</sup> The exact contours of this dynamic would await development under a right to counsel system as it has separately evolved for lawyers appointed to represent a criminal defendant.

pensation, and other matters amounted to more than \$131 million.<sup>107</sup> Benefits of representation may not easily convert to dollar amounts. Although not easily quantifiable, the “enhance[d] human dignity and self-respect” of a person who fully participates in a proceeding where important decisions about family, home, income or other personal interest are made is significant.<sup>108</sup>

Depending on the contours of a right to counsel, the policy implications could be significant, but not without exemplars as many other countries have a comprehensive right to counsel.<sup>109</sup> While a thorough examination of policy implications is beyond the scope of this Article, a broad civil right to counsel, even within the contours of the ABA Resolution, would have consequences for litigants, courts, lawyers, and society. For litigants, the right would reduce, but not eliminate, the number of pro se parties in courts and administrative hearings. As discussed above, outcomes for represented litigants could improve. More represented litigants could shift the power balance historically present in some forums. For example, based on an increase in successful outcomes in landlord-tenant court, the power balance could begin shifting away from landlords. For courts, a reduction in the number of unrepresented litigants may have a positive effect on the efficiency of operation. Rightly or wrongly, self-represented litigants have been accused of burdening the courts, caus-

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<sup>107</sup> THE IOLA FUND OF THE STATE OF NEW YORK, 2007 ANNUAL REPORT 3, <http://www.iola.org/iola/outcomes2007.pdf>.

<sup>108</sup> See Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. LAW REV. 885, 886 (1981).

<sup>109</sup> Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L.J. 83, 89 (2001).

ing delay and inefficiency.<sup>110</sup> As an unbiased decision maker is one hallmark of due process, self-represented litigants also pose a neutrality difficulty for courts when confronted with the dilemma of providing assistance.<sup>111</sup>

A right to counsel in civil matters could have a significant effect on the legal profession. Depending again on the contours of the right, the number of lawyers necessary to meet the need could be significant. As an example, a study on the civil legal needs of the poor in New York revealed that poor households had about 2.4 legal problems annually.<sup>112</sup> Most of the identified problems were of the type identified in the ABA resolution as appropriate for appointed counsel. At a ten percent poverty rate, a geographic area with a population of one-half million could account for as many as 50,000 civil legal problems annually. Using 2006 data from the federal Legal Services Corporation, staff legal aid lawyers close an average of about 200 cases a year.<sup>113</sup> More than 220 full-time lawyers would be needed to meet the demand. That number of lawyers could equal more than ten percent of the local bar.<sup>114</sup> Although the most recent trend for organized bar associations is to support the right to counsel, other interests within the bar would undoubtedly join the debate, some supportive

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<sup>110</sup> Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1548 (2005).

<sup>111</sup> Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004).

<sup>112</sup> NEW YORK STATE BAR ASS'N, COMM'N ON LEGAL AID, THE NEW YORK LEGAL NEEDS STUDY 1 (June 1990, revised and reprinted December 1993).

<sup>113</sup> LEGAL SERV. CORP., FACT BOOK 2007, <http://www.lsc.gov/pdfs/factbook2007.pdf> (dividing the number of cases closed by Program Staff by the number of full-time attorneys).

<sup>114</sup> The lawyer estimates are based on the author's experience practicing law in Syracuse, New York.

and some in opposition.

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*"Look at the task we've set out. We're going to ask the Supreme Court to change a precedent established twenty-seven years ago. I imagine, like most institutions, the Court doesn't change often. What's more, we would be asking the Court to change its holding in Lassiter on similar facts and essentially the same due process argument."*

*"I think we may find the Supreme Court is one institution that seems to relish change."*

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## VIII. SCOTUS AND CHANGE

Given a replay of a factual situation in *Lassiter*, what could the Supreme Court do? The range of action available to the Court is broad, with some scenarios positively influencing the extension of a constitutional right to civil counsel, while others would slow the development of the right. The Court could refuse to accept any *Lassiter* type cases for review.<sup>115</sup> The Court could affirm *Lassiter's* essential holding and end it there. If a new case offered the opportunity to distinguish facts from *Lassiter*, the Court could announce how the new facts either affirm or change the *Lassiter* holding. The new case could present the Court with an opportunity to relieve the harsh result

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<sup>115</sup> Such a response to a certiorari petition is highly likely. For any *Lassiter* type challenge to be addressed by the Supreme Court, due consideration of the Court's jurisdictional prerogatives would be essential. One essential theme of this Article, however, is developing a strategy for positioning a case beyond meeting solely the established process for accepting certiorari.

reached for *Ms. Lassiter* and create a tone less likely to result in a balancing against the parents' interests. The Court could modify the presumption against counsel unless physical liberty was at stake or the use of the *Mathews* balancing test. The Court could abandon the *Lassiter* test and announce a constitutional right to counsel for parents in a termination case by overruling *Lassiter*. The possibilities are not limited to those described. Some possible changes the Court could make in *Lassiter* implicate the question of whether or not the Court should adhere to precedent, summarized simply:

The distinctive attributes of decisional rules are captured in the term that the legal system uses to describe such rules: "precedents." In ordinary language, a precedent is something done in the past that is appealed to as a reason for doing the same thing again. It is much the same in law. The earlier decision provides a reason for deciding a subsequent similar case . . . having almost the same force as a statutory rule.<sup>116</sup>

Before setting a course for changing a Supreme Court holding, a rudimentary examination of the Supreme Court's propensity to change is useful, as implicit in the right to counsel conventional wisdom is the notion that it is not only difficult to get an overruling, but the composition of the Court compounds the difficulty.

The Supreme Court and legal commentators have engaged in considerable writing about precedent and stare decisis, especially horizontal stare decisis—the Court's practice of following its own

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<sup>116</sup> William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 250 (1976).

precedent.<sup>117</sup> For many venerable institutions, change is not easy and may cause great consternation and debate about the value of change and how to manage and survive it. The Supreme Court may be unique in its acceptance of change. Intuitively, the Court seems like it should follow this course as the law needs to be interpreted to achieve stability. An argument can be made that the Court's authority and credibility depend on consistency.

The policy rationale for following precedent represents a tension between adherence to established law or abandoning the law for something new. Policy considerations support affirming past court decisions: (1) following established law results in efficiency for the court system, as a court does not have to start anew with every case; (2) continuity in law, especially where contractual and property interests are at stake, creating a stable set of rules people can rely on in their business dealings; (3) fairness as the courts will treat those in like situations in like ways; and (4) legitimacy of the judiciary results from removing capriciousness.<sup>118</sup> Equally compelling policy arguments are offered for overruling or limiting past court decisions: (1) strict adherence to established previous case law does not permit either correction of erroneous past decisions<sup>119</sup> or responsiveness to changing environments and (2) clinging to outdated and outmoded

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<sup>117</sup> In following its own precedents, the Supreme Court invokes horizontal stare decisis. Vertical stare decisis, however, refers to a lower court following the precedent established by a higher court in the state and federal court systems. Both of these forms of stare decisis have their own policy rationale and rules.

<sup>118</sup> SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992* 3-5 (1995) [hereinafter *STARE INDECISIS*].

<sup>119</sup> Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 653-54 (1999).

law impugns the legitimacy of the judiciary.<sup>120</sup>

The Supreme Court not only changes the law with a degree of frequency,<sup>121</sup> but has adopted a set of principles for ushering in change.<sup>122</sup> Simply, these are the “change rules.” Since stare decisis is not a rule established with constitutional force, but as a matter of judicial policy, even the “change rules” change.<sup>123</sup>

How does the Court decide if it will invoke the change rules? The literature on Supreme Court decision making generally and the doctrine of precedent is split into two camps: the legalists and the social scientists.<sup>124</sup> Legalists, in their relatively pure form, apply the preexisting rules, reason by analogy, and avoid policy considerations.<sup>125</sup> Past legal decisions impose significant restrictions on subsequent decisions. Political scientists, however, take the position based on empirical studies that precedent has almost no bearing on subsequent decisions.<sup>126</sup> Depending on their particular theory of judicial decision making, judges base their decisions on policy preferences or strategic objectives.<sup>127</sup> A little help from the legalists and social scientists may be what litigators can use to devise a strategy for change.

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<sup>120</sup> *Id.*

<sup>121</sup> STARE INDECISIS, *supra* note 118, at Appendix 1, 112-21 (listing overruled decisions of the Vinson, Warren, Burger, and Rehnquist Courts).

<sup>122</sup> Lee, *supra* note 119, at 654.

<sup>123</sup> See Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165 (2008).

<sup>124</sup> Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 905 (2005).

<sup>125</sup> POSNER, *supra* note 98, at 7.

<sup>126</sup> *Id.* at 8.

<sup>127</sup> Gerhardt, *supra* note 124, at 909-11. Gerhardt identifies two schools of decision making, the attitudinalists, and the rational choice theorists. Posner, in addition to acknowledging the legalists, identifies eight different social science theories of judicial decision making. POSNER, *supra* note 98, at 19.

