

## TAKING THE ENGLISH RIGHT TO COUNSEL SERIOUSLY IN AMERICAN “CIVIL GIDEON” LITIGATION

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*Courts have rejected a right to counsel for indigent civil litigants under the U.S. Constitution. But in some American states, that right arguably already exists as a matter of common law, albeit derived from centuries-old English common and statutory law. This Article analyzes the viability of arguments for incorporating the old English right to counsel in the twenty-seven American states that continue to recognize old English common and statutory law as a source of binding authority. Such “originalist” arguments may be appealing to judges who are more willing to revive a historically based right than establish a new right based in concepts such as due process.*

### INTRODUCTION

A recent study estimated that low-income households in the United States face an average of three civil legal problems per year,<sup>1</sup> generally without the assistance of counsel.<sup>2</sup> To alleviate this need, the “Civil Gideon” movement seeks to establish a right to civil counsel for indigent civil litigants, similar to the right to criminal counsel established in *Gideon v. Wainwright*.<sup>3</sup>

California recently enacted legislation creating a civil right to counsel in cases involving eviction, child custody, and domestic abuse,<sup>4</sup> but few other states have similar laws. Many Civil Gideon proponents have thus attempted to persuade courts to create a right to civil counsel under the federal constitution or a state constitution. The U.S. Supreme Court’s 1981 decision in *Lassiter v. Department of Social Services*, however, effectively foreclosed the

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1. LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 9 (2007), available at <http://www.lsc.gov/justicegap.pdf>.

2. See *id.* at 4.

3. 372 U.S. 335 (1963).

4. Assemb. B. 590, 2009–2010 Leg., Reg. Sess. (Cal. 2009) (as amended in Assembly, Mar. 12, 2009). See also Carol J. Williams, *State Gives Poor a New Legal Right*, L.A. TIMES, Oct. 17, 2009, at A8.

federal constitutional argument,<sup>5</sup> and state supreme courts have generally followed suit in interpreting their own constitutions. Accordingly, those seeking to establish Civil Gideon through litigation have looked to other sources of law, including distant sources such as international treaties, or even Magna Carta.<sup>6</sup>

Ironically, of all the non-constitutional arguments for a court-created Civil Gideon right, one of the most plausible may be hardest to take seriously at first glance. In at least twenty-seven states, the common law of England—and sometimes old English statutes—remain enforceable so long as such law remains “applicable” and has not been repealed by the legislature. The common law of England and an old English statute provided a right to counsel for indigent civil litigants. Assuming that the right remains “applicable” and unrepealed, indigent civil litigants in such states should have a right to counsel in at least some types of matters.

On its face, this argument seems too good to be true. Have American states really adopted English common law—and related old English statutes—as their law? Is such incorporation taken seriously?<sup>7</sup> If this argument is solid, why has it not been truly tested, let alone accepted by a court?

In fact, this argument for resurrection of the English right to counsel appears to have been argued in American courts four times.<sup>8</sup> In one case, the litigant advancing the argument cited old English law as ancillary support for the right to counsel, rather than direct authority.<sup>9</sup> In the other three cases, the parties asserted a right to counsel directly under English law, the litigants diluted

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5. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25–34 (1981).

6. See, e.g., James A. Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 SEATTLE J. FOR SOC. JUST. 383, 392–93 (2005); John McKay, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 TENN. L. REV. 101, 104–05 (2000); Mary Helen McNeal, *Toward a “Civil Gideon” Under the Montana Constitution: Parental Rights as the Starting Point*, 66 MONT. L. REV. 81, 84–89 (2005).

7. Such adoption or incorporation is often referred to as “receiving” the common law. See, e.g., *In re Water of Hallett Creek Stream System*, 749 P.2d 324, 332 (Cal. 1988) (“California adopted the riparian system of water rights when it received the common law in 1850.”); *Lehndorff Geneva, Inc. v. Warren*, 246 N.W.2d 815, 823 (Wis. 1976) (“Alien land laws pre-date our Declaration of Independence; they became part of the fabric of state law as the colonies received the common law from England.”). This Article primarily refers to this phenomenon as “incorporating” English law, rather than “receiving” it, because “receiving” tends to obscure the fact that states chose to adopt law that did not necessarily apply.

