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ACCESS TO JUSTICE -- CIVIL RIGHT TO COUNSEL -- CALIFORNIA ESTABLISHES PILOT PROGRAMS TO EXPAND ACCESS TO COUNSEL FOR LOW-INCOME PARTIES. - ACT OF OCT. 11, 2009, CH. 457 (CODIFIED IN SCATTERED SECTIONS OF CAL. BUS. & PROF. CODE AND CAL. GOV'T CODE).

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Few informed observers of America's civil justice system would dispute that Americans who cannot afford legal representation in court "routinely forfeit basic rights, not due to the facts of their case or the governing law, but due to the absence of counsel." [1] Forging a solution to this serious problem, however, has proven elusive, with the United States now lagging far behind other advanced industrial democracies in ensuring access to justice for its low-income population. [2] Litigation strategies aimed at achieving the recognition of a constitutionally based right to counsel have foundered as judges have hesitated to establish new rights that would likely be onerous for the government to support and enforce. Meanwhile, legislators have been reluctant to commit substantial additional public funds to make a civil justice system already regarded as wasteful and dysfunctional even more litigious. Against this background, it is noteworthy that all three branches of California's politically fractured state government recently rallied around a new approach to the problem in the form of Assembly Bill (AB) 590. [3] The legislation, signed into law in the fall of 2009, [4] establishes pilot programs that will begin to give low-income Californians access to counsel in "civil matters involving critical issues affecting basic human needs." [5] Defined by three key elements--legislative as opposed to judicial line-drawing, targeted experimentation, and an emphasis on pragmatism over judicially enforceable guarantees--AB 590 represents an important new model for expanding access to justice to low-income people.

Ever since the Supreme Court recognized, in Gideon v. Wainwright, [6] a constitutional right to counsel for indigent criminal defendants ***1533** who are at risk of losing their physical liberty, [7] access to justice advocates have hoped that courts would similarly recognize a right to counsel for indigent parties in civil cases. [8] But the Supreme Court dealt a serious blow to those hopes in Lassiter v. Department of Social Services, [9] which adopted a case-by-case approach to determining whether appointed counsel is a constitutional due process right and established a presumption against recognizing such a right unless the indigent person's physical liberty is at risk. [10] Despite this setback, some states enacted legislation to guarantee counsel in a few narrow categories. [11] Since these categories covered only a small fraction of total civil litigation, however, the legislation did little to address the formation of a serious nationwide "justice gap" between what was needed to meet the civil legal needs of the poor and the total amount of services actually available. [12] One of the most obvious symptoms of this gap was a large number of self-represented litigants, who were the source of increasing difficulties for judges, clerks, and even opposing counsel. [13] Given California's growing poverty rate and substantial non-English-speaking population, these challenges were especially salient there. [14]

In an attempt to address these problems, Assembly Member Mike Feuer, the chairman of the California Assembly Judiciary Committee and a former legal aid attorney, introduced a bill in early 2009 to establish pilot programs aimed at expanding access to legal counsel for low-income parties in civil cases. [15] A small increase in various fees associated ***1534** with nonessential court services would fund the programs. [16] At the outset, enactment into law appeared unlikely given California's dire budget straits and the political unpopularity of raising fees to support new programs. [17] But after the fee increases were enacted

separately as part of an effort to resolve the state budget crisis, [18] AB 590 was amended so that it would no longer raise fees; instead, starting July 1, 2011, it would redirect the already enacted fee increases to establish the pilot programs. [19] Technically no longer a bill that raised fees, AB 590 passed the Senate 23-13 [20] and the Assembly 52-26, [21] facing no organized outside opposition. [22]