**IX. THE CHANGE RULES—THE HEART OF LEGALISM**

Without digressing into a history of the doctrine of stare decisis, the idea that courts are bound by what has been done previously is relatively recent.<sup>128</sup> The Supreme Court under Chief Justice John Marshall's early opinions revealed very little respect for the doctrine of precedent.<sup>129</sup> One commentator has suggested a practical reason for not following precedent—the unavailability of researchable reported decisions.<sup>130</sup> Throughout the evolution of the doctrine, the Court has recognized a difference in the application of the doctrine to constitutional, property, and commercial matters. The Court has been traditionally more hesitant to overrule precedent where property or commercial matters are at issue.<sup>131</sup> Courts will deviate from precedent more readily when methods of changing the law in question are more difficult to accomplish.<sup>132</sup> Statutes may be changed by legislative bodies more easily than the Constitution can be amended, therefore, the Court will more readily change constitutional interpretations. As *Lassiter* is constitutionally based, the Court may be more willing to accept a role as a change agent.

Legalism's latest enshrinement of the doctrine of precedent, and according to one commentator the first general theory of precedent and stare decisis the Court has ever announced,<sup>133</sup> is set forth in

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<sup>128</sup> Lee, *supra* note 119, at 659.

<sup>129</sup> *Id.* at 667.

<sup>130</sup> *Id.* at 668.

<sup>131</sup> *Id.* at 652-53.

<sup>132</sup> *Id.* at 728.

<sup>133</sup> Paulsen, *supra* note 123 1168-69.



*Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>134</sup> In *Casey*, the Court confronted its precedential holding in *Roe v. Wade*,<sup>135</sup> that a woman had a constitutional right to an abortion. Since 1973, the *Roe* decision had been under attack by litigants and questioned by members of the Court.<sup>136</sup> Justice Sandra Day O'Connor's plurality opinion in *Casey* confronted the direct attack on *Roe* by first paying homage to Justice Benjamin Cardozo's admonition that continuity in the Court's interpretation of the Constitution was necessary to avoid remaking the law with each case, but acknowledging that "common wisdom" mandated the rule of stare decisis was not an "inexorable command."<sup>137</sup> Her opinion enumerated four "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law" to balance the effects of following or abandoning precedent.<sup>138</sup> First, the Court should inquire into the "workability" of the original decision. The Court's inquiry would be to ask "whether the rule has proven to be intolerable simply in defying practical workability." Second, the Court should consider reliance on the precedent. When looking at the precedential rule the question is "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." Third, the Court should determine if intervening developments

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<sup>134</sup> 505 U.S. 833, 854-69 (1992).

<sup>135</sup> 410 U.S. 113 (1973).

<sup>136</sup> In *Webster v. Reproductive Health Services*, 492 U.S. 490, 492-94 (1989), Justices Kennedy, Rehnquist, and White joined in a plurality opinion overruling the trimester scheme adopted in *Roe*.

<sup>137</sup> *Casey*, 505 U.S. at 854.

<sup>138</sup> *Id.* at 854-55.

have eroded the precedent, that is, “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.” Finally, the Court should examine the changing environment, that is, “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.” Along with a civics lesson on the role of the Court and its quest for legitimacy, Justice O’Connor adds a final consideration—a “how-bad-will-we-look-if-we-do-this” review of what the Court is about to do.<sup>139</sup>

The following discussion tackles the uncomfortable position the Court may find itself in if the current justices look at the precedential case and believes that a previous Court, probably with an entirely different array of justices, just got it wrong. Practically, Justice O’Connor expressed the collective concern that the Court’s legitimacy would be questioned if too many look-backs at precedent ended with the conclusion that their predecessors somehow lacked the capacity to get it right. Justice O’Connor reminds us that this really should not be a problem since people understand the language of the Constitution is “hard to fathom,” and new justices are “sometimes able to perceive significant facts or to understand principles of law that eluded their predecessors and that justify departures from existing decisions.”<sup>140</sup>

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<sup>139</sup> *Id.* at 864-65.

Our analysis would not be complete, however, without explaining why overruling *Roe*’s central holding would not only reach an unjustifiable result under principles of stare decisis, but would seriously weaken the Court’s capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law.

*Id.*

<sup>140</sup> *Id.* at 866.

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*“That sounds like Justice O’Connor was saying that either former members of the Court misread the law or the Court is looking at more than the rules and principles. I doubt that she meant to call her predecessors ignorant, so maybe she was lining up with the political scientists?”*

*“I’m not sure if I would go that far, but we should look at what the empirical studies say about precedent and overruling. Can we make some general characterizations about the kinds of cases the Supreme Court is willing to overrule?”*

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## **X. BEYOND THE CHANGE RULES**

Differing from the legal profession’s adherence to a rule-oriented Supreme Court decision making process, social scientists claim that judges are not meaningfully constrained by previous decisions, but motivated by their attitudes and values on social policy. While the theories of judicial decision making offered by social scientists come in many flavors, social scientists have produced analyses of stare decisis that add to information considered by lawyers framing a strategy for overruling or maintaining precedent. Harold Spaeth and Jeffrey Segal, two respected and prolific Supreme Court researchers, invite use of their works in such a manner.<sup>141</sup> What does the research reveal about how the Supreme Court actually uses the change rules to overrule precedent? More to the point, how do the

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<sup>141</sup> Harold J. Spaeth & Jeffrey A. Segal, *The U.S. Supreme Court Judicial Data Base: Providing New Insights into the Court*, 83 JUDICATURE 228-29 (2000).

findings advance strategy development in Emily's case?

In "Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946-1992,"<sup>142</sup> Spaeth and Brenner reviewed existing studies of Supreme Court decision making and conducted their own analysis of 115 overruling cases and 154 precedential cases overruled during a 46-year period covering the Supreme Court under four chief justices and reported on the characteristics of cases overruled in fifteen major findings.<sup>143</sup> Characteristics about strategy development are descriptive and not predictive, but point to likely outcomes. About one-half of the overruled cases were less than twenty-one years old, but the results were heavily influenced by the overruling of Warren Court decisions. As might be expected given the development of a more conservative Court soon after the decisions, a Warren Court overruled case survived less than eighteen years. The Rehnquist Court overruled cases that were twenty-three years old, more in the range of *Lassiter's* lifetime. The study also found that where older cases were overruled, it was more likely that the overruling case would be decided by a wider margin rather than a closely split decision. Brenner and Spaeth found that, consistent with the doctrine of stare decisis, it was much more likely that the subject matter of the overruled cases would be constitutional law (63.9%) than statutes (20%) or common law (13.5%).<sup>144</sup> Overruled cases tend to engender more opinions from the justices. Of the justices still on the Court, Stevens (4), Kennedy (2), and Souter (1) wrote overruling

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<sup>142</sup> See STARE INDECISIS, *supra* note 118.

<sup>143</sup> *Id.* at 47-48.

<sup>144</sup> *Id.* at 47.

decisions.<sup>145</sup> The authors found that a small number of cases overruled precedent in each term—about two cases.<sup>146</sup> Not surprisingly, the study found that the ideological direction of overruling cases showed that justices voted because of their ideology.

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*“The findings show that Lassiter is likely in the age range and issue category appropriate for overruling, but it looks like we could expect a close decision either way. Can’t we do better than that?”*

*“There’s a more recent study that asks a relevant question: What happens in those cases where a litigant asks the Court to overrule precedent?”*

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## XI. ASK AND YOU SHALL RECEIVE (MAYBE)

Jeffrey Segal and Robert Howard took “stare indecisis” one important step further when they looked at cases where a litigant had requested the Supreme Court overrule precedent.<sup>147</sup> Segal and Howard build on previous studies that offered the following factors that make it more likely that a precedent will be overruled: (1) there was “ideological distance between the majority that established the decision” and the Court faced with the option of overruling, (2) a constitutional issue was at stake, (3) the precedential case had one or more

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<sup>145</sup> An informal survey conducted by the author of overruling Supreme Court cases from 1988 to 2004, found that Justice Kennedy authored, joined, or concurred in about 90%. The issues in the cases indicated that Justice Kennedy joined both liberal and conservative factions. *Id.* at 41

<sup>146</sup> *Id.* at 27.

<sup>147</sup> See Jeffrey A. Segal & Robert M. Howard, *How Supreme Court Justices Respond to Litigant Requests to Overturn Precedent*, 85 JUDICATURE 148 (2001).

concurring opinions, (4) the precedent was achieved by a narrow margin, (5) the case was complex, and (6) intervening decisions had negatively treated the precedent.<sup>148</sup>

Segal and Howard's investigation contrasted with Spaeth's characterization of overrulings per term as a small number. That conclusion does not account for a majority of cases where no litigants are dissatisfied with precedent, but rather urge an interpretation of the precedent as rationale for the current case. During one nine-year period studied, litigants asked the Court to overrule precedent in only 5.2% of the cases.<sup>149</sup> Of the forty-four cases where the Supreme Court considered overturning precedent, it did so about forty-three percent of the time.<sup>150</sup> Adding the variable of the litigant's request demonstrates overruling may be small in absolute numbers, but significant when the issue is on the table. Segal and Howard also found criminal cases to be the most common platform for a litigant's request, followed in order by business matters, cases sponsored by interest groups, and the federal government. The overruled case age here was approximately thirty-four years.<sup>151</sup> Most requests to overrule came from litigants the authors classified as conservative, that is, the government in criminal cases and anti-minority parties in civil rights cases.<sup>152</sup>

Like many studies in the attitudinal mode, Segal and Howard looked at stare decisis and ideology. Of the six justices who were on

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<sup>148</sup> *Id.* at 150-51.