8. The authors are aware of one case each from the States of California, Florida, Maryland, and Washington. See *infra* notes 9–11.

9. Brief for Appellant at 19–21, *King v. King*, 174 P.3d 659 (Wash. 2007) (No. 57831-6-I) [hereinafter Brief for King].

the argument by presenting it as one of several bases on which the court could grant relief.<sup>10</sup>

This hesitant approach may reflect not only a lack of faith in the strength of the argument, but also the difficulty in providing the historical detail necessary to convince a court to resurrect long-dormant law.<sup>11</sup> Even academic commentators, unconstrained by word limits and other considerations of appellate advocacy, have barely scratched the surface regarding the potential incorporation and application of the English right to counsel in America.<sup>12</sup> Not surprisingly, the courts that squarely considered the argument all relied on historical uncertainty as a reason to reject the English right to counsel.<sup>13</sup> One court particularly worried about practical concerns, such as when the right attaches and how long it continues.<sup>14</sup>

This Article attempts to fill in some of the missing history regarding the English right to counsel. Numerous sources confirm that this right was neither a myth nor a relic, but a right long recognized and invoked in English courts through well-established procedures addressing practical concerns. Beginning in colonial days, some American courts recognized and applied the English right to counsel and continued to do so after independence. Even states that did not exist at independence acknowledged the English right, though they had never been subject to English rule.

Civil Gideon arguments based on old English law thus seem to deserve more respect and consideration than they currently receive. Whether the English right to counsel applies in the various states depends upon whether and how each state has incorporated English law. But the history recounted in this Article should dispel

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10. See *Hunt v. Hackett*, 111 Cal. Rptr. 456, 457–58 (Ct. App. 1973); *In re Amendments to Rules Regulating the Fla. Bar*, 573 So. 2d 800, 802–03 (Fla. 1990); Brief for Appellant at 29–59, *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003) (No. 6, Sept. Term 2003) [hereinafter Brief for Frase].

11. Cf. Brief for King, *supra* note 9, at 21 (citing nothing apart from 11 Hen. 7, c. 12, an old English statute discussed *infra* at Part III); Brief for Frase, *supra* note 10, at 33–42 (citing eight sources, apart from 11 Hen. 7, c. 12).

12. See, e.g., Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 60–61 (2007); 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. & CIV. RTS. L. REV. 769, 773–74 (2006); David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 745–49 (1980).

13. See *Hunt*, 111 Cal. Rptr. at 457–58; *Frase*, 840 A.2d at 130 n.10; *King*, 174 P.3d at 667. In a Florida case, which took the form of a rule petition to the Florida Supreme Court, the court acknowledged the petitioners' argument that Florida law incorporates the English right to counsel and then simply ignored it. *In re Amendments to Rules Regulating the Fla. Bar*, 573 So. 2d at 802.

14. *Frase*, 840 A.2d at 130 n.10.

most doubts regarding the existence and scope of, and the procedures employed under, the English right to counsel.

It is also worth pointing out the “originalist” flavor of Civil Gideon arguments based on the old English right to counsel. Such arguments do not rely on abstract principles of justice or fairness, but on a developed body of real law from England. Courts are not called upon to invent new rights, but simply to perpetuate (or revive) old ones. This may be more attractive to history-minded judges, similar to the originalism-inspired revival of the Confrontation Clause in the U.S. Supreme Court.<sup>15</sup> The English right to counsel may likewise appeal to judges who worry about circumventing the democratic process. By the terms of many states’ incorporation statutes, the legislature can modify or repeal incorporated English law, as it could any other aspect of common law. The legislature thus has the final word.

This Article proceeds as follows: in Part I, we briefly discuss various types of English law incorporation statutes throughout the United States, and show that they are not a dead letter, as some might suppose. In Parts II and III, we present a historical analysis of the English right to counsel, and demonstrate that courts have long recognized it in England (Part II), and in America (Part III). Part IV delves into potential issues raised by attempting to apply the old English right to counsel today. Although such issues and their resolutions will vary from state to state, Part IV argues that courts should have broad discretion when implementing the right, as they would in dealing with any common law right. Accordingly, little basis remains for many of the historical and practical worries some have expressed about a modern American revival of the old English right to counsel.

