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The Poor Man's Problem in Bankruptcy

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COMMENT

THE POOR MAN'S PROBLEM IN BANKRUPTCY

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*St. Mary's University School of Law, J.D., 2024; Texas A&M University, B.S. 2021. First and foremost, I wish to thank Chief Bankruptcy Judge Craig Gargotta of the Western District of Texas and everyone in his chambers for inspiring me to write this topic and for being a steadfast support. I also wish to thank my colleagues at the *St. Mary's Law Journal* for their tremendous work in enhancing this Comment and for encouraging me along the way.

I. INTRODUCTION

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[1]

Between 2020 and 2021, nearly one million businesses and individual debtors filed for bankruptcy.[2] This Comment will explore the challenges laymen face in navigating bankruptcy pro se.[3] Additionally, this Comment will propose an equitable and feasible solution that gives debtors a fighting chance at a fresh start with the assistance of competent counsel.

1. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

2. *See Bankruptcy Filings Drop 24 Percent*, U.S. CTS. (Feb. 4, 2022), https://www.uscourts.gov/news/2022/02/04/bankruptcy-filings-drop-24-percent [https://perma.cc/A3G5-C6W5] (totaling the number of business and non-business filings for each year since 2017).

3. *Pro Se*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining pro se as, "For oneself; on one's own behalf; without a lawyer."); *Filing Without Attorney*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/filing-without-attorney [https://perma.cc/7FD4-SFFX] ("Individuals can file bankruptcy without an attorney, which is called filing *pro se*.").

While bankruptcy filings have decreased since the inception of the COVID-19 pandemic,[4] experts predict that as government aid packages dry up, individuals and business debtors will seek relief through the bankruptcy courts once again.[5] If more people utilize the bankruptcy process, the number of pro se, or self-represented debtors, will likely increase. In some cities, such as Los Angeles, pro se filings account for as much as 24% of all reported bankruptcy cases.[6] The trouble is that, in general, pro se cases almost never have a happy ending.[7] Applying this generality specifically to bankruptcy, where a pro se debtor is forced to navigate the complicated bankruptcy process while simultaneously dealing with the personal stresses of filing for bankruptcy, the likelihood of the bankruptcy purposes being fulfilled is slim.[8] Sadly, the benefits of bankruptcy are not a fundamental right, and neither is the right to counsel in civil proceedings.[9] Because bankruptcy is civil in nature, there is no right to appointed counsel meaning debtors who are unable to afford an attorney are forced to navigate the challenges of bankruptcy alone.[10]

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4. Maria Chutchin, *Chapter 11s Soared, but Overall Bankruptcies Hit Historic Low in 2020*, REUTERS (Jan 5, 2021), https://today.westlaw.com/Document/I9bd73f104f8d11ebba08bd9ae31a9608/View/FullText.html?transitionType=SearchItem&contextData=(sc.Default) [https://perma.cc/CA2T-RG8N] ("Experts have suggested that economic uncertainty caused by the pandemic has left many people unsure that bankruptcy, which can come with substantial legal fees, is the right path.").

5. Maria Chutchian, *Bankruptcy Filings Are Creeping Back Up in Early 2022*, REUTERS (Apr. 5, 2022, 2:21 PM), https://www.reuters.com/legal/transactional/bankruptcy-filings-are-creeping-back-up-early-2022-2022-04-05/ [https://perma.cc/A36D-WHD4].

6. Ed Flynn & Phil Crewson, *Data Show Trends in Post-BAPCA Bankruptcy Filings* [4] (2008), https://www.justice.gov/archive/ust/articles/docs/2008/abi_200808.pdf [https://perma.cc/V4EW-Y8VX].

7. *See* Sonja Ebron, *Self-Represented Litigants Lose Often. Here's Why.*, COURTROOM5 (Dec. 6, 2019), https://courtroom5.com/blog_content/why-do-pro-se-litigants-lose-so-often [https://perma.cc/PMT4-TLW4] (explaining pro se litigants often misunderstand the law and lose as a result).

8. *See* Village of San Jose v. McWilliams, 284 F.3d 785, 790 (7th Cir. 2002) ("The purpose of the Code is to provide equitable distribution of the debtor's assets to the creditors and 'to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" (quoting Williams v. U.S. Fid. & Gaur. Co., 236 U.S. 549, 554–55 (1915))).

9. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981) (holding a right to appointed counsel only exists when the defendant's physical liberty is at stake).

10. *See id.* at 27 (asserting there is a "presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom").

Part II of this Comment describes how bankruptcy courts operate and explores the effects of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) on indigent parties. Part II also discusses the unique concerns surrounding pro se bankruptcy cases compared to other proceedings and points out the inequities that currently exist between trustees and debtors. Next, Part III examines the civil-criminal dichotomy and the heavily debated "Civil *Gideon*" movement. First, Part III highlights the landmark case of *Gideon v. Wainwright*,[11] which declared the right to legal counsel is a fundamental right for indigent criminal defendants.[12] Second, Part III dives further into *Boddie v. Connecticut*[13] and *Powell v. Alabama*,[14] which explain the importance of the right to access the courts, as well as how the right to counsel is needed in civil and criminal proceedings.[15]

Part IV sets forth more details about the Civil *Gideon* movement and discusses its relevance in bankruptcy law. Part IV also explains four prevalent issues in bankruptcy law that support the need for an appointed right to counsel in bankruptcy. Most importantly, Part IV proposes a solution to provide access to counsel in bankruptcy proceedings and addresses popular concerns with public assistance programs. Finally, Part V wraps up the conversation and revisits the many reasons why the Sixth Amendment right to counsel should be extended beyond the criminal courts.

II. BACKGROUND

Article I of the United States Constitution gives Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[16] Bankruptcy courts are called "legislative courts," and are not "Article III courts that derive their powers from Article III of the Constitution."[17] Bankruptcy courts are courts of equity[18] and seek to help people and corporations get back on their feet. A debtor, whether an individual or a corporation, can file under one of the many chapters of the

11. Gideon v. Wainwright, 372 U.S. 335 (1963).
12. *Id.* at 344–45.
13. Boddie v. Connecticut, 401 U.S. 371 (1971).
14. Powell v. Alabama, 287 U.S. 45 (1932).
15. *Id.* at 73; *Boddie*, 401 U.S. at 382–83.
16. U.S. CONST. art. I, § 8, cl. 4.
17. Craig A. Gargotta, *Who Are Bankruptcy Judges and How Did They Become Federal Judges?*, FED. LAW., Apr. 2018, at 11, 11.
18. *Id.*

Bankruptcy Code (Title 11 of the United States Code).[19] There are six different chapters under which a debtor can file, but chapter 7 is the most common.[20] Chapter 7 cases are referred to as "liquidation bankruptcy"[21] and are the most basic form of bankruptcy.[22] In a liquidation case, the trustee collects the nonexempt property of the debtor, converts that property to cash, and distributes the cash to the creditors.[23] The second most common form of bankruptcy is a chapter 13 case.[24] A chapter 13 case involves a "wage earner plan" where the debtor proposes a plan to repay their debt with their income.[25] A less common form of bankruptcy is a chapter 11 case.[26] Chapter 11 cases are a "reorganization" where the debtor remains in control of the business operations and does not have to sell assets.[27]

While the term bankruptcy is often associated with a negative connotation,[28] bankruptcy seeks "to give a debtor, either a person or a business, a 'fresh start' by relieving the debtor of most debts, and to give the debtor the opportunity to repay creditors in an orderly manner."[29] Most debtors seek relief through bankruptcy during periods of economic hardship caused by "medical reasons, divorce, employment loss, or some

19. *Bankruptcy Courts and Cases – Journalist's Guide*, U.S. CTS., https://www.uscourts.gov/statistics-reports/bankruptcy-courts-and-cases-journalists-guide [https://perma.cc/S95Z-F6VX] (noting there are typically two options when filing bankruptcy: liquidation or reorganization).

20. Steve Nitz, *The Different Chapters of Bankruptcy Explained*, NAT'L FOUND. FOR CREDIT COUNSELING (Sept. 22, 2017), https://www.nfcc.org/blog/different-chapters-bankruptcy-explained/ [https://perma.cc/LC7E-8FMR].

21. *Liquidation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining liquidation as, "The act or process of converting assets into cash, [especially] to settle debts").

22. Nitz, *supra* note 20.

23. *Liquidation*, *supra* note 21.

24. *Bankruptcy Courts and Cases* – Journalist's Guide, *supra* note 19.

25. Nitz, *supra* note 20.

26. *Id.*

27. *Id.* (explaining chapter 11 cases are open to individuals and businesses, and businesses will often try to change the terms of their debt to make it easier to pay off); *Bankruptcy Courts and Cases – Journalist's Guide*, *supra* note 19 (stating in chapter 11 bankruptcy the debtor must formulate a plan of reorganization).

28. *Why Bankruptcy of the Rich and Famous Is Nothing Like Yours*, NASDAQ (Sept. 28, 2015, 8:00 AM), https://www.nasdaq.com/articles/why-bankruptcy-rich-and-famous-nothing-yours-2015-09-28 [https://perma.cc/ML4Y-87U7] ("The classic image of bankruptcy is a destitute man with his pockets turned inside out. He has nothing; not a cent to his name.").