<sup>149</sup> *Id.* at 152.

<sup>150</sup> *Id.* at 156.

<sup>151</sup> *Id.* at 155.

<sup>152</sup> Segal & Howard, *supra* note 147, at 155.

the Court during the study period and are still on the Court, it appears more likely that they would overrule a “liberal” precedent than a “conservative” one.<sup>153</sup> The data, however, does not show a particularly wide disparity between overruling liberal and conservative cases. That conclusion is not as strong when a composite of civil rights and business cases were examined.<sup>154</sup>

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*“So what? What’s this got to do with Emily’s case?”*

*“The empirical work tells us two things. First, Emily’s situation is not out of the range of cases where the Court has overruled precedent. We wouldn’t be outside the realm of possibility. It also gives some guidance on how we could proceed.”*

*“I agree. The studies give us more information for our case preparation. The first thing I noticed was the odds of getting an overruling are much greater when the litigants ask for it. I was also surprised the liberal-conservative information wasn’t more lopsided.”*

*“I think what we’ve discussed creates some realistic views of what we can expect, although it doesn’t help us predict what the Court will do.”*

*“The political scientists have done some work in that area as well. A group of lawyers and political scientists working out of Washington University created the Supreme Court Forecasting Pro-*

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<sup>153</sup> *Id.* at 157. The justices include Stevens, Scalia, Kennedy, Souter, Thomas, and Ginsburg.

<sup>154</sup> *Id.*

ject.<sup>155</sup> For the 2002 Supreme Court Term, their model could predict seventy-five percent of the cases successfully, while a panel of legal experts had a fifty-nine percent success rate. Interestingly, breaking down the legal expert panel, the academics had a fifty-three percent success rate while the practicing lawyers, many of whom had appeared before the Court, had a ninety percent success rate.”

“Here’s an idea. Let’s get one of those lawyers for Emily.”

“We’ll talk about that later. Meanwhile, there must be some examples to give us a model for approaching the job of convincing the Court to change its mind about Lassiter.”

“Of course, there’s Gideon itself. The Court went from a case-by-case approach on appointed counsel in criminal matters to the recognition of the constitutional right. Batts to Powell to Gideon. It’s the very same pattern we’re looking at here. Maybe we should look at what was happening as that line of cases progressed?”<sup>156</sup>

“I agree we can learn from Gideon, but I see one big problem. As controversial as the Warren Court was in the 1960s, I think today’s Court may be more so. Certainly, the message resonating with the public is the atmosphere in the Court on certain issues is very ideologically charged. Commentators are assessing the 2007 term just finished and some have written that Chief Justice Roberts’ goal of less acrimony and the number of 5-4 decisions is starting to show,<sup>157</sup> but I’m not persuaded the ideological divisions have dimin-

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<sup>155</sup> See Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004). See the Project’s website at <http://wusct.wustl.edu/>.

<sup>156</sup> See Abel, *supra* note 12.

<sup>157</sup> See Jeffrey Rosen, *Narrow Minded: John Roberts Does Obama a Favor*, THE NEW



ished.”<sup>158</sup>

*“If we need to look at a more recent Court about-face on an ideologically charged issue, what about Lawrence v. Texas?”<sup>159</sup> I’m certain the Court understood the implications went far beyond striking down state sodomy laws. Lawrence may be the platform for the Court’s tackling the same-sex marriage issue in a few years. In spite of Justice Kennedy’s protestation that Lawrence wasn’t the slippery slope on the same-sex issue, I’d have to agree with Justice Scalia on that account.<sup>160</sup> The similarities to our case are evident. Lawrence also followed a line of cases on constitutional issues involving gays and lesbians. Just as we think overruling Lassiter would be a harbinger of the future for the right to counsel in civil matters, that may be true for Lawrence.”*

*“Let’s look at what we can learn from Lawrence.”*

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## **XII. CHANGE IN A CONTENTIOUS MATTER**

The Supreme Court has heard dozens of cases involving gays and lesbians,<sup>161</sup> but a series of constitutional challenges starting with *Bowers v. Hardwick*<sup>162</sup> in 1983 to its overruling in *Lawrence v.*

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REPUBLIC, July 9, 2008, available at <http://www.tnr.com/story.html?id=08bf58e7-db39-46d9-942c-ea471ad63ea0&p=1>.

<sup>158</sup> See Fed-Soc.org, The Federalist Society Online Debate Series, <http://www.fed-soc.org/debates/dbtid.22,css.print/default.asp> (last visited Oct. 23, 2008).

<sup>159</sup> 539 U.S. at 558.

<sup>160</sup> *Id.* at 605 (Scalia, J., dissenting).

<sup>161</sup> JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* (2001). The Appendix, starting at page 531, contains a comprehensive list of cases.

<sup>162</sup> 478 U.S. at 186.

*Texas*<sup>163</sup> in 2003 illustrates a change in Court doctrine. In *Bowers*, the Court confronted a constitutional challenge to Georgia's criminal sodomy law. Consistent with the tenor of the majority decision in *Lassiter*, the opinion in *Bowers* emphatically sent a message not only about criminal sodomy laws, but the perceived direction the Court was moving with substantive due process in cases like *Griswold v. Connecticut*<sup>164</sup> and *Roe v. Wade*.<sup>165</sup> No fan of the Court's then developing privacy and abortion cases, Justice Byron White's brief decision was blunt. Arrested for violating the state's sodomy laws while in their home, the respondents argued their conduct in the privacy of their home was protected by the substantive wing of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court found no fundamental due process right to engage in sodomy, even in the privacy of the home.<sup>166</sup> The Court, therefore, applied the rational basis test to the criminal sodomy law and concluded prohibition of sodomy was constitutionally permissible, as the Georgia legislature had a rational basis for the law—sodomy was morally unacceptable. Justice White found the antisodomy law was “based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”<sup>167</sup> Adding an exclamation point, Justice White also characterized the respondents' arguments as “face-

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<sup>163</sup> 539 U.S. at 578.

<sup>164</sup> 381 U.S. 479 (1965).

<sup>165</sup> *Roe*, 410 U.S. at 113.

<sup>166</sup> *Bowers*, 478 U.S. at 194-96.

<sup>167</sup> *Id.* at 196.

tious.”<sup>168</sup> Yet another exclamation point came when Chief Justice Warren Burger’s even briefer concurring opinion worried that striking the law “would be to cast aside millennia of moral teaching.”<sup>169</sup> Just as with Justice Stewart’s harsh admonitions in *Lassiter*, the Supreme Court sent a message that a constitutional attack on criminal sodomy laws need not be revisited.

The effect of allowing states to maintain antisodomy laws went far beyond the act of sodomy, as the laws provided justification for discriminating against gays and lesbians. If gays and lesbians could be labeled as “criminals,” the path was cleared to permit discrimination in employment, housing, public accommodations, governmental services, education, adoption, child custody, and citizenship.<sup>170</sup>

Following *Bowers*, the Supreme Court tackled two cases involving the First Amendment rights of gays and lesbians. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,<sup>171</sup> the Court turned back an effort by GLIB, the acronym used by the organizational respondents, to march in Boston’s St. Patrick’s Day parade under a banner identifying themselves as Irish-Americans and gay. Permitted by court order to march in 1992, GLIB was again denied participation the following year. The parade organizers justified the refusal as they feared the inclusion of GLIB would inject a sexual message into the event. After GLIB prevailed in the state courts un-

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<sup>168</sup> *Id.* at 194.

<sup>169</sup> *Id.* at 197 (Burger, J., concurring).

<sup>170</sup> See Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813 (2001).

<sup>171</sup> 515 U.S. 557, 559 (1995).

der a statute prohibiting discrimination in public accommodations,<sup>172</sup> the Supreme Court agreed to hear the case. The organizers prevailed when the Court found the parades were expressive conduct protected by the First Amendment to the United States Constitution.<sup>173</sup> The organizers could not be compelled to include the message “I’m Irish and I’m gay.” GLIB members could march in the parade, but the parade organizers had the right to ban their message.

The result in *Boy Scouts of America v. Dale*<sup>174</sup> was similar to *Hurley*, when the Court found a state antidiscrimination statute had to give way to the expressive rights of an organization.<sup>175</sup> The Boy Scouts, based on their stated disapproval of homosexuality, had a right to dismiss a gay scout leader. Writing for the majority, Chief Justice William Rehnquist found the Boy Scouts could exercise their freedom of expressive association to bar gay scouts and leaders. Being compelled to accept gay members would be contrary to the “system of values” the scouts had adopted.<sup>176</sup>

On their face, the Court’s decisions in *Hurley* and *Boy Scouts of America* appeared to be losses for gays, but the decisions started moving the Court away from its holding in *Bowers*. The Court protected gays and lesbians from discrimination while exercising their own First Amendment associational rights. Organizations seeking to prohibit discrimination against gays and lesbians were also protected from legal challenges. For example, the decision would insulate uni-

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<sup>172</sup> *Id.* at 561.

<sup>173</sup> *Id.* at 580-81.

<sup>174</sup> 530 U.S. 640 (2000).