## I. ENGLISH LAW INCORPORATION IN AMERICA

By constitution or statute, many American states have incorporated English common law into their domestic laws. Most of these incorporation provisions contain three common elements: (1) a statement of the incorporated authority (i.e., only the common law, or the common law and statutes “in aid thereof”); (2) a disclaimer that English authority does not control if it contradicts local constitutions or laws, or is no longer “applicable”; and (3) a statement that the legislature can abrogate otherwise applicable

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15. See *Crawford v. Washington*, 541 U.S. 36, 42–50 (2004).

English authority.<sup>16</sup> Many of these incorporation provisions also contain a specific date (e.g., July 4, 1776), indicating that the English authority—as it existed in the colony at that time—controls.<sup>17</sup>

As a matter of perpetuating the still-cherished “rights of Englishmen,” and as a matter of continuity, incorporation made sense for states that had been British colonies.<sup>18</sup> As other states joined the Union, however, they also incorporated English law, despite the lack of continuity with British colonial rule. Some states reached even farther back in time, before the beginning of colonial rule. For example, Colorado, Illinois, Indiana, Missouri, and Wyoming adopted English common law and related English statutes enacted “prior to the fourth year of James the First,”<sup>19</sup> that is, before 1607.<sup>20</sup>

16. ALA. CODE § 1-3-1 (2010); ARK. CODE ANN. § 1-2-119 (West 2010); CAL. CIV. CODE § 22.2 (West 2007); COLO. REV. STAT. ANN. 2-4-211 (West 2009); DEL. CONST. sched., § 18, *as interpreted by* Steele v. State, 151 A.2d 127, 130 (Del. 1959); FLA. STAT. ANN. § 2.01 (West 2010); GA. CODE ANN. § 1-1-10(c)(1); HAW. REV. STAT. § 1-1 (2010); IDAHO CODE ANN. § 73-116 (2010); 5 ILL. COMP. STAT. ANN. 50/1 (West 2010); IND. CODE ANN. § 1-1-2-1 (West 2000); MD. CONST., art. 5(a)(1) (2010); MO. ANN. STAT. § 1.010 (West 2010); MONT. CODE ANN. § 1-1-109 (2010); NEB. REV. STAT. § 49-101 (2010); NEV. REV. STAT. § 1.030 (2009); N.H. CONST., part 2, art. 90 (2010), *as interpreted by* State v. Rollins, 8 N.H. 550 (1837); 1 PA. CONS. STAT. § 1503(a) (2008); R.I. GEN. LAWS § 43-3-1 (2010); S.C. CODE ANN. § 14-1-50 (2010); TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon 2002); UTAH CODE ANN. § 68-3-1 (2010); VA. CODE ANN. § 1-200 (West 2010); VT. STAT. ANN. tit. 1, § 271 (2010); WASH. REV. CODE ANN. § 4.04.010 (West 1988); W. VA. CODE ANN. § 2-1-1 (West 2010); WYO. STAT. ANN. § 8-1-101 (2010).

17. See MD. CONST., Declaration of Rights, art. 5(a)(1) (2010); 1 PA. CONS. STAT. § 1503(a) (2008) (noting that English common law and English statutes in force as of May 14, 1776 are in force within the colony). See generally Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 573–74 (2006) (discussing how disagreements over such dates affected the Founding-era debate over whether there existed a federal common law based on English precedent).

18. See, e.g., THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 23–25 (Boston, Little, Brown & Co. 1868); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 95–96 (1973); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 at 4 & n.18 (1977); HARTY W. JONES, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 445 (1975); Bernard C. Steiner, *The Adoption of English Law in Maryland*, 8 YALE L.J. 353, 354, 361 (1899).

19. See COLO. REV. STAT. ANN. § 2-4-211 (West 2009); 5 ILL. COMP. STAT. ANN. 50/1 (West 2010); IND. CODE ANN. § 1-1-2-1 (West 2000); MO. ANN. STAT. § 1.010 (West 2010); WYO. STAT. ANN. § 8-1-101 (2010).