29. *Bankruptcy Courts and Cases – Journalist's Guide*, *supra* note 19.

combination of the three."[30] Filing for bankruptcy is a safety net that provides individuals and businesses with many benefits like staying collection efforts or exempting property that is essential to the debtor's fresh start.[31] But filing for bankruptcy is costly, and some individuals find themselves too financially destitute to even file for bankruptcy.[32]

A. *Bankruptcy Post-BAPCPA*

In 2005, Congress enacted the BAPCPA in an effort to reform bankruptcy law.[33] The purpose of the Act is "to 'improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.'"[34] The biggest change made by the BAPCPA was the "inclusion of the 'means test' for consumer cases."[35] The means test ensures debtors "who can afford to make payments to creditors" are not abusing the system by avoiding their obligations.[36] Congress believed the BAPCPA was necessary to prevent further alleged abuse of the bankruptcy system.[37] At the time the BAPCPA was enacted, Congress did not anticipate the adverse effects it would have on those who need access to the bankruptcy courts the most: the indigent.[38]

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30. Andrew P. MacArthur, *Pay to Play: The Poor's Problems in the BAPCPA*, 25 EMORY BANKR. DEV. J. 407, 412 (2009).

31. *Id.*

32. *See* Paul Kiel, *When You Can't Afford to Go Bankrupt*, PROPUBLICA (Mar. 2, 2018, 12:30 PM), https://www.propublica.org/article/when-you-cannot-afford-to-go-bankrupt [https://perma.cc/WTW9-LTP2] (confirming bankruptcy often fails the very people it is supposed to help because the destitute lack funds to pay the required filing fees or for an attorney).

33. Mary A. DeFalaise, *Means Testing and Preventing Abuse by Consumer Debtors,* U.S. ATT'YS BULL., June 2006, at 2, 2.

34. MacArthur, *supra* note 30, at 413–414 (quoting Erwin Chemerinsky, *Constitutional Issues Posed in* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 79 AM. BANKR. L.J. 571, 583 (2205)).

35. DeFalaise, *supra* note 33.

36. *Id.* at 3.

37. *See* MacArthur, *supra* note 30, at 414 ("[T]he pre-BAPCPA bankruptcy system was being used to discharge payable debt causing credit to be less accessible and affordable, '*especially for low-income workers* who already face financial obstacles.'" (quoting the President's Remarks on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 41 WEEKLY COMP. PRES. DOC. 642 (Apr. 20, 2005))).

38. *See id.* at 415–20 (explaining the bankruptcy system is less trusting of debtors and instead protects the system by requiring people to file complex paperwork).

The passage of the BAPCPA made filing for bankruptcy substantially more complicated.[39] The BAPCPA added additional filing requirements, decreased the number of automatic stays available, enacted provisions to stave off repeat filings, and made attorneys potentially liable for their client's errors in preparing documents.[40] All of these provisions place the indigent population in an extremely vulnerable position and make the need for counsel in bankruptcy that much more important. For example, the added filing requirements mean the indigent will most likely need an attorney "to guide them through the bankruptcy process, but the additional filing requirements increase the cost of obtaining this assistance."[41] Since attorneys are potentially liable for their clients' mistakes, attorneys are charging "higher fees to offset their new risks."[42] This action will most likely deter indigents from filing for bankruptcy altogether, let alone try to handle their case pro se. The brave debtors who do choose to handle their cases pro se are more likely to have their cases thrown out or to be taken advantage of by creditors.[43]

Additionally, bankruptcy is highly specialized, and the changes introduced to the court system by the BAPCPA have only made it more complicated.[44] The BAPCPA harms indigent parties who may lack the legal tools to navigate a bankruptcy case on their own.[45] The BAPCPA has effectively made a vulnerable population more vulnerable. This Comment acknowledges that "while obtaining a fresh start and eliminating debt is important, it is not a fundamental right."[46] However, this Comment also questions the purpose of a court system that prevents those who need it most from gaining meaningful access to it. Under the BAPCPA, indigent debtors have additional hurdles to overcome that require the assistance of retained counsel.

39. *See id.* at 414 (stating the new steps debtors must follow to file for bankruptcy).

40. *Id.*

41. *Id.* at 420.

42. *Id.* at 434.

43. *See id.* at 437 ("The poor generally lack the legal or educational background required to correctly fill out the bankruptcy forms necessary to avoid automatic dismissal of their case.").

44. *Id.* at 436.

45. *Id.* at 437.

46. *Id.* at 438 (citing United States v. Kras, 409 U.S. 434, 446 (1973)).

B. *The Dilemma with Pro Se Cases*

There are grave concerns with the success rate of pro se cases in all proceedings, but bankruptcy proceedings pose a special risk now that the BAPCPA has effectively made attorneys essential for indigent debtors filing for bankruptcy. Among the cited concerns are the ethical implications that arise when pro se debtors litigate against skilled counsel and the inherent complexity of the bankruptcy system, which is incredibly difficult for laymen to navigate.[47] In fact, the bankruptcy courts caution debtors against filing cases pro se.[48] The United States Bankruptcy Court highly recommends debtors "seek[] the advice of a qualified attorney . . . because bankruptcy has long-term financial and legal outcomes."[49] The court even provides a detailed list of all the ways a bankruptcy attorney can help with a case.[50]

1. Ethical Concerns

A debtor is neither required to have a lawyer to handle the debtor's case, nor is the debtor denied the right to one.[51] As previously noted, a debtor's right to retain counsel "does not require the government to provide counsel for litigants in civil matters."[52] However, it is generally understood that most people do not have the funds to retain a lawyer, increasing the likelihood that a pro se debtor will litigate against an experienced attorney should there be an adversarial proceeding.[53] "[A] pro se litigant may not have any experience trying a case," while opposing counsel has "spent years

47. *See* Ashley Gargour, *Ethical Considerations When Litigating Against a Pro Se Debtor*, 55 S. TEX. L. REV. 751, 751–52 (2014) (asserting, "Litigating against a person with no formal legal education, training, or experience creates an ethical minefield for the opposing lawyer").

48. *See Filing Without Attorney*, *supra* note 3 (recommending debtors speak with an attorney before filing for bankruptcy).

49. *Id.*

50. *Id.* The court outlines ways in which a lawyer can assist a debtor including: (1) providing advice on whether to file a bankruptcy petition, (2) determining the appropriate chapter to file under, (3) assessing the dischargeability of debts, (4) addressing concerns about retaining property (such as a home, car, or other assets) after filing, (5) explaining the tax consequences of filing, (6) advising regarding ongoing payments to creditors, (7) explaining bankruptcy law and procedures, (8) assisting with form completion and filing, and (9) offering general assistance throughout the bankruptcy case.

51. *See* Potashnick v. Port City Const. Co., 609 F.2d 1101, 1104 (5th Cir. 1980) (explaining a civil litigant's right to retain counsel is rooted in the Fifth Amendment's Due Process Clause).

52. *In re* Flowers, 83 B.R. 953, 954 (Bankr. N.D. Ohio 1988).

53. *See* Jodi Nafzger, *Bring on the Pettifoggers: Revisiting the Ethics Rules, Civil* Gideon*, and the Role of the Judiciary*, 34 NOTRE DAME J. L. ETHICS & PUB. POL'Y 79, 80 (2020) (advocating for "a mandatory pro bono appointment system for serious civil matters that threaten family, shelter, or health").

in law school and practice gaining knowledge and honing trial skills."[54] This imbalance raises concerns because it places the pro se debtor at a clear disadvantage. The average person does not have the education or training to successfully litigate a case in court. This disadvantage is especially true for bankruptcy cases because they are extremely complicated and highly specialized.

There are also ethical concerns because of a pro se debtor's lack of separation from the case. In bankruptcy, emotions run high because the debtor's livelihood is often at stake. When emotions are high, they tend to direct the course of a case.[55] Pro se debtors are "deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom."[56] Pro se debtors have a unique challenge in trying to prevent their emotions from influencing their judgment—a struggle that debtors with retained counsel do not experience.

Nevertheless, there are numerous resources available to pro se debtors.[57] Some programs offer access to legal databases to conduct research and others provide free assistance from the court clerks' office.[58] While these resources offer valuable support, they are not enough. Despite the availability of educational resources, pro se debtors still suffer from a clear disadvantage due to their limited legal knowledge and lack of courtroom experience, both of which are essential to gaining a fresh start in bankruptcy, should the debtor find himself in an adversarial proceeding.

2. Bankruptcy is Extremely Complex

The Supreme Court in *Powell v. Alabama* proclaimed, "Even the intelligent and educated layman has small and sometimes no skill in the science of law."[59] This assertion is especially true in bankruptcy proceedings. A pro se debtor struggles equally in all chapters of bankruptcy because, while the

54. Gargour, *supra* note 47, at 751.

55. *See id.* at 761–62 ("[T]he entire premise of hiring a lawyer is to have a zealous advocate who will not be so emotionally invested in the outcome or so close to the facts that the lawyer loses sight of the forest for the trees.").

56. *Id.* at 758 (quoting Kay v. Ehrler, 499 U.S. 432, 437–38 (1991)).

57. *Id.* at 758–59.

58. *Id.* at 759.

59. Powell v. Alabama, 287 U.S. 45, 64 (1932).

various chapters are different in many aspects, complexity pervades them all. For example, "Chapter 13 cases are so complex that the learning curve for a non-Chapter 13 bankruptcy lawyer is almost insurmountable."[60] If lawyers who specialize in the complicated field of bankruptcy law find it challenging to practice in areas beyond their specialty chapter, imagine the difficulty a pro se debtor faces.