<sup>175</sup> *Id.* at 644.

<sup>176</sup> *Id.*

versities with strong discrimination policies from legal challenge for refusing to make its facilities available to groups espousing antigay sentiments. More importantly, the decisions displayed a less hostile viewpoint on gays and lesbians than the majority and concurring decisions in *Bowers*. The changing attitude marked a transition for the Court.<sup>177</sup>

The most significant transitional Supreme Court decision on gay and lesbian rights came in 2000 when the Court in *Romer v. Evans*<sup>178</sup> struck down a Colorado state constitutional amendment that prohibited “all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians.”<sup>179</sup> The implications of the amendment were broad. As argued by the challengers’ lawyer before the Supreme Court, the amendment would allow a police agency to withdraw patrols from a community with a significant gay presence.<sup>180</sup> In a six-to-three decision written by Justice Anthony Kennedy, the Court held the challenged amendment violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as it treated gays and lesbians not just differently, but with “animus.”<sup>181</sup> While the majority opinion did not discuss *Bowers*, the stinging dissent by Justice Scalia, joined by Chief

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<sup>177</sup> See *Lawrence*, 539 U.S. at 558; *Boy Scouts of Am.*, 530 U.S. at 640; *Romer v. Evans*, 517 U.S. 620 (1996); *Hurley*, 515 U.S. at 557; *Bowers*, 478 U.S. at 186; *Griswold*, 381 U.S. at 479.

<sup>178</sup> 517 U.S. at 620.

<sup>179</sup> *Id.* at 624.

<sup>180</sup> *Id.* at 630. Jean E. Dubofsky, formerly a judge on the Colorado Supreme Court, represented those who challenged the amendment. *Id.* at 621.

<sup>181</sup> *Id.* at 632.

Justice Rehnquist and Justice Thomas, pointed to *Bowers* as not only controlling, but “unassailable.”<sup>182</sup> The vituperative nature of Scalia’s opinion suggested the dissenters saw the warning signs and did not agree with the direction in which the Court was heading.

The Court’s transition was completed when it accepted another challenge to state criminal sodomy laws in *Lawrence*, on facts similar to those in *Bowers*.<sup>183</sup> The legal arguments offered in *Bowers* were almost identical to those made in *Lawrence*; only the result was different. Justice Kennedy’s holding was unequivocal: “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”<sup>184</sup>

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*“Justice Kennedy really turned it around. I know we’ve discussed the Court’s view on precedent and stare decisis, but Lawrence is an outstanding example of how the Court can and does change.”*

*“I feared since Emily’s case has facts so similar to Lassiter and the due process challenge would be virtually the same as already argued, getting the case back to the Court would have been impossible. Maybe not, if we can position it well. What else do you see in the Lawrence opinion that might be helpful?”*

*“It was six-to-three. Though the 2003 Court may be more*

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<sup>182</sup> *Id.* at 640 (Scalia, J., dissenting).

<sup>183</sup> The majority opinion only identified two differences. The Texas statute prohibited sodomy for only same-sex couples, while the Georgia statute had no such restriction. In *Bowers*, Hardwick was not criminally prosecuted and raised the issue through an action in federal court to declare the law unconstitutional. *Bowers*, 478 U.S. at 187-88.

<sup>184</sup> *Lawrence*, 539 U.S. at 578.

*conservative than the Bowers Court, the vote to overrule was just as strong as the original vote to adopt. That's significant, because I'd be willing to bet this Court is more conservative than the Lassiter Court."*

*"Not so fast with the liberal-conservative differences. We talked about ideology and maybe it's not quite as important when the Court takes on issues relating to lawyers' roles and the administration of justice. Even if ideology does play a role, Judge Posner's recent article, "Rational Judicial Behavior: A Statistical Study" might suggest something of interest.<sup>185</sup> If you look at the rankings of judges on various scales, it appears the current Court may be no more conservative than the Lawrence Court."*

*"The big difference between Bowers and Lawrence was the Court's message. It changed radically. In Bowers, it was framed as 'whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.'<sup>186</sup> It was a precursor to the political campaign supporting the state constitutional amendment in Colorado—gays wanted special rights. In Lawrence, Kennedy rejected the Bowers framing of the issue. He characterized the challenged law as having 'far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.'<sup>187</sup> He drew in a wide audience. This wasn't about a particular group, but rather about what could happen to any or all of us."*

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<sup>185</sup> Landes & Posner, *supra* note 63.

<sup>186</sup> *Bowers*, 478 U.S. at 190.

<sup>187</sup> *Lawrence*, 539 U.S. at 567.

*"What strikes me is the way the Court handled the narrow issue in Lawrence to send a message about broader implications. In Bowers and Lawrence, it was about a criminal sodomy statute, but it was really about where the Court may go with the issue of equality for gays and lesbians. Lassiter was about representation in a termination of parental rights proceeding, but Justice Stewart signaled the implications for right to counsel."*

*"I agree. Lawrence did more than strike down a criminal law."*

*"What occurs to me is the language of Justice Scalia's dissent in Lawrence and Romer. The almost acerbic language shows a very real split on the Court."<sup>188</sup>*

*"My first impression about Lawrence was the way Kennedy handled the reason for overruling Bowers. He just flat out said the Court was wrong. Scalia's dissent infers the majority didn't really make a case for a serious mistake in Bowers. Seems like Scalia recognized the issue reached a tipping point and the Court was ready to change."*

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### **XIII. LAWRENCE AND THE TIPPING POINT**

What happened during the seventeen years between *Bowers* and *Lawrence*? Attitudes were changing within and outside the Supreme Court. These forces converged to become a tipping point after which the Supreme Court could change. The convergence helped

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<sup>188</sup> See *id.*; *Romer*, 517 U.S. at 620.



convince the Court, based on virtually the same facts and legal theories, it was now time to change its *Bowers* holding. What were some of those changing attitudes? Public acceptance of gays increased between 1986 and 2003. For example, Gallup Polls showed an upward trend in accepting gay relationships between consenting adults. In 1982 the acceptance rate was forty-five percent, but it increased to sixty percent in 2003.<sup>189</sup> The public's acceptance of equal employment rights for gays increased from fifty-nine percent to eighty-eight percent during the period 1982 to 2003.<sup>190</sup> Acceptance of the "gay life style" also rose from thirty-four percent to fifty-four percent during the same period.<sup>191</sup> Challenging one stereotypical fear, acceptance of gays as elementary school teachers also rose from forty-one percent in 1992 to sixty-one percent in 2003.<sup>192</sup> The acceptance of gay clergy increased from thirty-eight percent in 1982 to fifty-six percent in 2003.<sup>193</sup>

Gallup was not alone in its conclusions about acceptance of gays and lesbians. The American Enterprise Institute, a conservative think-tank, reviewed various polls over several years. In a press release accompanying the first report in 2004,<sup>194</sup> the following conclu-

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<sup>189</sup> Gallup.com, Homosexual Relations, Gallup's Pulse of Democracy, <http://www.gallup.com/poll/1651/homosexual-relations.aspx>.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* It is interesting to note that the polls show a backlash following the Supreme Court decision in *Lawrence*. The backlash, however, appears to be complete after about a year, with a slight increase in acceptance since.

<sup>192</sup> *Id.*

<sup>193</sup> Jennifer Robison, *Support of Gay Clergy Growing Slowly But Surely*, GALLUP.COM, July 22, 2003, <http://www.gallup.com/poll/8884/Support-Gay-Clergy-Growing-Slowly-Surely.aspx>.

<sup>194</sup> See KATHY BOWMAN, AM. ENTER. INST., ATTITUDES ABOUT HOMOSEXUALITY & GAY MARRIAGE 2 (2008), available at [http://www.aei.org/publications/filter.all,pubID.14882/pub\\_detail.asp](http://www.aei.org/publications/filter.all,pubID.14882/pub_detail.asp). The report was up-

sions were reported:

There has been a substantial liberalization in attitudes toward homosexuality. In 1973, 73 percent told National Opinion Research Center interviewers that sexual relations between adults of the same sex were always wrong. In 2002, 53 percent gave that response.

Large majorities say that homosexuals should have equal rights in terms of job opportunities. Fifty-six percent gave that response to Princeton Survey Research Associates interviewers in 1977; 87 percent did in early 2004. Majorities now support hiring homosexuals as members of the clergy and as elementary school teachers, two occupations about which there has been resistance in the past.

People are willing to vote for a homosexual for president. Fifty-nine percent told Gallup in 1999 that they would vote for a well-qualified person who happened to be homosexual.

Fifty-six percent in 2000 told Princeton Survey Research Associates that they had a friend or close acquaintance who was gay or lesbian, up from 22 percent in 1985.<sup>195</sup>

Between *Bowers* and *Lawrence*, other societal and cultural changes contributed to shifting views on gays and lesbians. For example, in the 1970s, “the American Psychiatric Association removed homosexuality from [its] Diagnostic and Statistical Manual of Mental

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dated in June 2008.

<sup>195</sup> Press Release, American Enterprise Institute for Public Policy Research, AEI Study on Homosexuality and Gay Marriage (July 8, 2004), available at [http://www.aei.org/publications/pubID.20867,filter.all/pub\\_detail.asp](http://www.aei.org/publications/pubID.20867,filter.all/pub_detail.asp).