20. The “fourth year of James the First” began on March 24, 1606 and ended March 23, 1607. See 5 ILL. COMP. STAT. ANN. 50/1 (West 2010). But Illinois and Colorado courts have routinely marked the fourth year of James the First as 1607. See, e.g., *Chilcott v. Hart*, 45 P. 391, 395 (Colo. 1896); *Amman v. Faidy*, 114 N.E.2d 412, 418 (Ill. 1953). These particular statutes’ apparent origin in Virginia law may explain why they refer to “the fourth year of James the First”—the year in which the Jamestown colonists set sail for the New World. According to the Illinois Supreme Court, Illinois’ common law adoption statute came by way of the Indiana territory, which itself borrowed the statute from a Virginia colonial enactment of May 1776 establishing the pre-1607 requirement for English statutes. *Bulpit v. Matthews*, 34 N.E. 525, 526 (Ill. 1893). Colorado later borrowed Illinois’s statute. *Chilcott*, 45 P. at 397. Missouri may have also borrowed from its neighbor, Illinois, and Wyoming may have borrowed from its neighbor, Colorado.

Today, common law incorporation statutes (or constitutional provisions) remain on the books in at least twenty-seven states, and these statutes are not a dead letter. The Colorado Court of Appeals, for instance, held in 2006 that the English common law age of consent to marriage—fourteen for males and twelve for females—governs common law marriage in Colorado.<sup>21</sup> In 1994, the Utah Court of Appeals held that the state attorney general possesses the powers of attorneys general under English common law.<sup>22</sup> And in Florida, the legislature may not, without a powerful reason, abolish a tort cause of action derived from English common law.<sup>23</sup>

Accordingly, Civil Gideon proponents have reason to argue that old English law provides modern Americans (in some states, at least) with a right to court-appointed counsel when indigent. In states that did not begin as British colonies, the argument is even stronger because incorporating English law was not a matter of continuity (and therefore potentially subject to desuetude), but a deliberate choice to incorporate law that was already very old. As the Montana Supreme Court emphasized:

To whatever extent [English common law] has been in force, it was and is ours by adoption and not by inheritance. The territory embraced within this state was not a British possession in colonial days, and came under the influence of the common law only by virtue of an act of the first legislative assembly . . . .<sup>24</sup>

That first legislative assembly met in 1864–65 in Bannack, Montana<sup>25</sup>—a gold-driven boomtown (nearly forgotten today) nestled in the Bitterroot Range, thousands of miles from both England and its former colonies on the East Coast. Presumably, a Civil War-era territorial legislature on the American frontier would not haphazardly

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21. *In re Marriage of J.M.H.*, 143 P.3d 1116, 1118–20 (Colo. Ct. App. 2006).

22. *State v. Robertson*, 886 P.2d 85, 89–91 (Utah Ct. App. 1994), *aff'd*, 924 P.2d 889 (Utah 1996).

23. *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973). Florida courts continue to apply this holding. *See, e.g.*, *Kish v. A.W. Chesterton Co.*, 930 So. 2d 704, 706 (Fla. Dist. Ct. App. 2006).

24. *State ex rel. Metcalf v. District Court*, 155 P. 278, 279 (Mont. 1916). *But see* S. Pac. Co. v. Porter, 331 S.W.2d 42, 45 (Tex. 1960) (noting that “Texas was never a British colony nor an American territory and the common law comes to us by adoption rather than by inheritance, so to speak[,]” but emphasizing that the adoption statute “[is] not construed as referring to the common law as applied in England in 1840 [when the Republic of Texas first enacted the adoption act], but rather to the English common law as declared by the courts of the various states of the United States”).

25. Robert L. Housman, *The First Territorial Legislature in Montana*, 4 PAC. HIST. REV. 376 (1935).

choose to incorporate old English law if it did not intend its courts to take English law seriously.