Hypothetically, an exceptionally skilled pro se debtor may understand the statutes at play in their case and file under the correct chapter with all the necessary paperwork. However, despite their limited understanding of bankruptcy and all the pro se resources available to them, they still may be ten steps behind their opposing counsel should they find themselves in an adversarial proceeding. This educational and experiential gap places further limitations on pro se access to the bankruptcy courts. Bankruptcy courts function like any other court in the United States, and there should be a right of free access to them.[61] In order for a right of access to be productive and meaningful, indigent debtors need the assistance of competent bankruptcy counsel at every step of the way.

III. THE SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment guarantees criminal defendants effective assistance of counsel during their trial if they are unable to afford an attorney.[62] The Sixth Amendment right to counsel should not be confused with the Fifth Amendment right to counsel.[63] "The purpose of the Sixth Amendment counsel guarantee—and hence the purpose of invoking it—is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime."[64] This right to counsel is offense specific and "attaches" when formal judicial adversarial proceedings have commenced against a

60. Gargour, *supra* note 47, at 760.

61. *See* Timothy E. Gammon, *A Reappraisal of the Indigent's Right of Access to Bankruptcy Proceedings*, 9 AKRON L. REV. 531, 531, 545 (1976) (discussing the difficulties indigent debtors face in accessing bankruptcy courts); *see also* Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 558 (1967) (distinguishing between a right of access to the courts and an effective use of the courts).

62. U.S. CONST. amend. VI.

63. *See* McNeil v. Wisconsin, 501 U.S. 171, 177–78 (1991) (distinguishing the Fifth Amendment, which applies during custodial interrogations and is not offense specific, with the Sixth Amendment, which attaches when adversarial proceedings commence and is offense specific).

64. *Id.* at 177–78 (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984)).

criminal defendant.[65] Formal adversarial judicial proceedings include being formally charged, arraigned, or indicted.[66]

A. *The History of the Sixth Amendment*

The Sixth Amendment in pertinent part states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[67] Since its inception, the Sixth Amendment has evolved to meet the ever-changing needs of the American criminal justice system.[68] This was made apparent in *Argersinger v. Hamlin*,[69] where Chief Justice Burger stated "[t]he right to counsel has historically been an evolving concept."[70] Interestingly enough, much of the Sixth Amendment's roots and history can be traced back to England.[71]

1. A Look Back in Time

Across the pond, in the eighteenth century, the right to counsel was centered around the seriousness of the offense, implying that there was no right to counsel for those charged with serious crimes.[72] Contrary to what is seen in modern-day America, it was actually the criminal defendant who had to face the tribunal unassisted by counsel in England.[73] This was the case even if the defendant could afford to retain an attorney.[74] The idea was

65. *Id.* at 175 ("The Sixth Amendment right, however, is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, 'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" (quoting *Gouveia,* 467 U.S. at 188)); *see* Yachnin v. Vill. of Libertyville, 803 F. Supp. 2d 844, 851 (N.D. Ill. 2011) (explaining a criminal defendant does not have a Sixth Amendment right to counsel until formal adversarial judicial proceedings have begun).

66. *Yachnin*, 803 F. Supp. 2d at 851.

67. U.S. CONST. amend. VI.

68. John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L L. REV. 1, 6 (2013).

69. Argersinger v. Hamlin, 407 U.S. 25 (1972).

70. *Id.* at 44 (Burger, C.J., concurring).

71. *See* King, *supra* note 68, at 7–8 (noting the American colonies were far more liberal than English courts in acknowledging a right to counsel even prior to the ratification of the Sixth Amendment).

72. *See id.* at 7. ("At the time of the drafting and ratification of the Sixth Amendment, England still only guaranteed the right to retain counsel to defendants charged with misdemeanors, and even then only at their own expense.").

73. Jeffrey M. Mandell, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J. L. REFORM 554, 555 (1976).

74. *Id.*

that if those charged with serious offenses were appointed a lawyer, the risk of acquittal was too high and threatened to disrupt the social order and peace.[75] Pertinent here is that historically, in England, counsel was provided to indigents only in *civil* courts, and the Founding Fathers drew heavily from the English judicial system when writing the Constitution and the Bill of Rights.[76] Many believe, "It is not surprising, then, that the framers found a specific guarantee of counsel necessary only for criminal trials; there was simply no need to reaffirm the rights already routinely enjoyed in the civil courts."[77] However, both civil and criminal law are technical, complicated, and crafted in such a way that only those trained in the field are capable of navigating it.[78] There is simply no good reason for differentiating between the right to counsel in civil and criminal proceedings. Additionally, the United States is the *only* Western nation that refuses to provide for a civil right to counsel.[79]

2. *Gideon v. Wainwright*

From the eighteenth century to present day, the evolution of the law has increased the need for lawyers.[80] In the revolutionary case of *Gideon v. Wainwright*,[81] the Court overruled *Betts v. Brady*[82] and held the Sixth Amendment requires the states to provide criminal defendants with counsel if they are unable to afford their own.[83] The Court determined, "The right of one charged with crime to counsel may not be deemed

75. King, *supra* note 68, at 7.

76. Mandell, *supra* note 73, at 555–56; Comment, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1325–27 (1966); *see* Raven Lidman, *Civil* Gideon *as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & C.R. L. REV. 769, 773 (2006) ("England has had a statute providing a right to a free civil lawyer for indigents for more than 500 years.").

77. Mandell, *supra* note 73, at 555–56.

78. *See The Right to Counsel in Civil Litigation*, *supra* note 76, at 1329 (recounting the history of the emergence of trained lawyers).

79. *See* Earl Johnson Jr., *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341, 351–52 (1986) (confirming most industrial democracies recognize the importance of ensuring all parties have access to legal counsel in both civil and criminal cases).

80. *The Right to Counsel in Civil Litigation*, *supra* note 76, at 1329 ("[T]he need for lawyers increased and the attitude of the colonists toward lawyers changed markedly, antipathy giving way to acceptance by the time of the Revolutionary War.").

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

82. *See* Betts v. Brady, 316 U.S. 455, 461 (1942) (holding there was only a right to counsel in *federal* criminal cases).

83. *Gideon*, 372 U.S. at 344.

fundamental and essential to fair trials in some countries, but it is in ours."[84] *Gideon* left unresolved the question of whether the Sixth Amendment right to counsel extended to indigent defendants in all criminal cases or solely felony cases.[85] The Court later answered this question in *Argersinger* and held "the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial" and "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[86]

B. *There is No Constitutional Right to Counsel in Civil Cases*

The result of *Gideon* is that indigent defendants have a constitutional guarantee under the Sixth Amendment to the assistance of counsel in a criminal proceeding, but an indigent debtor or civil litigant is not constitutionally protected in *any* way.[87] Instead, civil proceedings are governed by the Fourteenth Amendment,[88] and counsel may only be appointed in limited circumstances.[89] The lack of concern for participants of civil proceedings lies in the words of the Sixth Amendment: "in all *criminal* prosecutions."[90] Notably, Justice Sutherland's moving words in *Powell v. Alabama* are instructive here:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even

84. *See id.* at 344–45 (answering the question before the Court narrowly and not expressly extending the right to all criminal cases).

85. John P. Gross, *The True Benefits of Counsel: Why "Do-It-Yourself" Lawyering Does Not Protect the Rights of the Indigent*, N.M. L. REV., Spring 2013, at 1, 4–5.

86. Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972) (explaining how the Sixth Amendment right to counsel is necessary to ensure a fair trial); *see also* United States v. Wade, 388 U.S. 218, 224–25 (1967) (explaining how the Sixth Amendment's protections are necessary at any "critical stage" of a criminal proceeding).

87. Gross, *supra* note 85, at 8.

88. *See* discussion *infra* Part III.C.1 (discussing the difference between the Sixth and Fourteenth Amendment right to counsel).

89. *See* Gross, *supra* note 85, at 8 (explaining counsel has been appointed on a case-by-case basis, including in juvenile delinquency proceedings).

90. U.S. CONST. amend. VI (emphasis added).

> though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.[91]

Unless the individual's liberty is at stake,[92] there is no right to appointed counsel in civil proceedings (which includes bankruptcy).[93] Specifically, an indigent debtor does not have a right to appointed counsel because "neither the Bankruptcy Code, Bankruptcy Rules, or Federal Rules authorize appointed counsel for individual debtors in bankruptcy matters."[94] This reality is true even though the consequences of a judgment in a civil case and the difficulties of navigating civil courts are not meaningfully different from those in criminal proceedings. This fact does not render a civil litigant or indigent debtor unfit or undeserving of a right to appointed counsel. The case of *Turner v. Rogers*[95] explained, "we cannot even say that loss of liberty is something that defines the harms of a criminal trial, but not the harms of a civil trial. Civil trials, too, can lead to a loss of liberty."[96] Yet, *Turner* dealt a death blow to the Civil *Gideon* movement when the Court "suggested that defendants facing up to a year in jail be given a kind of 'Do-It-Yourself' guide to constructing a defense."[97] The reality is that the deprivation of property actually produces consequences as severe as the deprivation of one's liberty.[98] "[T]he citizen who permanently loses his home, a government job, a required license, or unemployment benefits may, in many circumstances, receive a more crippling blow than the criminal who serves a jail sentence."[99] Further, some cases are so criminal in nature due to their consequences that, despite being labeled as civil, "the consequences

91. Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

92. *See In re* Eagle, 373 B.R. 609, 612 (B.A.P. 8th Cir. 2007) ("The right to counsel only exists in favor of an indigent whose physical liberty is at stake."); *see also In re* Winslow, 131 B.R. 171, 174 (D. Colo.), *decision clarified*, 132 B.R. 1020 (D. Colo. 1991) ("When faced with the potential deprivation of liberty, debtors' right to counsel is paramount, and any waiver of that right must be knowing and intelligent.").