Declaring California's "responsibility to provide legal counsel without cost" to those who cannot afford it, [23] AB 590 requires California's Judicial Council to establish renewable three-year pilot programs to address the legal needs of unrepresented low-income parties. Eligible cases are limited to "civil matters involving critical issues affecting basic human needs," specifically: "housing-related matters, domestic violence and civil harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, [and] actions by a parent to obtain sole legal or physical custody of a child." [24] The pilot programs are to take the form of partnerships between a court and a legal services agency. [25] A committee appointed by the Judicial Council ***1535** will select partnerships for funding after a competitive grants application process. [26] Within the partnership, the court is responsible for referring cases to the agency [27] and providing support services to help ensure due process to those who cannot be provided legal representation. [28] The legal services agency, meanwhile, is charged with receiving cases from the court and other sources and then, at the agency's discretion, coordinating legal service providers associated with the agency to handle the clients' needs. [29] AB 590 also requires the Judicial Council to collect data and report back to the legislature and governor by early 2016 on the effectiveness and continued need for the programs. [30] Finally, AB 590 directs the fee increases enacted in the 2009-2010 budget to be used to support the programs for a six-year period, starting July 1, 2011. [31]

Even though it acknowledges California's responsibility to provide counsel when the basic needs of low-income persons are at stake and invests tens of millions of dollars in support, AB 590 is clearly modest in many respects. Its pilot programs will be few and of limited duration and, contrary to what some have claimed, [32] do not create a right to counsel. For these reasons, AB 590's significance could be easily overlooked. Yet, a close examination of AB 590 reveals three critical features of a potential new model for advancing a civil Gideon agenda: legislative line-drawing, targeted experimentation, and an emphasis on pragmatism. Each of these features represents a strategic adaptation to challenges that stymied past efforts, and together they trace a new path to expanding access to counsel for low-income persons.

The first feature is reliance on the legislative process to expand sharply the scope of cases in which access to counsel is provided for low-income civil litigants. [33] For decades, strategies aimed at increasing access to counsel for the poor have been primarily litigation- ***1536** focused, with the goal of persuading courts to extend the logic of Gideon to civil cases and create a civil right to counsel. Yet, these strategies have generally failed, as judges have been wary of recognizing such a right, even in cases implicating fundamental rights, for fear of opening the "floodgates." [34] That is, were a court to recognize the right to counsel in one set of cases, either consistency would compel that court continuously to expand the right to other cases, thereby imposing an increasingly costly mandate on a state, [35] or fiscal concerns would force the court to cabin the right arbitrarily, creating inconsistency and undermining the court's legitimacy. [36] In contrast, AB 590 emerged out of a legislative process less burdened with the need to maintain strict adherence to principle and more responsive to political realities. Unbolting doors without the risk of opening floodgates, the legislation substantially expands the universe of civil cases in which the law recognizes that representation by counsel is essential, with cases ranging from housing to domestic violence and from elder abuse to child custody. Any gaps in this range reflect choices made through the legislative process--not arbitrary judicial line-drawing.

To be sure, all of the cases AB 590 covers fall under the category of "civil matters involving critical issues affecting basic human needs." [37] But note that AB 590's scope does not in fact include all matters falling under this category. For example, AB 590 does not include immigration cases, recognizing that allocating taxpayer money to pay for the legal defense of individuals accused of breaking immigration laws would likely create fierce political opposition. [38] Yet, immigration cases frequently involve such

critical issues as whether one must leave one's family or return to a country where one might face persecution, imprisonment, ***1537** or even death. [39] Now drawing such fine lines regarding when counsel should be provided is probably politically critical to successfully establishing a civil right to counsel. But it would be difficult to imagine judges, after announcing a "basic human needs principle," then sharply departing from the principle in response to political realities and credibly drawing the necessary fine lines. By leaving the line-drawing to legislatures, civil Gideon advocates can thus sidestep a major obstacle bedeviling litigation-focused strategies and maintain political support for the expansion of access to counsel. [40]