Disorders.”<sup>196</sup> Changing sexual mores increased tolerance for differences, along with greater demands for the government to stay out of sexual behaviors, such as the use of contraceptives. There was a growing recognition in the business community that gays and lesbians were a potentially lucrative market. Television introduced mainstream audiences to gay characters from Billy Crystal’s role as the gay Jodie Dallas on “Soap” to the popular comedy series “Will and Grace.”

While the public’s opinions about gays and lesbians changed, a social transformation also occurred within the Supreme Court.<sup>197</sup> The *Bowers*’ justices might be charitably described as naive about homosexuality. In a discussion recounted by one of his law clerks, Justice Lewis Powell questioned the prevalence of gays and lesbians and sexual attraction in a manner suggesting Powell had a scant frame of reference and was struggling to understand “a phenomenon totally alien to him.”<sup>198</sup> Nevertheless, by the time the Court decided *Lawrence*, there had been at least eighteen gay men and four lesbian law clerks.<sup>199</sup> As the years passed, more of the clerks and other Court personnel came out, giving the justices an opportunity to know them personally and to avoid being “alien.” Although accounts differ, some gay law clerks lobbied for the Court to accept cases involving

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<sup>196</sup> Psych.org, Am. Psychiatric Ass’n, Psychiatric Treatment and Sexual Orientation, available at <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/199820.aspx> (last visited Oct. 24, 2008).

<sup>197</sup> MURDOCH & PRICE, *supra* note 161, at 272-73.

<sup>198</sup> *Id.* at 273. See also Jeffrey Toobin, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 186-90 (2007).

<sup>199</sup> MURDOCH & PRICE, *supra* note 161, at 23.

gay and lesbian issues.<sup>200</sup>

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*“What’s more important for Emily, the change rules or the external factors?”*

*“We’re lawyers; we’ve got to pay attention to the change rules the Supreme Court will apply. Using Lawrence as a guide, let’s run through the Casey factors and see how it looks.”*

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#### XIV. EMILY AND THE CHANGE RULES—WORKABILITY

Is the precedent created by *Lassiter* still workable? To decide workability, the Court looks to whether the precedent’s rule can guide future courts. A comprehensible summary of the workability rule is provided by Michael Stokes Paulsen:

To distill and refine: the inquiry into workability appears to ask whether the rule of a precedent decision, besides being wrong, has tended to generate inconsistent applications, fostered unclarity and uncertainty, or proven difficult to manage in any kind of principled way—and on such account should be regarded as intolerable.<sup>201</sup>

The *Casey* opinion did not require each of the four factors in its analysis of stare decisis to predicate the overruling of precedent. *Bowers* presented a workable principle. It was unlikely that in attempting to follow the Court’s clear precedential decision, its applica-

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<sup>200</sup> Toobin indicates that the clerks did not lobby for the Court to take cases, while Murdoch and Price indicate the opposite. Compare TOOBIN, *supra* note 198, at 217, with MURDOCH & PRICE, *supra* note 161, at 23.

<sup>201</sup> Paulsen, *supra* note 123, at 1175.

tion would be consistent. The *Lawrence* Court concluded *Bowers* was wrong; workable, but wrong.

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*"Lassiter's double balancing test is the paragon of unworkability. Maybe I'm missing something, but in applying the Mathews test to Ms. Lassiter, the Supreme Court used facts adduced at the trial. For example, the Court commented that there were no difficult questions of law and no expert witnesses to examine in Ms. Lassiter's trial. A trial judge has to decide whether to appoint counsel before the trial starts. How does the judge know what facts will come out at trial before the trial begins?"*

*"I might be persuaded that the Mathews test is useful for deciding the larger issue—whether due process requires appointment of an attorney, but to hold that it must be considered in every case where a litigant asks for a lawyer doesn't make sense."*

*"There's another problem with workability. Requiring the Mathews test in every case raises the probability of inconsistent decisions. In one court you could have some parents represented and some not, with very little difference in their situations. Courts are open to questions of fairness when its actions are or seem inconsistent."*

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## **XV. EMILY AND THE CHANGE RULES—RELIANCE**

*Casey's second factor examines whether or not the precedential case created expectations relied upon by society in ordering legal, economic, and social relations. The Court explained how the avail-*

ability of abortions since *Roe* in 1973 created reliance: “[F]or two decades of economic and societal developments, people have organized their intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.”<sup>202</sup>

Reliance is a concept central to the doctrine of stare decisis when applied to economic ordering matters. The classic example of reliance value is the need for stability and predictability for contract law. *Casey* took it one step further and brought reliance into the societal realm by recognizing that pronouncements of the Court also contributed to the ordering of personal relationships. Identifying reliance in *Lawrence* is problematic and despite its importance in other contexts, it does not appear to contribute to the overruling of *Bowers*. Certainly those persons negatively touched by the result in *Bowers* were not interested in relying on a holding perpetuating the existence of criminal sodomy laws. If the Court were ever again to confront the constitutionality of criminal sodomy laws, reliance on *Lawrence* would be a very significant factor.

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*“I know much has been made of the Supreme Court’s adopting a reliance test, but I’m not sure how Lassiter’s holding has created either an economic or societal reliance.”*

*“States may argue they have relied upon Lassiter to save money. I think we would agree that the Lassiter test is likely to result in a finding that counsel need not be appointed.”*

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<sup>202</sup> *Casey*, 505 U.S. at 855-56.

*“On the other hand, most states have done just the opposite of relying on Lassiter. Legislatures have created a statutory right to counsel and incurred the cost of providing legal representation. In arguing to overrule Lassiter, I don’t think a persuasive argument could be made that states have relied on it.”*

*“The reliance justification is not significant for parents in court. If anything, the expectations created in Lassiter have harmed parents.”*

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## **XVI. EMILY AND THE CHANGE RULES—EROSION OF LEGAL AUTHORITY**

The third factor in the *Casey* analysis asks whether the legal principle established in the precedential case has been undermined over time. Did the Supreme Court take any logical intermediate steps in the progression from precedent to overruled case? The doctrinal development from *Bowers* to *Lawrence* is an example. As discussed above, intermediate holdings by the Court eroded the vitality of *Bowers*. Directly confronting the issue of discrimination against gays and lesbians in *Romer* signaled the Court’s final disposition of the constitutionality of criminal sodomy laws.

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*“This could be a problem in our case. Since Lassiter, the Court has not dealt with a due process right to counsel case in any setting.”*

*“That’s thinking too narrowly. Step back and look at the entire range of procedural due process issues. It is possible to argue*

*the vitality of Mathews has been diminished during the years since the Lassiter decision, although there may be some revival in Hamdi v. Rumsfeld.*<sup>203</sup>

*“The Court tackled the issue of due process in a property forfeiture case—Dusenberry v. United States.<sup>204</sup> The Court suggested the Mathews test was inappropriate to decide how much process was due, that is, the sufficiency of notice of forfeiture. The Court recognized Mathews was imposed as a test for the amount of process due in an administrative proceeding challenging the denial of Social Security benefits. The Court specifically found it ‘never viewed Mathews as announcing an all-embracing test for deciding due process claims.’<sup>205</sup> The case was followed by Jones v. Flowers,<sup>206</sup> a case about due process requirements for the sale of a home for failure to pay taxes. The Court didn’t even mention Mathews.”*

*“Didn’t the Court revive the Mathews test in Hamdi?”*

*“The opinion in Hamdi, authored by Justice O’Connor and joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, uses the Mathews test to decide if an ‘enemy combatant’ had a constitutional due process right to challenge that designation. There are some unique features in the case that do not necessarily refute the contention Mathews has been eroded by the Court. The O’Connor opinion is a plurality. Justice Clarence Thomas dissented and specifically rejected the use of Mathews as the appropriate test.”<sup>207</sup>*

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<sup>203</sup> 542 U.S. 507 (2004).

<sup>204</sup> 534 U.S. 161 (2002).

<sup>205</sup> *Id.* at 168.

<sup>206</sup> 547 U.S. 220 (2006).

<sup>207</sup> *Hamdi*, 542 U.S. at 594 (Thomas, J., dissenting).



*Given the nature of the underlying national security issues, you could argue that Mathews might be appropriate because of the government's interests. Finally, Flowers was decided two years after Hamdi with no mention of Mathews."*

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## XVII. EMILY AND THE CHANGE RULES—CHANGED FACTS

The final *Casey* factor looks to whether changed facts, or the perceptions of changed facts, have undermined the precedential case. This suggests the application of a relevancy test, but as treated in *Lawrence* it goes to the heart of Justice Kennedy's assertion that *Bowers* was wrong when conceived. *Lawrence* concluded the history of sodomy laws in the United States is more "complex" than understood by the Court in *Bowers*.<sup>208</sup> Misunderstanding the background, not the particular facts of the case, contributed to making the decision in *Bowers* inappropriate for continuation as precedent. The *Lawrence* opinion also noted the changing views in society and law that the *Bowers* Court should have recognized.<sup>209</sup> The Court should have recognized states were repealing criminal sodomy laws and prosecutions were waning, which are trends that continued after *Bowers*. The Court should have recognized the recommendation of the American Law Institute in 1955 to remove antisodomy laws from state criminal laws.<sup>210</sup> Finally, although a matter of sharp contention for the dissenters in *Lawrence* and subsequent cases, the European

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<sup>208</sup> *Lawrence*, 539 U.S. at 571.