93. Batac v. Boyajian, 532 B.R. 440, 446 (D.R.I. 2015).

94. *In re* Sullivan, 455 B.R. 829, 836 (B.A.P. 1st Cir. 2011) (quoting *In re* Flowers, 83 B.R. 953, 954 (Bankr. N.D. Ohio 1988)).

95. Turner v. Rogers, 564 U.S. 431 (2011).

96. Chad Flanders & Alexander Muntges, *The Trumpet Player's Lament: Rethinking the Civil* Gideon *Movement*, 17 U. D.C. L. REV. 28, 30–31 (2014) (providing examples of a loss of liberty in the civil context, such as: "the loss of a house, the loss of a child, deportation, and even prison").

97. Gross, *supra* note 85, at 2.

98. *The Right to Counsel in Civil Litigation*, *supra* note 76, at 1332–33.

99. *Id.* at 1333.

involved in certain civil proceedings are threats to the fundamental interests no less important than freedom."[100]

Despite the "civil-criminal dichotomy," there is a connection between the right to counsel and all types of proceedings.[101] In every kind of proceeding, "the litigant usually lacks the skill and knowledge to adequately prepare his case, and he requires the guiding hand of counsel at every step in the proceedings against him."[102] Thus, the superficial distinctions drawn between civil and criminal proceedings cannot justify depriving civil litigants and bankrupt debtors the right to counsel.[103] "The result is a distinction without a difference: the proceeding may be called criminal or civil, but the ultimate result is the same . . . ."[104] Despite efforts from the American Bar Association and many other groups "advocating for 'Civil *Gideon*,' no such categorical constitutional right to counsel has been recognized for litigants in civil cases."[105]

The dilemma is that the government spends large amounts of money to establish an entire team of people and other resources to convict defendants.[106] Prosecutors hired by the government are essential to protect the public's interests in criminal cases, and individuals who are charged with a crime likewise employ defense counsel if they have the funds to do so.[107] This confirms the belief that lawyers in criminal courts are "necessities, not luxuries."[108] The concern for pro se debtors is that, despite facing some of the same challenges as indigent criminal defendants, they do not receive the

100. Mandell, *supra* note 73, at 558.

101. Potashnick v. Port City Const. Co., 609 F.2d 1101, 1118 (5th Cir. 1980).

102. *Id.* (citing Powell v. Alabama, 287 U.S. 45, 69 (1932)).

103. *The Right to Counsel in Civil Litigation*, *supra* note 76, at 1322, 1332–33 ("Although many procedural safeguards have traditionally hinged upon the designation of a proceeding as 'criminal' or 'civil,' this terminological distinction should not be decisive unless it reflects an accurate characterization of proceedings requiring different treatment.").

104. Gross, *supra* note 85, at 12. For example, in most states intentionally withholding child support is a criminal offense where the Sixth Amendment right to counsel attaches, but the state of New Mexico enforces child support issues through civil contempt proceedings where the Fourteenth Amendment applies rather than the Sixth Amendment. This means "in a criminal court, the defendant is afforded an attorney under the Sixth Amendment to make this argument on his or her behalf; in a civil court, the burden of mounting this affirmative defense falls upon the respondent." *Id.* at 13.

105. Stephen J. Cullen & Kelly A. Powers, *The Last Huzzah for Civil* Gideon, 41 MD. B.J. 24, 26 (2008).

106. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

107. *Id.*

108. *Id.*

same fundamental right to counsel. Notably, in bankruptcy, the government has the United States Trustee (UST) to monitor the case and detect fraud, while indigent debtors are not entitled to anything.[109]

C. *Civil* Gideon

There is a movement within the legal community commonly referred to as the "Civil *Gideon*" movement. This movement calls for the extension of *Gideon* to all legal proceedings so that everyone in need may have a constitutional right to counsel, not just criminal defendants.[110] The Civil *Gideon* movement began decades ago, and advocation for a "parallel *Gideon* right in civil cases followed almost immediately on the heels of *Gideon*."[111] Many argue that extending *Gideon* to civil cases would cause the justice system to collapse, and "the chronic failure of the states to adequately fund the right to counsel in criminal proceedings" is a common justification for not extending the right to counsel to civil proceedings.[112] Nevertheless, financial concerns do not justify an immediate dismissal of the Civil *Gideon* proposal. More importantly, "the failure to provide the necessary resources to protect one constitutional right should not serve as a justification for the abandonment of other[s] . . . ."[113] In sum, the United States "should look for a fair legal system as a whole, not in parts."[114]

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109. *See What Is the Function of the United States Trustee and Where Is It Located?*, U.S. CTS., https://www.canb.uscourts.gov/faq/general-bankruptcy/what-function-united-states-trustee-and-where-it-located [https://perma.cc/R7CE-K7MM] ("The Office of the United States Trustee is an executive branch agency that is part of the Department of Justice. Its responsibilities include monitoring the administration of bankruptcy cases and detecting bankruptcy fraud.").

110. Lidman, *supra* note 76, at 769–70. In 2006, the American Bar Association voted unanimously in favor of a Civil *Gideon*. *Id.*

111. Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 978 (2012); Russell Engler, *Shaping a Context-Based Civil* Gideon *from the Dynamics of Social Change*, 15 TEMP. POL. & C.R. L. REV. 697, 700 (2006) ("The arguments justifying a civil right to counsel appeared virtually from the day *Gideon* itself was decided.").

112. Gross, *supra* note 85, at 32; *see* Barton & Bibas, *supra* note 111, at 980 (discussing how a civil *Gideon* would stretch limited resources even further); Benjamin H. Barton, *Against Civil* Gideon *(And for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1262 (2010) (cautioning against a civil *Gideon* system).

113. Gross, *supra* note 85, at 32.

114. Flanders & Muntges, *supra* note 96, at 42.

D. *Due Process Concerns*

The Court in *Gideon* based its decision on the Sixth Amendment, but it also implicated the Due Process Clause of the Fourteenth Amendment by requiring states to provide counsel to defendants in criminal trials.[115] Many argue the Court's decision was broad enough to view the due process requirement of appointed counsel in terms of both civil and criminal proceedings.[116] Recently in *Turner*, the Court further distinguished the Sixth Amendment right to counsel from the more limited right under the Fourteenth Amendment and was "satisfied that due process of law could be achieved through substitute procedural safeguards."[117] The Constitution insists that "equal access to legal resources is both a moral imperative and a fundamental right implicit in the Due Process and Equal Protection Clauses."[118] However, the problem with the Court's rationale on this issue is it lends support to the idea that someone charged with a criminal offense can't spend even a short amount of time in jail without having the assistance of counsel, whereas individuals in civil proceedings can spend an extended period of time in jail without counsel.[119]

An example of a due process violation is found in the case of *Boddie v. Connecticut*, where an indigent litigant in a divorce proceeding was unable to pay the required court costs to commence the case and execute service of process.[120] The litigant argued that the court costs restricted access to the

115. Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (concluding the Sixth Amendment right to counsel is a fundamental right under the Fourteenth Amendment); Mandell, *supra* note 73, at 556; *The Indigent's Right to Counsel in Civil Cases*, *supra* note 61, at 550 ("Separate rights to counsel for rich and poor may deny equal protection as well as due process."); *see* Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055, 1055 (1973) (discussing a First Amendment right of access to the courts).

116. *See* Mandell, *supra* note 73, at 556 ("[A] number of recent court decisions suggest that the due process requirement of counsel for a fair trial embraces certain civil proceedings as well as the criminal trial.").

117. *See* Gross, *supra* note 85, at 16, 30 ("Under the Fourteenth Amendment's Due Process Clause, counsel is a luxury and not a necessity. The underlying assumption is that the presence of counsel will not have a measurable impact on the outcome of the case as long as there are other procedural safeguards in place.").

118. Ben Notterman, *Leveraging Civil Legal Services: Using Economic Research and Social Impact Bonds to Close the Justice Gap*, 40 HARBINGER 1, 1 (2015).

119. Gross, *supra* note 85, at 3 ("[I]t is unconstitutional to deny counsel to someone who is convicted of a criminal charge and sentenced to a single day in jail, but it is perfectly acceptable to send someone to jail for a year without counsel . . . [if the] proceeding is labeled 'civil.'").

120. Boddie v. Connecticut, 401 U.S. 371, 372–73 (1971).

courts.[121] The Court "prohibited a state from denying indigents access to its divorce courts because of their inability to pay court costs."[122] Thus, the indigents were still permitted to access a divorce court (a civil court) even though they were unable to pay the court costs.[123] *Boddie* ultimately "invalidated, at least in certain cases, court costs that amount to barriers to court access."[124] The Court reasoned it was because due process "at a minimum" requires a meaningful opportunity to be heard.[125] A meaningful opportunity to be heard is mandated by the Fourteenth Amendment in civil litigation whenever there is a potential deprivation of life, liberty, or *property*.[126] A lawyer's fee is arguably a court cost that should be invalidated as a barrier to receiving a meaningful opportunity to be heard.[127] Without counsel, a meaningful opportunity to be heard is practically impossible, "and an adverse judgment could thus constitute a deprivation of property without due process of law."[128]

Some believe the holding of *Boddie* can only be applied to divorce cases, but Justice Black in *Meltzer v. C. Buck LeCraw & Co.*[129] adamantly exclaimed, "*Boddie* cannot and should not be limited to either its facts or its language."[130] *Meltzer* involved eight different cases in which indigent defendants were precluded from civil courts because of their poverty.[131] The main distinction that *Boddie* draws in defense of its holding is that divorce proceedings are regarded as fundamental.[132] It would make sense then that if divorces are deemed to be fundamental, then almost every other enforceable right would also be deemed fundamental.[133] Justice Black grappled with this idea again in *Meltzer* and said, "Even the need to be on

121. *Id.* at 372.