## II. THE ENGLISH RIGHT TO COUNSEL

Although arguments based on old English law may succeed in cases involving arcane areas such as common law marriage or the powers of the attorney general,<sup>26</sup> we suspect that old English law is rarely used to support rights-based systemic change, such as a civil right to counsel. Before incorporating a right of such importance, courts will likely require extensive historical support. Yet, as far as we are aware, no case arguing for the English right to counsel (nor any academic treatment) has presented the history in sufficient detail to overcome the courts’ understandable skepticism about the continuing viability of old English law regarding a civil counsel right.

The research presented in this Part demonstrates that the English right to counsel was real, widely recognized, and well developed. It had common law, statutory, and equitable incarnations. Standardized procedures eventually developed to govern its application. By the time that treatise writing came into vogue in the English bar in the 1700s and 1800s,<sup>27</sup> the English right to civil counsel was seemingly as well developed as the Sixth Amendment right to criminal counsel in America today. Modern American state courts should not shy away from the English right to counsel on account of historical obscurity.

### A. 11 Hen. 7, c. 12 and Antecedents

In 1495, Parliament noted the King’s concern for “poor subjects [who] be not of ability nor power to sue according to the laws of [the] land for the redress of injuries and wrongs to them daily done.”<sup>28</sup> The King “will[ed] and intend[ed] indifferent justice to be had and ministered according to his common laws to all his true subjects as well to poor as rich,”<sup>29</sup> and Parliament responded with a

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26. See *supra* notes 21–22 and accompanying text.

27. A. W. B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 653 (1981).

28. An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, 1495, 11 Hen. 7, c. 12 (Eng.), reprinted in 2 STATUTES OF THE REALM 578 (1816) (spelling modernized).

29. *Id.*

statutory right to counsel—and a waiver of court fees—for indigent civil plaintiffs:

[E]very poor person or persons which have [and] hereafter shall have cause of action or actions against any person or persons within the realm shall have, by the discretion of the Chancellor of this realm, for the time being writ or writs original and writs of subpoena according to the nature of their causes, therefore nothing paying to your Highness for the seals of the same, . . . [a]nd that the said Chancellor for the same time being shall assign . . . Counsel learned by their discretions which shall give their Counsels nothing taking for the same, and in like wise the same Justices shall appoint attorney and attorneys for the same poor person and persons and all other officers requisite and necessary to be had for the speed of the said suits to be had and made which shall do their duties without any rewards for their Counsels' help and business in the same . . . .<sup>30</sup>

Some sources indicate that 11 Hen. 7, c. 12 codified preexisting judge-made rights found in common law and other courts. Justices in Eyre—medieval circuit riders assigned by the king to dispense his justice in England's various counties<sup>31</sup>—received petitions for appointed counsel as early as 1292.<sup>32</sup> Some sources indicate that English ecclesiastical courts were appointing counsel for paupers as early as 1295.<sup>33</sup> Writing in the 1800s, a number of English judges opined that 11 Hen. 7, c. 12 was “confirmatory of the common law.”<sup>34</sup> Eminent English legal historian William Holdsworth confi-

30. *Id.*

31. See J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 16 (2002); William Craddock Bolland, *Introduction*, in 30 THE PUBLICATIONS OF THE SELDEN SOCIETY xv–xix (William Craddock Bolland ed., 4th ed. 1914).

32. BOLLAND, *supra* note 31, at xlvi, 21. See also John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 367–68 (1923); Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1326 & nn.26–27 (1966).

33. JAMES THOMAS LAW, FORMS OF ECCLESIASTICAL LAW 34 n.2 (London, Saunders & Benning 1831) (quoting a rule laid down by the Archbishop of Canterbury in 1295 that “advocates and proctors, and other officers in the Ecclesiastical Court, in the case of paupers, should render their services gratis”). See also Maguire, *supra* note 32, at 365.