A second critical feature of the model underlying AB 590 is targeted experimentation in the form of three-year pilot programs. Implicit in AB 590's establishment of pilot programs is the idea that before policymakers can endorse the statewide expansion of access to counsel, two sets of questions must be answered. The first set concerns the form of the system through which counsel should be provided to low-income civil litigants. [41] What kind of organization should determine which litigants get counsel? What is the best way to provide counsel? And at a nuts-and-bolts level, how will this system work in conjunction with existing legal aid providers and how much will it all cost? The second set concerns the determination of when legal representation is significantly more likely to protect litigants' due process rights and avert erroneous decisions [42] than less costly alternatives. [43] Certain litigants, for example, may fare only marginally better with legal counsel, while others may be extremely unlikely to receive justice without full representation. Common sense and existing data offer incomplete answers about when counsel truly adds significant value. [44]

***1538** In this light, initiating the expansion of access to counsel in the form of select pilot programs is an appropriate, if not necessary, way of resolving the fundamental issues that any successful civil Gideon initiative must address. AB 590's pilot programs serve as targeted experiments that will provide courts and legal aid providers with models for how best to work together and will furnish policymakers with the data critical for determining how best to allocate resources. [45] Such knowledge will also enable advocates and legislators to shape future programs in a way that addresses the concerns of skeptics and builds sufficient political support. [46] Of course, it is possible to imagine alternative approaches that would eschew pilot programs and seek immediately to guarantee a right to counsel statewide. But without first resolving the basic issues outlined above, any such approach would risk wasting scarce resources on ad hoc measures and, for a period, likely do more to confuse and disrupt the existing court system than to ensure due process for low-income litigants. Sustainable support for the programs could be jeopardized unnecessarily as a result.

The final critical feature of the AB 590 model is its recognition that it may be premature to grant a judicially enforceable right to counsel in the cases AB 590 covers. In this way, AB 590 mirrors courts' previous hesitation to create such a right. [47] As discussed above, unresolved questions remain regarding whose legal needs are most vulnerable and when access to counsel, as opposed to a potential alternative, is truly necessary to protect the basic rights of low-income civil litigants. In the face of such ambiguity, budget-conscious legislatures tend to be resistant to allocating large sums of tax dollars, let alone creating expensive new rights enforceable in court. Consequently, the AB 590 model does not create a categorical right to counsel, but instead leaves it completely up to the courts and legal aid providers first to determine where needs might be greatest within a specific set of cases defined by the legislature and then to decide who should receive counsel, the risk of unchecked discretion notwithstanding.

***1539** Yet, such flexibility to exercise discretion within a group of cases is more than just the product of tight-fisted legislators and uncertainty about when representation is necessary. It is also a crucial part of the experimental design of AB 590's pilot programs. With counsel a scarce resource, the court-agency partnerships have an incentive to maximize the use of existing resources and develop an integrated continuum of services to meet clients' many different types of legal needs. These incentives for the development of alternatives to legal representation, when combined with a comparative assessment of the impacts of representation and its alternatives, offer the most promising route for distinguishing the cases in which representation is truly indispensable to protect basic human needs from the cases in which less expensive alternatives are equally effective. Access to justice advocates, in turn, can then use such information either to convince legislators to ensure adequate and reliable funding

for appointed counsel in civil cases, or to persuade judges to establish an expanded civil right to counsel [48] and thereby avoid rendering funding for appointed counsel subject to "legislative whim" and a given year's resource limitations. [49]

Together, these three critical features represent a new model that fits into a broader strategy of targeted incrementalism being pursued nationwide. [50] Under this strategy, claims for a broad, judicially enforceable right to counsel are eschewed in favor of targeted, deliberate action by state legislatures. Through such action, legislatures take responsibility for the lack of access afflicting lower-income citizens, draw difficult policy lines, and produce through experimentation the information and data necessary to advance to the next stage. Far from a token advance, AB 590 represents an unlikely victory for civil Gideon proponents and plants the seeds for wide-ranging legislative and judicial initiatives to improve access to justice not only in California, but also in states across the nation.