122. Mandell, *supra* note 73, at 556.

123. *See Boddie*, 401 U.S. at 383 (holding a state may not prevent the dissolution of a legal relationship without providing all citizens with access to the means for obtaining such dissolution).

124. Mandell, *supra* note 73, at 557 n.21.

125. *Boddie*, 401 U.S. at 377.

126. U.S. CONST. amend. XIV.

127. Mandell, *supra* note 73, at 557 n.21.

128. *Id.* at 554.

129. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 936 (1971).

130. *Id.* at 956.

131. *Id.* at 954.

132. *Id.* at 956.

133. Mandell, *supra* note 73, at 566.

the welfare rolls *or to file for a discharge in bankruptcy* seems to me to be more 'fundamental' than a person's right to seek a divorce."[134]

The fact that filing for bankruptcy is not a fundamental right and does not fall under the purview of *Boddie* does not make a pro se debtor any more equipped to face the bureaucratic machinery of the government. As such, proceedings involving fundamental rights are not the only cases that are deserving of a meaningful opportunity to be heard. The logical conclusion to be drawn from *Boddie* is that its holding also requires the appointment of counsel for indigents in *all* civil cases, not just divorce cases.[135]

IV. CIVIL *GIDEON* AND BANKRUPTCY

Coincidently, *Gideon* has already been extended to non-criminal proceedings.[136] First, in *In re Gault*,[137] and next in *Argersinger v. Hamlin*.[138] In the case of Mr. Gault, *Gideon* was extended to a juvenile proceeding that could have resulted in confinement.[139] Juvenile proceedings are not criminal.[140] The rationale was that due process required "appointed counsel because the juvenile's liberty was at stake."[141] This is a clear example that when the interest is important enough, "the due process right to appointed counsel can extend beyond Sixth Amendment criminal cases."[142] Due process was not "tethered solely to the Sixth Amendment hook."[143] Next, in *Argersinger v. Hamlin*, the Sixth Amendment right to counsel was expanded to all misdemeanor prosecutions that could result in confinement, rather

134. *Compare Meltzer*, 402 U.S. at 958 (emphasis added) (contending bankruptcy is more fundamental than a divorce), *with* United States v. Kras, 409 U.S. 434, 444–45 (1973) (stating the elimination of one's debt burden does not rise to the same constitutional level as the ability to dissolve one's marriage).

135. *See Meltzer*, 402 U.S. at 960 ("There is simply no fairness or justice in a legal system which pays indigents' costs to get divorces and does not aid them in other civil cases which are frequently of far greater importance to society."); *see also* Boddie v. Connecticut, 401 U.S. 371, 387–88 (1971) (Brennan, J., concurring in part) ("The right to be heard in some way at some time extends to all proceedings entertained by courts.").

136. Barton & Bibas, *supra* note 111, at 979.

137. *In re* Gault, 387 U.S. 1 (1967).

138. Argersinger v. Hamlin, 407 U.S. 25 (1972); Barton & Bibas, *supra* note 111, at 979.

139. Barton & Bibas, *supra* note 111, at 979.

140. *Id.*

141. *Id.*; *In re Gault*, 387 U.S. at 41.

142. Barton & Bibas, *supra* note 111, at 979.

143. Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 505 (1998).

than just felonies.[144] "That set a low bar for liberty interests, as many civil cases involve more serious deprivations than a day in jail . . . ."[145] *Argersinger* and *Gault* both support an extension of *Gideon* to civil proceedings.[146] Additionally, "reports consistently show that representation is a significant variable affecting a claimant's chances for success in eviction, custody, and debt collection cases."[147] Studies also show that litigants achieved significantly better results if represented by counsel.[148] It follows that debtors should also fair better in bankruptcy should they be afforded the right to counsel. Further, the presence of counsel also increases the defendant's or debtor's confidence in the justice system.[149]

A. *Current Issues in Bankruptcy that Further the Need for Appointed Counsel*

There are several reasons why bankruptcy is a difficult process for indigent debtors to navigate. These problems are exacerbated by the fact that indigent defendants have an extremely difficult time obtaining affordable and effective counsel.[150] Despite this fact, many believe that indigent civil litigants have a host of options.[151] This rendition is a gross mischaracterization of the indigent defense crisis in this country. In reality,

144. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

145. Barton & Bibas, *supra* note 111, at 979.

146. *Id.*

147. Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 39 (2010).

148. *See id.* (sharing the results of a meta-analysis indicating "lawyers are between 17% and 1380% more likely to receive favorable outcomes in adjudication than are parties appearing pro se").

149. *See* Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 L. & SOC'Y REV. 483, 498 (1988) (finding time spent with an attorney is positively correlated with procedural fairness, likely from "a sense of having a voice in the process").

150. *See Frequently Asked Questions*, A.B.A., https://www.americanbar.org/groups/legal_services/flh-home/flh-faq/ [https://perma.cc/BVW6-4SFN] (noting the challenges experienced by indigent defendants who try to procure effective counsel in legal cases).

151. 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, 4–7 (2003) (citing *Legal Services Corporation Oversight: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 104th Cong. (1996) (statement of Allyson Tucker, Exec. Dir., Individual Rts. Found.)) (arguing there are "thousands of places that the poor can turn to for legal assistance" because pro bono lawyers have a hard time finding clients, the vast availability of pro se court assistance, and the opportunity to participate in alternative dispute resolution).

only 20% of the legal needs of indigent parties are being met.[152] Additionally, the public defender system faces the challenges of appointing inept or inexperienced counsel, delays in appointing counsel, sporadic representation, a lack of training for public defenders, excessive caseloads, understaffing defender programs, inadequate resources for counsel, and a lack of contacts between the defender and the client.[153] Despite the widespread issues that indigent criminal litigants face, there are still *some* resources available for them to utilize. Conversely, there are few existing programs, if any, to help meet the needs of indigent debtors. Indigent debtors are just as deserving of public assistance as criminal defendants, yet bankruptcy remains overwhelmed with pro se debtors that go without the guiding hand of counsel.

There are four pertinent issues in bankruptcy law that lend support to the notion that indigent debtors should have access to counsel. First, attorneys often do not take on bankruptcy cases pro bono.[154] Second, the UST has the ability to hire their own counsel, which exemplifies the need for competent counsel in bankruptcy to avoid ethical dilemmas.[155] Next, the trustee does not solely have the debtor's interests in mind.[156] Finally, bankruptcy is arguably as much of a struggle for a pro se debtor as a criminal trial is for a pro se defendant.

152. *Id.* at 5 n.21 (citing *Oversight Hearings on the Legal Services Corporation: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of John Pickering, Member, Am. Bar Ass'n Standing Comm. on Legal Aid and Indigent Defendants)).

153. *See* Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1198 (2013) (discussing the challenges indigent defendants and public defenders face); *see also* Barton, *supra* note 112, at 1251 ("[E]very indigent defendant is guaranteed a warm body with a J.D., but we are far from *Gideon*'s 'noble ideal' of 'impartial tribunals in which every defendant stands equal before the law.'" (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963))).

154. *See* MacArthur, *supra* note 30, at 436 (noting attorneys often take on pro bono cases pertaining to subject matters outside their specialties—the fact that bankruptcy cases are so specialized makes it particularly challenging for non-specialist to take on these types of cases).

155. *In re* Larsen, 406 B.R. 821, 825 (Bankr. E.D. Wis. 2009).

156. *See* Lawrence V. Gelber & Aaron Wernick, *The Good, the Bad, and the Ugly of Replacing a Debtor's Management with a Chapter 11 Trustee*, DAILYDAC (Jan. 3, 2022), https://www.dailydac.com/debtor-management-chapter-11-trustee/ [https://perma.cc/BZ6G-H57H] (discussing methods in which corporate management might seek appointment of a trustee to further their own interests while in chapter 11 bankruptcy).

1. Pro Bono Bankruptcy Attorneys are a Dime a Dozen

Testimony before the U.S. House of Representatives showcased the opposition to many of the arguments mentioned above.[157] Regarding pro bono attorneys, testimony before the House indicated that some believe pro bono attorneys are "so widespread that many lawyers who wish to donate their time actually have difficulty finding needy clients."[158] However, statistics tell a different story. The 2022 Justice Gap study showed that "low-income Americans do not receive any or enough legal help for 92% of their substantial civil problems."[159] This statistic illustrates that the current rate of pro bono services in the country is not meeting the needs of the indigent and further shows that pro bono services are not the "one-size-fits-all" solution to increasing access to the justice system. Regardless of the statistics, when it comes to bankruptcy, most attorneys refuse to take bankruptcy cases pro bono because of their complexity.[160]

2. Even Lawyers Need Lawyers

In personal bankruptcy cases (chapters 7 and 13), the court will appoint a bankruptcy trustee.[161] It is within a court's discretion to appoint a bankruptcy trustee in chapter 11 cases, which is determined on a case-by-case basis.[162] The UST is charged by statute with "the duty to oversee and supervise the administration of bankruptcy cases."[163] Their primary role is to guard the public's interest and make sure cases are being conducted lawfully.[164] At times, a bankruptcy trustee is a "sort of neutral third-party who is there to balance the interests of both the debtor seeking protection

157. *See* Bindra & Ben-Cohen, *supra* note 151, at 4–5 (citing *Legal Services Corporation Oversight: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 104th Cong. (1996) (statement of Allyson Tucker, Exec. Dir., Individual Rts. Found.)) (discussing the numerous resources afforded to indigent debtors).