<sup>209</sup> *Id.* at 577-78.

<sup>210</sup> MODEL PENAL CODE § 1984 (Proposed Official Draft 1955).

Court of Human Rights had invalidated criminal sodomy laws based on the European Convention of Human Rights five years before *Bowers*.<sup>211</sup>

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*"I'd say those changes were dramatic. What kind of change has occurred since Lassiter that might influence the Supreme Court to overrule its decision? I think we need some brainstorming on the issue."*

*"I'm not a family lawyer, but I can tell you there have been some significant changes in the law on terminating parental rights since Lassiter. In 1980, just before Lassiter, Congress enacted the Adoption Assistance and Child Welfare Act.<sup>212</sup> The Act, in response to problems in the foster care system, attempted to prevent the unnecessary placement of children in foster care and to reunify families whenever possible. A goal of the Act was:*

*[To] prevent[]the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing the breakup of the family where the prevention of child removal is desirable and possible . . . restoring to their families children who have been removed, by the provision of services to the child and the families . . . .<sup>213</sup>*

*Family reunification was the preferred outcome. States had to conform to the newly established norms."*

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<sup>211</sup> See *Dudgeon v. United Kingdom*, 4 Eur. Ct. H.R. 149, 149 (1981).

<sup>212</sup> Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C. (1980)).

<sup>213</sup> 42 U.S.C. § 625(a)(1) (2000).

*"That seems to mitigate against the need for parents to have representation. I'm surprised the Supreme Court didn't insert the statute into the Mathews formula."*

*"There have been significant changes since 1980. In 1997, Congress passed the Adoption and Safe Families Act.<sup>214</sup> The policy embodied in this Act was for more frequent and earlier parental rights termination proceedings by the states. Again, I'm not making a value judgment about the policy, but the Act is a significant change."*

*"In spite of the Act, many states still maintain their policy is to promote family stability, preserve the family unit, and assist families to achieve and maintain self-sufficiency."<sup>215</sup>*

*"The federal and state laws and policies create a significant tension; a tension created after Lassiter was decided. It seems to me*

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<sup>214</sup> Adoption & Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.) (1997).

<sup>215</sup> For example, New York's legislative findings and purpose are found in N.Y. SOC. SERV. LAW §384-b (McKinney 2007):

(a) The legislature recognizes that the health and safety of children is of paramount importance. To the extent it is consistent with the health and safety of the child, the legislature further hereby finds that:

(i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;

(ii) it is generally desirable for the child to remain with or be returned to the birth parent because the child's need for a normal family life will usually best be met in the home of its birth parent, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;

(iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home; and

(iv) when it is clear that the birth parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child.

*this tension makes representing yourself in a parental termination trial more daunting now than in 1983.”*

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## **XVIII EMILY AND THE CHANGE RULES—INTEGRITY OF THE COURT**

Would the Supreme Court have to find that *Lassiter* was wrong when it was decided in 1981, thereby triggering the integrity look-back before holding there is a constitutional right to counsel in a termination of parental rights proceeding? This process raises the possibility of declaring that previous justices, some of whom may still be sitting on the Court, had been wrong in the prior decision. The Court in *Lawrence* acknowledged that *Bowers* was wrong. The *Gideon* majority labeled *Betts* as wrong. Identifying the precedent as erroneously decided may be a prerequisite of a justifiable overruling, thus important to the integrity of the Court.<sup>216</sup>

As evidenced by movement away from using the cost-analysis test announced by the Court in *Mathews*, foretold by Justice Stevens' criticism in his *Lassiter* dissent,<sup>217</sup> gives the Court an opportunity to base its overruling on an erroneous finding. The *Mathews* due process claim implicated a property right, which was the continuation of Social Security disability benefits. Mr. Eldridge had been receiving disability benefits for several years, but they stopped them when an examiner found he no longer met the medical criteria for disability. Mr. Eldridge's benefits stopped, but he was given the opportunity to

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<sup>216</sup> Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 2-3 (2001).

<sup>217</sup> *Lassiter*, 452 U.S. at 60 (Stevens, J., dissenting).

challenge the decision by invoking an administrative review process. Mr. Eldridge claimed the procedure denied due process of law since he did not have an opportunity for a hearing before the Social Security Administration stopped his benefits. The Court found that while the deprivation of benefits could work a hardship, other cash assistance programs were available to provide income while the administrative process continued.<sup>218</sup> Against this background, the Court devised the cost-benefit analysis to decide if the process provided to challenging claimants satisfied the Due Process Clause.

The Supreme Court based the *Mathews* decision on money, finding the cost of interrupted benefits to Mr. Eldridge, who had another source of temporary income, was less than the cost of providing a hearing. Undoubtedly, the Social Security Administration is, and has been, overwhelmed by the number of claimants who request administrative hearings challenging adverse agency determinations. In 2007, 738,000 claimants were waiting for a decision. Claimants waited more than 500 days for their hearing once requested.<sup>219</sup> Although application of the cost-benefit analysis to a disability claim may be justified, it does not translate to a proceeding where parents face losing their children. To accept a deviation from precedent, the Court's integrity would not be impugned by holding the *Lassiter* Court erroneously concluded a parent's liberty interest in preserving family integrity should be weighed in a cost-benefit analysis devised

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<sup>218</sup> *Mathews*, 424 U.S. at 342-43.

<sup>219</sup> Social Security Testimony Before Congress: Testimony of the 110th Congress before the Senate Finance Committee (2007) (statement of Michael J. Astrue, Comm'r of Soc. Sec. Testimony before the Senate Finance Comm.), available at [http://www.socialsecurity.gov/legislation/testimony\\_052307.htm](http://www.socialsecurity.gov/legislation/testimony_052307.htm).

more appropriate to property interests at stake in *Mathews*.

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*"I'll have to admit when we started this conversation, I didn't think there would have been a persuasive argument to make for overruling Lassiter. With more development, I think we could do it."*

*"We have made a case for overruling based on the current doctrine of stare decisis—the change rules—but that does not get us anywhere near a litigation strategy."*

*After a few minutes of silence, the meeting chair spoke up. "Consider what we've been discussing. What are the considerations in formulating a plan to let the Supreme Court know it's OK to hold Emily has a due process constitutional right to representation? We need to construct a strategy to convince the Court to change, to move the Court to the tipping point."*

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## **XIX. STRATEGY FOR CHANGE**

The natural inclination of lawyers approaching the task of getting a case before the Supreme Court seeking a desired outcome is to focus on the legal arguments to persuade a majority of the Court. The importance of a well-grounded legal justification for a Supreme Court ruling is obviously important. Arguments urging the recognition of a constitutional right to counsel in civil matters have been developed and honed before courts and in law reviews.<sup>220</sup> As acknowl-

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<sup>220</sup> See Schwinn, *supra* note 19, at 218 (offering the idea of Civil Douglas as a step towards Civil Gideon). See also Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557

edged, the primary legal underpinning of arguments favoring the right to counsel in state civil cases, the Due Process Clause of the Fourteenth Amendment to the Constitution, was well briefed for the Court by the appellants and amici in *Lassiter*.<sup>221</sup> It was likely not for want of persuasive legal arguments that the Supreme Court rejected the notion of the right to counsel.

Getting the Supreme Court to find a constitutional basis for appointing counsel in civil cases is about change. It is about moving an institution to a point where it is comfortable and willing to make a change. While there are numerous and often complex theories and strategies explaining change, Malcolm Gladwell, a science journalist, struck a nerve with the public in his widely read “The Tipping Point: How Little Things Can Make A Big Difference.”<sup>222</sup> As of this writing, *The Tipping Point* has been on the *New York Times* bestseller list for 198 weeks.<sup>223</sup> *The Tipping Point* is about change, explaining it with the simple metaphor of the epidemic. Readers have found its themes to be both compelling and intuitive. As Gladwell explains,

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(2006) (asserting “that victims of domestic violence [should] be afforded the benefit of appointed counsel”).

<sup>221</sup> See Brief for American Bar Association as Amici Curiae Supporting Petitioner, *Lassiter v. Dep’t of Soc. Serv.*, 452 U.S. 18 (1981) (No 79-6423), 1980 WL 340036; Brief for North Carolina Civil Liberties Union as Amicus Curiae Supporting Petitioner, *Lassiter v. Dep’t of Soc. Serv.*, 452 U.S. 18 (1981) (No 79-6423), 1980 WL 340040; Brief for National Legal Aid and Defender Association as Amicus Curiae Supporting Petitioner, *Lassiter v. Dep’t of Soc. Serv.*, 452 U.S. 18 (1981) (No 79-6423), 1980 WL 340038; Brief for National Center on Women and Family Law, Inc. et al as Amicus Curiae Supporting Petitioner, *Lassiter v. Dep’t of Soc. Serv.*, 452 U.S. 18 (1981) (No 79-6423), 1980 WL 340037; Brief for the State of North Carolina et al as Amicus Curiae, *Lassiter v. Dep’t of Soc. Serv.*, 452 U.S. 18 (1981) (No 79-6423), 1980 WL 340039.