Footnotes

1 Boston Bar Ass'n Task Force on Expanding the Civil Right to Counsel, Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts 1 (2008) [hereinafter Boston Bar Ass'n Task Force].

2 See generally Earl Johnson, Jr., Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies, 24 Fordham Int'l L.J. S83 (2000).

3 2009-2010 Leg., Reg. Sess. (Cal. 2009) (as amended in Assembly, Mar. 12, 2009).

4 Act of Oct. 11, 2009, ch. 457 (codified in scattered sections of Cal. Bus. & Prof. Code and Cal. Gov't Code).

5 Id. §6 (codified at Cal. Gov't Code § 68651(a) (Deering 2009)).

6 372 U.S. 335 (1963).

7 See id. at 344-45.

8 See, e.g., Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545, 547-49 (1967). Just a few years after Gideon, the right to counsel was further extended to juveniles in delinquency proceedings. See In re Gault, 387 U.S. 1, 41 (1967).

9 452 U.S. 18 (1981).

10 Id. at 26-27.

11 Categories included child abuse, termination of parental rights, and involuntary institutionalization. See Laura K. Abel & Max Rettig, State Statutes Providing for a Right to Counsel in Civil Cases, 40 Clearinghouse Rev. 245, 245-48 (2006). California enacted laws to guarantee counsel to parents whose custody or parental rights are at risk of elimination and to children in dependency proceedings. See id. at 253 (citing relevant parts of Cal. Fam. Code and Cal. Welf. & Inst. Code).

12 See, e.g., Legal Servs. Corp., Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans (2d ed. 2007).

13 See, e.g., Russell Engler, And Justice for All--Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks, 67 Fordham L. Rev. 1987, 1987-89 (1999).

14 See Cal. Comm'n on Access to Justice, Action Plan for Justice 18-19 (2007).

15 A.B. 590, 2009-2010 Leg., Reg. Sess. (Cal. 2009) (as amended in Assembly, Mar. 12, 2009). At the same time, the legislature's leadership introduced a similar proposal in budget legislation. See Staff of S. Appropriations Comm., 2009-2010 Leg., Reg. Sess., Analysis of AB 590, at 2 (Cal. 2009), available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_590_cfa_20090827_130625_sen_comm.html. Neither proposal was completely without precedent. In January 2007, only a few months after the American Bar Association approved a resolution urging states "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," Am. Bar Ass'n,

Report to the House of Delegates, Resolution 112A, at 1 (2006), Governor Arnold Schwarzenegger included funding to establish pilot programs along these lines in his annual state budget proposal, though with little detail. See Telephone Interview with Kevin Baker, Deputy Chief Counsel, Cal. Assembly Judiciary Comm. (Nov. 10, 2009) (on file with the Harvard Law School Library). In response to fiscal pressure, however, the funding was later dropped from the budget proposal. Staff of Assemb. Judiciary Comm., 2009-2010 Leg., Reg. Sess., Analysis of AB 590, at 9 (Cal. 2009), available at http:// www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_590_cfa_20090420_114230_ asm_comm.html.

16 A.B. 590, 2009-2010 Leg., Reg. Sess. (Cal. 2009) (as amended in Assembly, Mar. 12, 2009).

17 Cf. Jennifer Steinhauer, California, Nearly Broke, Edges Nearer Brink, N.Y. Times, Feb. 17, 2009, at A14.

18 Act of July 28, 2009, ch. 22 (codified in scattered sections of Cal. Bus. & Prof. Code, Cal. Gov't Code, Cal. Health & Safety Code, Cal. Penal Code, Cal. Prob. Code, and Cal. Welf. & Inst. Code); see also Staff of S. Appropriations Comm., supra note 15, at 2. This was just one of the budget trailer bills that comprised the 2009-2010 budget legislation.

19 Compare Cal. A.B. 590, (as amended in Assembly, Mar. 12, 2009), with Cal. A.B. 590 (as amended in Senate, Aug. 20, 2009).