158. *Id.* at 5 (citing *Legal Services Corporation Oversight: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 104th Cong. (1996) (statement of Allyson Tucker, Exec. Dir., Individual Rts. Found.).

159. Colleen Aracri, *The Justice Gap 2022: The Unmet Civil Legal Needs of Low-Income Americans*, MD. STATE BAR ASS'N (May 18, 2022), https://www.msba.org/the-justice-gap-2022-the-unmet-civil-legal-needs-of-low-income-americans/ [https://perma.cc/VS7B-TWZD].

160. *See* MacArthur, *supra* note 30, at 436 (stating bankruptcy is a highly specialized field that makes it difficult for pro-bono attorneys not specialized in the field to take on the work).

161. 11 U.S.C. § 701; 11 U.S.C. § 1302.

162. 11 U.S.C. § 1104(a)(2).

163. *In re* DeShetler, 453 B.R. 295, 302 (Bankr. S.D. Ohio 2011) (citing 28 U.S.C. § 586(a)).

164. *Id.*

and their creditors."[165] However, it is important to remember that bankruptcy trustees are agents of the UST and, among various other duties, one of their "principal role[s] . . . in bankruptcy is to collect money and other assets that may be owing to a debtor."[166] "A bankruptcy trustee is, without a doubt, a 'unique person,' serving simultaneously as a 'functionary' within a defined bankruptcy system and a 'fiduciary' to a 'discrete set of beneficiaries.'"[167] Additionally, bankruptcy trustees on occasion actually hire their own counsel to help with the case or represent them in other capacities.[168]

In re Larsen[169] discusses the need trustees have to retain counsel and simultaneously rejects an appointed right to counsel for debtors.[170] The court stated, "Chapter 7 trustees may have attorneys, either themselves or others, appointed to resolve matters incident to the bankruptcy case, . . . [and] [i]t would be redundant to appoint counsel for the debtor in estate matters because only the trustee is authorized to deal with them."[171] This assertion is clearly erroneous, because, though the debtor is not a party to the ancillary proceeding, the trustee's interests do not always align with the debtors, especially if the debtor is handling their case pro se. Essentially, trustees who may already possess an advanced law degree are assisted by retained counsel to help them administer the case, but an indigent debtor is not. If trustees, who are trained legal professionals, hire their own counsel, the odds are not even remotely in the pro se debtor's favor.

3. The Trustee's Interests Don't Always Align with the Debtor's

Appointment of a bankruptcy trustee or filing a motion to have one appointed can drastically change the course of the case, especially in

165. *What Are a Bankruptcy Trustee's Avoidance Powers?*, BIRCH HORTON BITTNER & CHEROT (Dec. 17, 2020), https://www.birchhorton.com/blog/2020/12/what-are-a-bankruptcy-trustees-avoidance-powers/ [https://perma.cc/HY3K-26DP].

166. *In re* H. King & Assocs., 295 B.R. 246, 266 (Bankr. N.D. Ill. 2003).

167. Elizabeth H. McCullough, *Bankruptcy Trustee Liability: Is There a Method in the Madness?*, 15 LEWIS & CLARK L. REV. 153, 162 (2011).

168. *See In re* Mack Indus., Ltd., 606 B.R. 313, 319 (Bankr. N.D. Ill. 2019) ("[T]rustees always hire their own counsel instead of using debtor's counsel because the trustees needs counsel who are dedicated fully to their interests, not the debtor's interests.").

169. *In re* Larsen, 406 B.R. 821(Bankr. E.D. Wis. 2009).

170. *Id.* at 825.

171. *Id.*

chapter 11 cases.[172] In a chapter 11 case, a trustee is appointed if either cause exists or if it is in the best interests of creditors and the estate.[173] There are several reasons why creditors may seek an appointment of a trustee which include, but are not limited to, evidence of criminal wrongdoing or gross mismanagement of funds and business operations.[174] While the appointment of a trustee is not always a negative thing, creditors can and sometimes do use the appointment of a trustee or the threat of appointing a trustee to further their own agenda at the expense of the debtor.[175] For example, in *In re WineCare Storage, LLC*,[176] the Court noted that:

> There seems to be a notion amongst some of the members of the bankruptcy community and their counsel, that aggressive tactics including . . . filing a motion to appoint a chapter 11 trustee are an acceptable way of achieving one's agenda in a chapter 11 case . . . [.] I want to underscore for the entirety of the bankruptcy community what a big deal a motion for appointment of a chapter 11 trustee is. It should not be used as a mechanism for being a squeaky wheel or for getting a debtor's management to run the business, or to propose a plan, or to do any of the other things that I've seen people use chapter 11 trustee motions for to advance a litigant's agenda.[177]

To illustrate, when a trustee is appointed in a chapter 11 case, the debtor's "exclusive right to file a plan" is terminated because they are no longer a debtor in possession (DIP).[178] This means that creditors can also propose plans which ultimately shifts the control of the bankruptcy away from the debtor.[179] These types of creditors use trustees to speed up confirmation of the plan regardless of the debtor's preference for a slower and more manageable pace.[180] A trustee's involvement can also lead to "a lack of

172. *See* Gelber & Wernick, *supra* note 156 (discussing how some courts call the seeking of an appointment of a trustee "the nuclear option").

173. 11 U.S.C. § 1104(a)(1)–(2); *see* Gelber & Wernick, *supra* note 156 (explaining how the costs and benefits of appointing a trustee must be balanced in every unique factual scenario).

174. Gelber & Wernick, *supra* note 156; 11 U.S.C. 1104(a)(1).

175. Gelber & Wernick, *supra* note 156.

176. *In re* WineCare Storage, LLC, No. 1:13-BK-10268 (Bankr. S.D. N.Y. 2015).

177. Gelber & Wernick, *supra* note 156, n.4 (Jan. 24, 2023, Hearing at 25:5–26:2, *In re* WineCare Storage, LLC, No. 1:13-BK-10268 (Bankr. S.D. N.Y. 2015)).

178. *See id.* ("[T]he Bankruptcy Code grants exclusivity [to file a plan] only to a 'debtor in possession.'").

179. *See id.* (asserting the appointment of a trustee "paves the way for the creditor to propose a plan.").

180. *Id.*

cooperation or loyalty" by either the debtor or those involved in the debtor's operations.[181]

Additionally, appointing a trustee is costly.[182] This is concerning because debtors who are already in a vulnerable situation continue to incur more costs to the bankruptcy estate even when the appointment of a trustee "does not guarantee a successful reorganization or even the particular outcome a creditor may have been hoping to achieve."[183] Appointing a trustee can have an enormous impact on the relationships between debtors and creditors and can substantially change the landscape of a case. For a pro se debtor, a trustee is yet another obstacle they must go through to achieve a fresh start, and it is plain to see how trustees could easily take advantage of the average pro se debtor's lack of knowledge regarding the bankruptcy process.

While trustees mainly act in the interest of creditors, "it is important to note that they are first and foremost agents of the Department of Justice."[184] Bankruptcy trustees are also given immense avoidance power under the "strong arm" statute.[185] "Essentially, § 544(a)(1) provides that a trustee may avoid any interest voidable by a hypothetical judicial lien creditor. The trustee, therefore, steps not only into the debtor's shoes, but certain creditors' shoes as well."[186] With the expansive power trustees have over bankruptcy cases, a pro se debtor, who is already at a clear disadvantage, may have little to no control over the disposition of their case. The appointment of a trustee is just one more example of what makes pro se representation an uphill battle.

4. The Non-lawyer Struggles in All Proceedings Alike, but Especially

181. *Id.*

182. *See id.* (discussing how the appointment of a trustee is costly because "the trustee's time and the fees and expenses of the professionals they retain are chargeable to the estate").

183. *Id.*

184. *Role and Responsibilities of a Bankruptcy Trustee*, WERNER L. FIRM (May 15, 2020), https://wernerlawca.com/role-responsibilities-bankruptcy-trustee/ [https://perma.cc/7N73-SMMH].

185. 11 U.S.C. § 544(a); *see What Are a Bankruptcy Trustee's Avoidance Powers?*, *supra* note 165 (discussing the avoidance powers of trustees that allow them to "negate or nullify" transactions or claims).

186. *See In re* Jim Ross Tires, Inc., 379 B.R. 670, 675 (Bankr. S.D. Tex. 2007) (discussing the expansive role that trustees play in the bankruptcy process and how they try to satisfy the needs of the debtor and their creditors simultaneously); *see* 11 U.S.C. § 101(36) (defining "judicial lien" as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding").