<sup>222</sup> THE TIPPING POINT, *supra* note 16.

<sup>223</sup> NYTimes.Com, Paperback NonFiction—Best Seller List, [http://www.nytimes.com/2008/06/15/books/bestseller/0615bestpapernonfiction.html?\\_r=1&oref=slogin](http://www.nytimes.com/2008/06/15/books/bestseller/0615bestpapernonfiction.html?_r=1&oref=slogin) (last visited Oct. 24, 2008). It is not an exaggeration to conclude that the popularity of the book reached a “tipping point” and sales became epidemic.

the tipping point is that magic moment when an idea, trend, or social behavior crosses a threshold, tips, and spreads like wildfire.<sup>224</sup> Gladwell contends that sudden or significant change may result from small events. In other words, a dramatic reordering is not necessary to push an idea or concept to the point where significant change occurs, that is the tipping point. Tipping points are not a Gladwell creation, as the concept can be traced to social scientists describing the point at which white families fled cities as neighborhood racial compositions changed.<sup>225</sup> The idea of a “tipping point” has entered our language in all sorts of spheres, including court opinions,<sup>226</sup> law review articles,<sup>227</sup> presidential campaigns,<sup>228</sup> decisions to buy fuel efficient cars,<sup>229</sup> and global warning trends.<sup>230</sup> The “Tipping Point” might be dismissed as pop sociology, but Gladwell’s three rules of the tipping point explain change.

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<sup>224</sup> THE TIPPING POINT, *supra* note 16, at 7.

<sup>225</sup> See MORTON GRODZINS, THE METROPOLITAN AREA AS A RACIAL PROBLEM (1958); see also Thomas C. Schelling, *Dynamic Models of Segregation*, 1 JOURNAL OF MATHEMATICAL SOC. 14386 (1971).

<sup>226</sup> See *United States v. Starrett City Assoc.*, 840 F.2d 1096, 1103 (2d Cir. 1988) (discussing tipping points in relation to housing discrimination litigation).

<sup>227</sup> See Frances H. Miller, *The Politics of Health Law: Any Tipping Points in View?*, 29 W. NEW ENG. L. REV. 265, 266 (2007) (explaining how tipping points apply to health law patterns; see also Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1955 (2006) (focusing on how “courts ‘tip’ from one understanding of a social group and its constitutional claims to another”).

<sup>228</sup> See, e.g., Russell Goldman, *Clinton Wins Big in Kentucky as Obama Looks Toward General Election*, ABC NEWS, May 20, 2008, available at <http://abcnews.go.com/Politics/Vote2008/story?id=4895191&page=1>.

<sup>229</sup> See, e.g., Robert Weisman, *Demand Outpaces Supply For Hybrids*, BOSTON GLOBE, June 9, 2008, [http://www.boston.com/lifestyle/green/greenblog/2008/06/demand\\_outpaces\\_supply\\_for\\_hyb.html](http://www.boston.com/lifestyle/green/greenblog/2008/06/demand_outpaces_supply_for_hyb.html).

<sup>230</sup> See, e.g., Dana Milbank, *Burned Up About the Other Fossil Fuel*, WASH. POST, June 24, 2008, at A03.



**XX. GLADWELL'S LAWS OF EPIDEMICS**

If a new idea or concept is to take hold, what kind of people are important to spreading that idea? Gladwell's Law of the Few identifies the people critical to spreading the word. The law restates the 80/20 principle—in any endeavor, eighty percent of the work is accomplished by twenty percent of those involved.<sup>231</sup> The few who are most responsible for the product of work are of three types: connectors, mavens, and salespeople. Gladwell argues these three types of people, each with distinctive skills and talents, are responsible for making an idea tip. Connectors are those “people with a special gift for bringing the world together.”<sup>232</sup> Connectors are responsible for spreading the epidemics to not only the many people they know, but the “kinds of people they know.”<sup>233</sup> Mavens are the people who accumulate knowledge and operate to inform and educate.<sup>234</sup> Mavens are the teachers. More than just teachers, mavens are those who are immersed in information and have the natural inclination to share information.<sup>235</sup> The final group necessary to spread social epidemics is the persuaders or salespeople. Gladwell identifies persuaders as the select group of people with the skills to persuade even when others are “unconvinced of what [they] are hearing.”<sup>236</sup>

Gladwell's second law, The Stickiness Factor, is about the message. Gladwell acknowledges there are unique qualities of some

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<sup>231</sup> THE TIPPING POINT, *supra* note 16, at 88.

<sup>232</sup> *Id.* at 38.

<sup>233</sup> *Id.* at 46.

<sup>234</sup> *Id.* at 60.

<sup>235</sup> *Id.* at 62.

<sup>236</sup> THE TIPPING POINT, *supra* note 16, at 70.

ideas that make them “stick” and influence future behavior. Using examples of developing programming for children’s television, Gladwell finds one component of “sticky” ideas, that they are often counterintuitive, challenging the conventional wisdom.<sup>237</sup> Gladwell’s final rule acknowledges the Power of Context—timing and the right environment for introducing a new idea are essential.

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*“If we look at Lawrence as the tipping point where the Court’s jurisprudence about constitutional protections for gays and lesbians changed, maybe it can inform our strategy for Emily’s case. What happened? Who were the communicators and what “sticky” messages came together in an environment at a particular time to the result in Kennedy’s opinion?”*

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## XXI. LAW OF THE FEW

The Communicators. The number and diverse nature of the roles of people involved in major litigation like that proposed here goes beyond the lawyer standing before the Supreme Court for oral argument. Classified by the function Gladwell assigns, potential communicators include: Persuaders—the parties, lawyers representing the parties, individuals and organizations filing amicus briefs; Mavens—lawyers representing the parties, individuals and organizations filing amicus briefs, academics, commentators, legal issue “think tanks” and Connectors—the media, bar associations, politi-

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<sup>237</sup> *Id.* at 131.

cians (executive and legislative branches at local, state and national levels), issue-oriented organizations, the public and the arguing lawyer's law firm.<sup>238</sup>

The party in any case before the Court is the single most important Persuader.<sup>239</sup> That person has a story to be told and heard. The life story of any parent facing termination of custody of their children is likely be one of challenges. Ms. Lassiter's story was undeniably tragic, culminating in a homicide conviction. Under the guise of balancing the costs and benefits of representation, the majority in *Lassiter* did not hesitate to highlight Ms. Lassiter's troubles.<sup>240</sup> Unfortunately, Ms. Lassiter was not a good Persuader.<sup>241</sup> Emily, the potential party here, has also had significant challenges in her life and would most likely reveal more, although she does not have a major felony conviction. Litigation strategy discussions wax and wane as the client's story unfolds—for every life event that elicits compassion, another will raise the possibility of condemnation. No litigation strategy discussion would be complete without an assessment of the story the client will tell.

The lawyer representing a litigant has the opportunity and duty to tell the client's story and take a lead role as a Persuader.<sup>242</sup> Nevertheless, merely recounting a client's history is not sufficient. In

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<sup>238</sup> *Id.* at 38, 46, 62, 69.

<sup>239</sup> *Id.* at 74.

<sup>240</sup> *Lassiter*, 452 U.S. at 28.

<sup>241</sup> Why was Ms. Lassiter's story the basis for an important holding on the Due Process Clause? Speculation here would not be useful, but her lawyers cannot be faulted for aggressively pursuing her claim.

<sup>242</sup> See NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow, Michael Ryan & Austin Sarat eds., 1992) (discussing the role of the lawyer as storyteller).

*Lawrence*, the lawyer representing the successful litigants was an experienced Supreme Court litigator.<sup>243</sup> Although the advocacy norm in 1981 when the Court heard *Lassiter* was different, the lawyer appearing before the Court was not an experienced Supreme Court litigator, nor did he practice in a Washington law firm housing an appellate practice.<sup>244</sup> Recalling the work of the Supreme Court Forecasting Project along with a growing recognition and use of experienced Supreme Court litigators,<sup>245</sup> the lawyer who opened that case meeting with the excited prediction that Emily's case would take them to the Supreme Court may be disappointed by the trends that recognized good lawyer-Persuaders to be Connectors as well.

In *Lawrence*, Mavens and Connectors arrived in the form of more than thirty amicus briefs split almost equally in number between support for appellants, *Lawrence* and Garner, and the respondent State of Texas. The briefs were filed by bar associations, law professors, politicians, medical and mental health professionals, gays and lesbians, and interest organizations of differing ideological affiliations.<sup>246</sup> Although it is likely the Communicators-by-brief will

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<sup>243</sup> The successful parties were represented by Paul M. Smith, a partner in Jenner & Block's Washington, D.C. office. He "co-chairs the firm's Appellate and Supreme Court . . . Practices. He has had an active Supreme Court practice for two decades, including oral arguments in twelve Supreme Court cases." Oyez.org, Oyez: U.S. Supreme Court Media—Paul M. Smith, [http://www.oyez.org/advocates/s/p/paul\\_m\\_smith/](http://www.oyez.org/advocates/s/p/paul_m_smith/) (last visited Aug. 29, 2008).

<sup>244</sup> See Oyez.org, Oyez: U.S. Supreme Court Media—Leowen Evans, [http://www.oyez.org/advocates/e/l/leowen\\_evans/](http://www.oyez.org/advocates/e/l/leowen_evans/) (last visited Sept. 16, 2008).