20 S. Daily Journal, 2009-2010 Leg., Reg. Sess., at 2332-33 (Cal. 2009).

21 Assemb. Daily Journal, 2009-2010 Leg., Reg. Sess., at 3293-94 (Cal. 2009).

22 Nearly every Republican legislator, however, voted against the legislation (while all Democratic legislators who voted approved the bill). See sources cited supra notes 20-21.

23 Act of Oct. 11, 2009, ch. 457, § 1(k).

24 Cal. Gov't Code §68651(b)(1) (Deering 2009). Eligibility is further limited to those clients making a household income at or below 200% of the federal poverty line. Id.

25 The legal services agency must be a nonprofit legal aid organization or a university-based legal aid program. See id. § 68651(b)(4) (citing Cal. Bus. & Prof. Code §6213(a) (Deering 2009)). Partnerships between courts and legal services programs have already existed in some parts of the state. See Cal. Comm'n on Access to Justice, supra note 14, at 9. Unlike the model programs envisioned by AB 590, however, the programs that predated the statute received few resources from the state, did not limit their focus to the categories of cases specified by AB 590, and were not subject to comprehensive study.

26 Cal. Gov't Code § 68651(b)(4)-(6).

27 Id. § 68651(b)(7).

28 Id. § 68651(b)(4).

29 Id. § 68651(b)(4), (7). Critically, while the legislation details criteria for what kinds of cases should be prioritized, it gives the court and lead legal services agency discretion regarding when actually to provide counsel. See id. § 68651(b)(7).

30 Id. § 68651(c).

31 See id. §§ 68085.1(c)(1)(E), 68085.1(l), 70626. The amount to be redirected is estimated to be approximately eleven million dollars annually. Staff of S. Appropriations Comm., supra note 15, at 2.

32 See, e.g., Carol J. Williams, State Gives Poor a New Legal Right, L.A. Times, Oct. 17, 2009, at A8.

33 The use of legislation to guarantee some right to counsel is not new, of course. See generally Abel & Rettig, supra note 11. But for pursuing a generalized right to counsel applicable to multiple types of cases, litigation has historically been the favored strategy.

34 E.g., Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 58-59 (1981) (Blackmun, J., dissenting) (intimating that the Court's decision not to recognize a categorical right to counsel in parental termination proceedings was motivated by underlying fears of opening the "floodgates").

35 See Simran Bindra & Pedram Ben-Cohen, Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants, 10 Geo. J. on Poverty L. & Pol'y 1, 31 (2003) ("The common refrain to a call for a right of appointed counsel for indigents is that such a program would bankrupt the government."); William S. McAninch, A Constitutional Right to Counsel for Divorce Litigants, 14 J. Fam. L. 509, 511 (1975-1976) ("Lurking in any constitutional calculus will be some notion of cost...."). Deciding to impose such a mandate is especially vexing if it means scarce public funds may have to be siphoned away from other constitutional priorities, such as under-funded public defender programs for indigent criminal defendants. See Jane Pribek, Case Raises Civil Gideon Issue, Wis. L.J., Mar. 22, 2006, http:// www.wislawjournal.com/archive/2006/0322/gideon.html.

36 See, e.g., State ex rel. Hamilton v. Snodgrass, 325 N.W.2d 740, 743 (Iowa 1982) ("A requirement of appointed counsel in paternity proceedings would inevitably lead to a requirement of appointed counsel for indigent defendants in other actions...."); cf. M.L.B. v. S.L.J., 519 U.S. 102, 129-30 (1996) (Thomas, J., dissenting) (warning that "the new-found constitutional right to free transcripts in civil appeals" cannot be "effectively restricted to this case").

37 Cal. Gov't Code § 68651(a) (Deering 2009).

38 Telephone Interview with Kevin Baker, supra note 15.

39 See, e.g., Boston Bar Ass'n Task Force, supra note 1, at 21-25 (proposing that Massachusetts's pilot programs for expanding access to counsel for those whose basic needs are at stake include immigration cases).