Bankruptcy

As discussed in Part II, bankruptcy is extremely complex and pro bono attorneys often refuse to take bankruptcy cases because of their difficulty and complexity.[187] The justification for the Sixth Amendment right to counsel in criminal proceedings is generally that indigent defendants would face obstacles that would be impossible to overcome if they had to navigate a trial on their own, but "those who reject the idea that there should be a civil *Gideon* have the burden of showing that there is a meaningful (functional or doctrinal) difference between the experience of the indigent *civil* defendant and the indigent *criminal* defendant."[188] This is a burden they simply cannot meet. The distinction made between civil and criminal proceedings does not in and of itself mean that a bankrupt debtor or civil litigant has an easier time navigating legal proceedings. Civil and criminal proceedings have obvious differences that require distinguishing them, but these distinctions do not justify the exclusion of bankrupt debtors or civil litigants from being included in the Sixth Amendment right to counsel simply because they do not fall under the title of "criminal prosecutions."[189]

The similarities between bankruptcy and other court proceedings are apparent because bankruptcy proceedings are "stamped [throughout] with a judicial imprimatur."[190] In bankruptcy, property is often at stake, and property is protected by the Due Process Clause of the Fourteenth Amendment.[191] The petitioner's counsel argued in *Betts v. Brady* that "as the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, . . . logic would require the furnishing of counsel in civil cases involving property.[192] Further, *Gideon v. Wainwright* states, "any person haled into *court*, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him," and bankruptcy indeed involves a functioning court.[193] As such, there

187. *See* discussion *supra* Part II (explaining the complex nature of bankruptcy courts and filing for bankruptcy).

188. Flanders & Muntges, *supra* note 96, at 28.

189. *See* U.S. CONST. amend. VI (limiting the Amendment to criminal prosecutions).

190. *In re* Smith, 323 F. Supp. 1082, 1089 (D. Colo. 1971).

191. U.S. CONST. amend. XIV.

192. Betts v. Brady, 316 U.S. 455, 473 (1942), *overruled by* Gideon v. Wainwright 372 U.S. 335 (1963).

193. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (emphasis added); Gammon, *supra* note 61, at 545.

should be a right of access to these courts regardless of a debtor's financial ability to retain an attorney.[194]

B. *Solution*

A proposed solution is for each state to develop a public defender program that exclusively serves indigent debtors in bankruptcy.[195] In essence, this would create a right to counsel in bankruptcy while avoiding the mayhem of a Supreme Court case. These programs would retain so-called "bankruptcy defenders" to assist indigent debtors and would be akin to a state public defender program. This solution would allow indigent debtors, and indigent debtors only, to receive the assistance and expertise that their bankruptcy case requires for a nominal cost.[196] Like public defenders, bankruptcy defenders could "be housed under different branches of state government, or none at all, depending on the relevant state legislature's decisions."[197] Establishing an appropriate structure may be challenging due to the lack of effective public defender programs upon which to base a bankruptcy defender program,[198] but Irene Oritseweyinmi Joe has proposed a solution for public defender programs.[199] The proposed bankruptcy defender program would closely

194. *See* Gammon, *supra* note 61, at 545 ("[I]t should once again be emphasized that the fundamental right is not the discharge in bankruptcy, rather it is the access to the bankruptcy proceeding.").

195. There are three kinds of public defender systems: (1) contract attorneys; (2) assigned counsel systems; and (3) public defender programs. Many states use a combination of these systems. Carrie Dvorak Brennan, Note, *The Public Defender System: A Comparative Assessment*, 25 IND. INT'L & COMP. L. REV. 237 (2015); Molly Heidorn, *An "Obvious Truth": How Underfunded Public Defender Systems Violate Indigent Defendants' Right to Counsel*, 52 NEW ENG. L. REV. 159, 168 (2018). The proposed bankruptcy program would be similar to a public defender program.

196. *See* discussion *infra* Part III.B.2 (discussing economic concerns with public assistance programs).

197. Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 118 (2020) ("State governance leads to more equitable funding than county management, but county management enables a public defender to remain more sensitive to the unique needs of its specific client population.").

198. *See* Barton & Bibas, *supra* note 111, at 968 ("[T]he quality and availability of indigent criminal defense remain hobbled by inadequate funding."); *see also* Barton, *supra* note 112, at 1251 (explaining how *Gideon* has "floundered" in two ways: (1) inadequate funding of indigent criminal defense and (2) setting a bare minimum requirement for effective assistance of counsel).

199. *See generally* Joe, *supra* note 197 (analyzing the various approaches to distributing public defender services).

mirror the public defender model discussed in Joe's *Structuring the Public Defender*.[200]

1. Structuring a Bankruptcy Defender Program

In *Structuring the Public Defender*, Joe conducted an independent study of "each state's architectural choices for the public defender" and discussed the differing approaches that each state uses to distribute public defender services.[201] Most states house their public defender programs within the state executive branch of government, other states within the judicial branch, and some states administer their programs locally[202] through the counties.[203] Each approach has strengths and weaknesses, but Joe arrives at the conclusion that "the public defender should be an important executive function in this modern era of mass criminalization" to "ensure[] more stable funding."[204]

Even though bankruptcy courts are federal courts, effective bankruptcy defender programs should be individually administered by the governments of the several states to ensure that the unique needs of each population are met.[205] And like they do for public defenders, the states would need to provide for the existence, structure, and management of the bankruptcy defender programs in a specific statute.[206] This program would be the first of its kind, but it would likely cure the deficiencies[207] that plague many of the public defender programs because it would be housed within the executive branch of each state's government to meet the unique needs of each state and assist a smaller group of litigants.[208] Despite the majority of

200. *Id.*

201. *See id.* at 113–14, 131–35 (showing "the majority of states place the public defender under the executive branch of state government").

202. Massachusetts utilizes the judicial branch to house their public defender system known as the Committee for Public Counsel Services (CPCS), and Pennsylvania requires that each county establish its own public defender system. Heidorn, *supra* note 195, at 169–70.

203. Joe, *supra* note 197, at 118.

204. *Id.* at 114, 153.

205. The fact that each state has their own public defender system implies that the needs of each state are different.

206. *See* Joe, *supra* note 197, at 132 ("The vast majority of states provide for the public defender's existence through a specific statute defining its structure and management.").

207. *See generally* Heidorn, *supra* note 195 (discussing the consequences of underfunded public defender programs); Brennan, *supra* note 195 (explaining the current issues with different public defense models).

208. Thirty-three states manage their public defender system under the executive branch. Joe, *supra* note 197, at 162.

states housing their public defender programs within the executive branch, these programs still fail. On its face, this appears to be a funding problem but in reality, it is more of a workload issue.[209] The National Association of Criminal Defense Lawyers discussed how "crushing workloads" renders it very difficult for public defenders to properly represent indigent clients.[210] When public defenders are overworked, they are unable to spend adequate time on each of their cases.[211] This doesn't make public defenders bad lawyers, it just means they are overworked and overwhelmed.[212] However, public defender programs are responsible for providing representation to all indigent criminal defendants,[213] whereas a bankruptcy defender program would be responsible for indigent debtors only. This would mean the program would serve a much smaller population and would be less prone to workload issues.

Additionally, the benefit to managing a program under the executive branch is the "natural fit" between the program and the executive's administrative purpose.[214] The bankruptcy specific program would be an addition to the executive's extensive list just as "[t]he public defender, as a necessary component of the constitutional right to the effective assistance of counsel, would fit neatly into the catalogue of state institutions and behaviors the executive branch already manages."[215] However, "[t]he executive branch has a clearly articulated objective of enforcing a jurisdiction's laws" which "may run counter to protecting the very individuals charged with violating those laws."[216] But if state governments institute changes, similar to those proposed by Joe in the *Structuring the Public*

209. *See* Heidi Reamer Anderson, *Funding* Gideon's *Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 425 (2011) (discussing the ethical concerns with public defender workloads).

210. Norman Lefstein, *Excessive Public Defense Workloads: Are ABA Standards for Criminal Justice Adequate?*, 38 HASTINGS CONST. L.Q. 949, 950–51 (2011).

211. *Id.* at 951.

212. Some "defenders have [] over one hundred clients at a time." *Id.* at 950.

213. In an interview, Emily Galvin-Almanza of Partners for Justice stated, "[A]n estimated 80% of people facing criminal charges in state courts use court-appointed public defenders." Erika Bolstad, *Public Defenders Were Scarce Before COVID. It's Much Worse Now.,* PEW (June 21, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/06/21/public-defenders-were-scarce-before-covid-its-much-worse-now [https://perma.cc/XGP9-RHAL].

214. *See* Joe, *supra* note 197, at 153–54 ("The executive branch is naturally understood to be responsible for a wide range of administrative activities.").

215. *Id.* at 154.

216. *Id.* at 135–36.

Defender,[217] bankruptcy defender programs could have a significant chance at inciting real change.

Joe discusses two possible revisions which include appointing a lead public defender and a board to oversee the administration of services.[218] Appointing a lead bankruptcy defender, analogous to Joe's lead public defender, would serve the role of ensuring compliance of the executive agency with the state's laws and managing the program. This position would mimic the role of an inspector general.[219] "[T]he inspector general model would easily transfer to the leading public defender, as the public defender institution already serves as a 'check' on the government's intrusion into a citizen's life through the criminal process,"[220] and likewise would be transferrable to a bankruptcy defender program. Additionally, a formal bankruptcy program board or commission that supervises the services being provided would be essential to the program's success.[221] To keep the program functioning optimally, a diverse board comprised of various bankruptcy practitioners would ensure that necessary improvements are being made and problems inherent to public assistance programs are being addressed. However, these suggested revisions are only a band-aid for preemptively addressing potential problems. Because bankruptcy defender programs have never been tested, specific challenges are unable to be predicted by examining public defender programs and are not yet known. All that can be assumed at this time is that many of the problems that public defender programs face will also be inherent in a bankruptcy program because both programs are oriented toward public assistance. However, the program model and suggested revisions in *Structuring the Public Defender* would help alleviate problems found not only in the public defender system but in the bankruptcy defender program as well.