<sup>245</sup> See Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and its Effect on Certiorari*, 9 J. APP. PRAC. & PROCESS 175, 175 (2007); see also Richard James Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. (forthcoming 2008), abstract available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1022629](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022629).

<sup>246</sup> See Briefs for *Lawrence*, 539 U.S. 558 (2003).

never learn if their role was influential in reaching a tipping point, it is likely the collective efforts of those supporting Lawrence and Garner contributed to reaching a tipping point. *Lassiter* was not without its amici Mavens and Connectors, but reflective of the era, fewer briefs were filed. Four of the five briefs were in support of Ms. Lassiter, including one by the American Bar Association.<sup>247</sup> The sole amicus for the local Department of Social Services was a single joint brief of eleven states.<sup>248</sup> The states argued not only that they opposed the appointment of counsel, but urged the Court not to make a holding adverse to their interests retroactive.<sup>249</sup> As for the supporters of the final outcome in *Lawrence*, it is likely the brief for the states had its own tipping point contribution.

Would Mavens and Connectors be as helpful as amici if Emily's case made it to the Supreme Court? Given the perception in the political sphere that the issue of right to counsel in civil matters has an ideological component, the "usual suspects" from the issue-oriented interest groups would participate. The American Bar Association, based on both the resolution described previously and their *Lassiter* amicus, would likely support Emily. Given the policy and fiscal concerns, participation by states addressing the issues as amicus would be influential. Any participation of states for Emily could be significant as it would be counterintuitive and, therefore, more likely to be a Maven important to the Supreme Court. Al-

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<sup>247</sup> See Brief for the ABA as Amici Curiae Supporting Petitioner, *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18 (1981) (No. 79-6423), 1980 WL 340036.

<sup>248</sup> Brief for North Carolina et. al. as Amicus Curiae Supporting Respondents, *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18 (1981) (No. 79-6423), 1980 WL 340449.

<sup>249</sup> *Id.*

though the Supreme Court may not view the right to counsel in an ideological light, it would be helpful for Public Counsel to solicit and encourage traditionally conservative groups to join as amicus.

## XXII. THE STICKINESS FACTOR

Whereas the Law of the Few is about people, the Stickiness Factor is about the message—both the content of the message and its construction. The content, or legal argument, is encased within the formal processes—the petition for certiorari, the briefs on the merits, and the oral argument. Throughout the strategy development, it has been assumed that the legal arguments on the right to counsel would be little different from those offered in *Lassiter*, although it would also be necessary to address the Court’s doctrine of stare decisis analysis in *Casey*. Emily’s “sticky” message transcends legal arguments. Analyzing Justice Kennedy’s “sticky” message in *Lawrence* is a starting point for framing Emily’s message.

The majority opinion in *Bowers* masterfully created its intended message: homosexuals want special rights to engage in the morally repugnant act of sodomy.<sup>250</sup> Justice Kennedy changed the message in *Lawrence* to: the Constitution protects everyone from government intrusions into our homes and lives.<sup>251</sup>

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<sup>250</sup> *Bowers*, 478 U.S. at 195.

<sup>251</sup> *Lawrence*, 539 U.S. at 562.

In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.

Kennedy moved the message away from a limited group of people demanding special treatment to a message of inclusion—we all have a stake to ensure the state does not restrict our liberty. Justice Kennedy artfully confronted the underlying issue in both *Bowers* and *Lawrence*—criminalizing sodomy perpetuated the justification for discriminating against gays and lesbians.<sup>252</sup>

As illustrated by Justice Kennedy's opinion, framing an appealing message made a difference in the change from *Bowers* to *Lawrence*. The *Lassiter* story needs to undergo a similar change to create a sticky message. *Lassiter* had a sticky message, but it was not one that pushed the concept of right to counsel to a tipping point, rather it reversed any momentum the idea may have held. *Lassiter's* theme was "the bad mom." Justice Stewart's bad mom story invokes a mental model of failure to parent and failure to meet the standards of the traditional nuclear family, especially as that model was accepted during the era: there was no father in the house, the mother did not even show up at a prior neglect proceeding, and she failed to show much interest after a foster care placement. Generational bad parenting was also present as the grandmother did not show any interest in the child either. Both mom and grandmother were involved

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*Id.*

<sup>252</sup> *Id.* at 567.

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences . . .

*Id.*

in a cold-blooded murder committed with a knife. The mother was convicted and sentenced to a long period and had a lawyer, but she did not bother seeking his help with the termination case. The Court's message was clear; this is a bad mom who has not done anything to keep her family together and does not even care to get her own lawyer, but wants taxpayers to pay. Bad moms need to be punished more than just by imprisonment. Bad moms should not have children. For the good of children and the society, bad moms need not expect too much due process.

Emily's sticky story needs to create a mental model that will allow the justices of the Court to be comfortable with recognizing a right to counsel. Emily's story should replicate the use of commonly held values as Justice Kennedy so effectively accomplished in *Lawrence*.<sup>253</sup> The heart of Emily's narrative is not the bad mom, but rather the mom who struggles against all odds to keep her family together following tragedy.<sup>254</sup> It is a narrative that calls forth a mental model of justice paralleling a universally held moral value. Principles important to achieving justice include fairness and access to the court system. Fairness, an American value that cuts across the ideological divide, reflects equitable distribution and access to opportunity. Access is not a special privilege, but rather a common good to be guaranteed for all by the government. To achieve fairness and ac-

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<sup>253</sup> The message created here is not the only, or even the best story, to be told in Emily's case. Although lawyers may think of themselves as good with words, it would be prudent to work with communication consultants to construct an effective message.

<sup>254</sup> The format for Emily's narrative borrows from the work on framing by cognitive scientists, linguists, and communication experts. The writings of George Lakoff, a cognitive linguist, have been a great influence. See GEORGE LAKOFF, THINKING POINTS: COMMUNICATING OUR AMERICAN VALUES AND VISION 119-40 (2006).



cess, some people, because of their circumstances, need assistance from the government to level the playing field.

Because legal argumentation is integral to constructing the message, a brief concession to the legalists will be made. The substantive legal arguments made in *Lassiter* would remain at the core. Because of the Court's willingness to find underpinnings for access to the courts in more than one constitutional provision, including the Due Process Clause, access could be a compelling theme coupled with the traditional fundamental fairness argument. The legal arguments should attack *Mathews* as a basis for determining how much process is due. As argued by Justice Stevens in his *Lassiter* dissent and acknowledged in decisions since, the cost-benefit balancing test sprang from an economically-related matter and was designed for an administrative context.<sup>255</sup> As reviewed above, a proceeding to terminate parental rights does not conform to either of these circumstances. The respondents in *Lawrence* asked the Court to overrule *Bowers*, a circumstance research shows as significant, and should be the core argument in Emily's case. Additionally, the *Lawrence* advocates did not seek an intermediate position, such as distinguishing *Bowers* or limiting its holding.<sup>256</sup> While it would be ethically necessary to argue that Emily's case meets the *Lassiter* balancing test, the lead argument should focus on its overruling.

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<sup>255</sup> *Lassiter*, 452 U.S. at 59-60.

<sup>256</sup> The appellants did maintain a fall-back position arguing that same-sex sodomy laws violated the Equal Protection Clause of the Fourteenth Amendment because the law did not apply to heterosexual sexual acts. *Lawrence*, 539 U.S. at 563. Justice O'Connor's concurring opinion in *Lawrence* adopts this rationale. *Id.* at 579 (O'Connor, J., concurring). A decision based on Equal Protection would have limited the scope of the constitutional protection, but would have invalidated the statute in question.

**XXIII. CONCLUSION: THE POWER OF CONTEXT**

Gladwell's third law, the Power of Context, is about the environment and how small, sometimes subtle changes in environment make a big difference in how people act in a particular context. In other words, the behavior and dynamics of the justices as an institution depends on a range of externally driven conditions. If the environment around the Court changes, dynamics of the Court will change. At an individual level, "a number of relatively minor changes in our external environment can have a dramatic effect on how we behave and who we are."<sup>257</sup> Simply, small changes in the context of a message can determine whether it will tip. Changes occur within the Court, in law, and in the role of law in society.

Have changes in each of these domains created the context within which it is possible or even probable that the Supreme Court could heed Emily's message and recognize the right to counsel in civil matters? Changes in context were significant in *Lawrence*. Those changes were previously discussed and will not be restated here, but acknowledging the changed context made it possible for the Court to change. When the message was reframed, the Court overruled *Bowers*. In essence, the Court came to a point where it understood it was "OK" to change. It had reached a place where it was comfortable with the change—the tipping point. Changes parallel to those providing context in *Lawrence* were previously analogized to those present post-*Lassiter*. It is likely the magnitude of these changes is greater than Gladwell suggests is necessary to arrive at a

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<sup>257</sup> THE TIPPING POINT, *supra* note 16, at 182.

tipping point when the communicators and message adapt to the new context.

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*“This has been a long morning. Have we reached any consensus about Emily’s case?” After a silence punctuated with nodding around the table, the chair brought the meeting to an end. “I’ll contact Emily so we can meet her and explain what we think is possible.”*