40 Of course, especially with regard to immigration cases, the legislature's exclusion for political reasons of cases that seem equally worthy as the cases it does include sometimes may mean turning a blind eye to the unfair treatment of some of society's most vulnerable defendants.

41 Telephone Interview with Kevin Baker, supra note 15. For an exploration of different publicly funded legal aid models from around the world, see generally Earl Johnson, Jr., Justice for America's Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad, 58 DePaul L. Rev. 393 (2009).

42 See Russell Engler, Shaping A Context-Based Civil Gideon from the Dynamics of Social Change, 15 Temp. Pol. & Civ. Rts. L. Rev. 697, 714 (2006). AB 590 encourages courts and legal service providers competing for pilot program funds to focus on precisely these questions and collect the associated data. See Cal. Gov't Code § 68651(b)(5)-(7).

43 See, e.g., Engler, supra note 42, at 706-07 (discussing alternatives to representation and emphasizing the need to pair any consideration of alternatives with rigorous outcome evaluation). Alternatives might include greater assistance to pro se litigants through court-based self-help centers and the standardization of common forms and procedures, referral to counsel for legal advice only, and the appointment of trained, nonlawyer advocates. See Judicial Council of Cal., Equal Access Fund: A Report to the California Legislature 12-13, 134 (2005).

44 See, e.g., Engler, supra note 42, at 711-14.

45 See Russell Engler, Toward a Context-Based Civil Right to Counsel Through "Access to Justice" Initiatives, 40 Clearinghouse Rev. 196, 200-01 (2006).

46 See Boston Bar Ass'n Task Force, supra note 1, at 27 ("[T]he best way to stimulate new, permanent funding by the legislature is to demonstrate the economic and social benefits that flow from providing a lawyer to low income people...."). Conversely, data that showed that in many cases legal representation is not particularly effective could create new skeptics. Ultimately, the success of the AB 590 model may hinge on what impact, if any, new data will have on the beliefs of legal aid providers, current skeptics of the usefulness of appointed counsel, and legislators.

47 See State ex rel. Hamilton v. Snodgrass, 325 N.W.2d 740, 743 (Iowa 1982) ("The cost to the State would be vast. The imposition of such a financial burden is best left for legislative determination." (citation omitted)); cf. Frase v. Barnhart, 840 A.2d 114, 138 (Md. 2003) (Cathell, J., concurring) ("So long as this Court declines to resolve [the civil right to counsel issue], the advocates for the poor will continue to seek judicial relief, rather than concentrating their efforts with the other branches of government.").

48 For a detailed explanation of a litigation strategy to expand the right to counsel in a targeted and context-sensitive way, see Engler, supra note 42, at 713-17.

49 Andrew Scherer, Securing a Civil Right to Counsel: The Importance of Collaborating, 30 N.Y.U. Rev. L. & Soc. Change 675, 683 (2006); see also id. at 683-84.

50 See, e.g., Engler, supra note 42, at 697 (advocating "a strategy of an incremental, context-based approach to achieving a civil right to counsel"); Clare Pastore, Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions, 40 Clearinghouse Rev. 186, 194 (2006) (recommending that since the Supreme Court is "in no rush to expand the federal rights of indigent litigants, advocates should examine state due process, equal protection, and access-to-court guarantees as an alternate source of incremental expansion of a right to counsel at the state level"); see also Press Release, Boston Bar Ass'n, Boston Bar Proposal To Prevent Homelessness Gets Grant from Boston Foundation (Jan. 7, 2009), http://www.bostonbar.org/prs/nr_ 0809/BostonFoundationGrant010709.htm (reporting funding for a Boston-area pilot project that will attempt to show through a cost-benefit analysis that Massachusetts "has a financial interest and a moral imperative to create a statewide right to representation for eviction for tenants with meritorious cases").

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