217. *See id.* at 153 (setting forth two revisions that could drastically improve state public defender programs).

218. *Id.*

219. *Inspector general*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A governor-appointed state official who oversees internal review within executive agencies to ensure that there is no waste or abuse of resources.").

220. Joe, *supra* note 197, at 155.

221. *See id.* at 157 ("Public defender boards are important institutional players as they can develop and promulgate rules that adapt basic constitutional and ethical guidance to the unique circumstances of their state.").

The seriousness of enacting such a program and essentially extending *Gideon* to bankruptcy proceedings should not be taken lightly.[222] However, the effective assistance of counsel is essential for debtors to have the ability to navigate bankruptcy courts and should not be ignored. The proposed program would provide debtors with the opportunity to receive effective representation without having to rely on the Civil *Gideon* movement or false hopes of the Supreme Court ever granting a meaningful right of access to all courts in the United States.

2. Economic Concerns

In reference to the Civil *Gideon* movement, Justice Black said he believes "there can be no doubt that this country can afford to provide court costs and lawyers to Americans who are now barred by their poverty from resort to the law for resolution of their disputes."[223] Ultimately, a constitutional guarantee of access to counsel in civil cases and "[a]ccessibility to the courts on equal terms is essential to equality before the law."[224] But "[a]s for the money to finance such a constitutional right, it must come from the public fisc as it does for the representation of criminals, security for the aged, and protection for the poor and the infirm."[225] While there undoubtedly will be a cost to providing counsel to impoverished litigants, "erosion of faith in the judicial system would exact an even higher price."[226] To combat these economic concerns, "legislative appropriation appears to be the most stable and reliable" method of financing and would be the major source of financing for bankruptcy defender programs.[227] Although reality requires

222. *See* Barton, *supra* note 112, at 1263 (cautioning against the extension of *Gideon* to civil proceedings).

223. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 936, 956 (1971).

224. Jennifer M. Smith, *Rationed Justice*, 49 SUFFOLK U. L. REV. 353, 353 n.3 (2016) (quoting Jack B. Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 655 (1981)).

225. Sweet, *supra* note 143, at 506.

226. *See id.* (discussing how the benefits of extending the right to counsel to civil proceedings outweigh the costs).

227. *See* Joe, *supra* note 197, at 144 (discussing legislative apportionment); *see also* Helaine M. Barnett, *An Innovative Approach to Permanent State Funding of Civil Legal Services: One State's Experience—So Far*, 17 YALE L. & POL'Y REV. 469, 475 (1998) ("[T]he provision of civil legal services for poor persons is a fundamental obligation of government which should, if necessary, be satisfied through allocation of general State revenues." (quoting letter from Michael A. Cooper, Legal Services Project, to Chief Judge Judith S. Kaye, New York Court of Appeals (Mar. 26, 1998))); *see also The Indigent's Right to Counsel in Civil Cases*, *supra* note 61, at 552 (discussing how a constitutional right to counsel in civil cases essentially mandates that states legislatively appropriate funds).

acknowledgment that "state appropriation amounts are subject to legislative priorities and state economies," a program such as this one requires stable and reliable funding. State legislative appropriations can provide this.[228]

> [S]tate legislatures set forth their budgets at least one year in advance. Local fines and fees ebb and flow at different times of the year and in different economic environments. Conversely, the state budgeting scheme is determined in advance after detailed deliberation from legislators with various political affiliations and different agendas. Because the state budgeting scheme must pass by congressional vote, it has a built-in accountability measure to ensure it has the effect of law.[229]

Further, "[a]ll states with public defender organizations managed under the executive branch receive statewide appropriations," so it is logical to extend this model to bankruptcy defender programs as well.[230] The debtors utilizing this program could also be required to pay as much, or as little, as they can towards their case to help cover the costs associated with their case and keeping the program running. The program could also offer different options in the form of "packages" to help keep costs down. For example, one type of package could be strictly for paperwork assistance, and another package may include assistance with adversarial proceedings and other associated needs of the debtor. Packages would limit costs because debtors would only be utilizing the program in a limited capacity. Offering packages would also allow the program to serve more debtors—attorneys could take on a larger number of clients because they are doing so in a limited capacity rather than remaining bogged down with cases that can often take years to resolve.

Notably, there are also negative economic consequences associated with not implementing a program such as the proposed one. Just as a bankruptcy defender program would have costs, the failure to provide counsel in civil proceedings (and bankruptcy) comes with costs of its own.[231] Studies have proven that "civil legal services benefit society *as a whole*, by avoiding

228. Joe, *supra* note 197, at 148.

229. *Id.* at 144 (internal citations omitted).

230. *Id.* at 142.

231. Gross, *supra* note 85, at 34–35. For example, providing representation to low-income tenants reduces levels of homelessness and the costs associated with it. *Id.* at 34. If counsel were not provided, those costs would be saved, but the economic costs associated with homelessness would increase and possibly surpass the cost of providing representation. *Id.* at 34–35.

events—including domestic violence and eviction—that would otherwise draw heavily on public funds."[232] If debtors are given access to competent counsel through a bankruptcy defender program, it will actually save public funds in other areas.

V. CONCLUSION

Bankruptcy, an extremely complicated and sometimes messy process, is a haven for individuals and business owners who have fallen on hard times. Without bankruptcy, businesses would be forced to close their doors when faced with adversity and individuals would lose their livelihoods. Unfortunately, access to bankruptcy courts is limited and has only become increasingly more difficult to access after the passage of the BAPCPA.[233] Indigent debtors who can't afford to retain their own counsel are forced to forgo filing for bankruptcy altogether or to try and undertake their case pro se. While appearing pro se in a bankruptcy case is a noble choice, it is not a wise one. Pro se debtors hardly stand a chance at succeeding when they are competing against seasoned and well-trained attorneys and are deprived of an independent third-party to make unbiased decisions.[234] Of course, the overarching concern is also that bankruptcy is simply too difficult for the average person to navigate on their own.

If bankruptcy courts are to continue to exist and their aim is to help people get back on their feet, there should be a meaningful right of access to them. There can be no meaningful right of access to bankruptcy courts without the effective assistance of counsel. The same is true for indigent criminal defendants, but these litigants, unlike indigent debtors, are fortunate enough to be protected by the Constitution's Sixth Amendment right to counsel.[235] Criminal defendants also enjoy the luxury of the public defender system and are guaranteed the assistance of counsel while indigent debtors are not guaranteed the assistance of anyone.[236] This reality is true even though bankruptcy is just as difficult for a layman as a criminal trial.

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232. Notterman, *supra* note 118, at 2.

233. *See supra* Part II.A.

234. Gargour, *supra* note 47, at 751, 758.

235. U.S. CONST. amend. VI.

236. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (focusing on the right of criminal defendants to have counsel); *see also In re* Flowers, 83 B.R. 953, 954 (Bankr. N.D. Ohio 1988) ("The Sixth Amendment to the U.S Constitution addresses a right to counsel but extends that right only to criminal and quasi-criminal proceedings.").

Sadly, the fact remains that there is no civil right to counsel in the United States despite there being no meaningful difference between civil and criminal proceedings.[237] Indigent civil defendants and debtors are treated as a separate and distinct class of litigants who are forced to navigate their cases alone and unaided by counsel. Opponents of a civil right to counsel allege that the consequences of a civil suit are not as serious and that these litigants are undeserving of a right to counsel.[238] This is simply not true. Indigent debtors who do not have the financial means to retain their own counsel are just as deserving of constitutional protection under the Sixth Amendment as criminal defendants. These debtors should no longer have to fall victim to the civil versus criminal debate that is ultimately a "distinction without a difference."[239]

While the public defender system is by no means a perfect model, it could be a great starting point for the development of a public assistance system full of programs for indigent debtors. The failures of the current public defender system should not be viewed as a roadblock. Rather, these failures should be treated as a learning opportunity and a chance to incite true change for indigent debtors through a public assistance program. As with any public assistance program, there will be challenges and costs. However, the states must be willing to overcome these challenges to improve the quality of bankruptcy law in this country. Using state appropriations and some contributions from debtors, each state can develop and house a bankruptcy defender program within their executive branch. These programs have the potential to transform bankruptcy law and how indigents access the bankruptcy courts. This change could in turn lead to economic benefits as debtors rely less on other public programs for assistance and more on the bankruptcy courts.[240] The economic costs of a public assistance program would be offset by the economic gain from allowing people to get back on their feet.[241]

Effectively, finding a method to ensure meaningful and readily accessible use of the bankruptcy courts in the United States is simply too important to

237. *See* Gross, *supra* note 85, at 12 (discussing the lack of meaningful distinction between civil and criminal proceedings where an order of incarceration is possible).

238. Flanders & Muntges, supra note 96, at 31.

239. Gross, *supra* note 85, at 12.

240. Notterman, *supra* note 118, at 2.

241. *See id.* at 3 (noting studies indicate a positive correlation between access to civil legal services and positive economic benefits).

ignore any longer. With every passing day more debtors go without counsel and refrain from filing for bankruptcy out of fear and poverty. While it would be the first of its kind, a bankruptcy public defender system could just be the missing piece needed to fix the poor man's problem in bankruptcy.