34. *Brunt v. Wardle*, (1841) 133 Eng. Rep. 1254, 1257 (Com. Pl.) (Tindal, C.J.) (“[I]s the 11 H. 7, c. 12, any thing more than confirmatory of the common law? . . . [A] case is referred to that occurred . . . twenty years before the passing of that act, from which it appears that . . . the officer was bound to enter [an indigent plaintiff's pleadings] gratis . . . .”); see also *Pitcher v. Roberts*, (1842) 2 Dowl. P.C., N.S. 394, 400 (Q.B.) (Patteson, J.) (stating, in the context of a dispute over court costs, “It appears to me to be clear that a pauper may be admitted to sue as such under the statute 11 Hen. 7, c. 12, perhaps even at common law . . . .”); 7 ENCYCLOPEDIA OF THE LAWS OF ENGLAND 192 (A. Wood Renton & Max A. Robert-



dently recounted that, as early as 1471, the King’s Bench could compel serjeants-at-law—the most elite English attorneys at that time—to plead for poor persons.<sup>35</sup> Accordingly, it appears that the principles embodied in 11 Hen. 7, c. 12 existed at common law in at least some form before passage of the statute.

Although 11 Hen. 7, c. 12 initially extended only to civil plaintiffs at law, courts of equity subsequently adopted the right to counsel and extended it to defendants,<sup>36</sup> likely as early as 1570.<sup>37</sup> Thus, indigent civil plaintiffs at law, and both plaintiffs and defendants in equity, could obtain counsel under 11 Hen. 7, c. 12 or its judge-made equitable equivalent. This right to counsel had enough prominence to catch Blackstone’s attention. In his famous *Commentaries*, he verified that 11 Hen. 7, c. 12 entitled “paupers” to “counsel and attorney assigned them without fee.”<sup>38</sup> Indeed, the term “*in forma pauperis*” became a shorthand reference to the rights granted by 11 Hen. 7, c. 12.<sup>39</sup>

### B. Available Causes of Action

The statute 11 Hen. 7, c. 12 did not restrict its applicability to any particular causes of action. The only portion of the statute arguably addressing that issue is the preamble’s description of the king’s concern for the “wrongs . . . daily done” to poor persons “as well concerning their persons[,] their inheritances[,] as other causes[.]”<sup>40</sup> But published decisions demonstrate that the English courts applied the right to counsel in a variety of actions, including wrongful death,<sup>41</sup> debt,<sup>42</sup> ejectment,<sup>43</sup> assumpsit,<sup>44</sup> probate,<sup>45</sup> and

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son eds., 1907) (“[The] common-law right [to appointed counsel] was affirmed by the Statute 11 Henry vii. c. 12.”).

35. Shapiro, *supra* note 12, at 746 n.48.

36. EDMUND ROBERT DANIELL, PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY 232 (Boston, Charles C. Little & James Brown 1846).

37. Book Note, *Monro’s Acta Cancellaria*, 7 L.R. & Q.J. OF BRIT. & FOREIGN JURIS. 259, 267 (1848) (reviewing CECIL MONRO, ACTA CANCELLARIÆ (1847)).

38. 2 WILLIAM BLACKSTONE, COMMENTARIES \*400.

39. See 5 MATTHEW BACON & HENRY GWILLIM, A NEW ABRIDGMENT OF THE LAW 297–300 (London, A. Strahan 1798); 2 BLACKSTONE, *supra* note 38, at \*400; DANIELL, *supra* note 36, at 43–47; HENRY JAMES HOLTHOUSE, A NEW LAW DICTIONARY 196 (Boston, Charles C. Little & James Brown 1850).

40. An Act to Admit Such Persons as are Poor to Sue in Forma Pauperis, 1495, 11 Hen. 7, c. 12 (Eng.), reprinted in 2 STATUTES OF THE REALM 578 (1816) (spelling modernized).

41. *Dooley v. Great N. Ry. Co.*, (1860) 121 Eng. Rep. 217 (Q.B.).

42. *O’Hare v. Reeves*, (1849) 116 Eng. Rep. 1415 (Q.B.).

43. *Doe v. Owens*, (1842) 152 Eng. Rep. 574 (Exch.).

44. *Casey v. Tomlin*, (1840) 151 Eng. Rep. 733, 734 (Exch.).

45. *Bland v. Lamb*, (1820) 37 Eng. Rep. 680 (Ch.).

false imprisonment.<sup>46</sup> The English ecclesiastical courts—which for centuries governed bills for divorce<sup>47</sup>—would also grant appointed counsel under circumstances similar to that of the courts of law and equity.<sup>48</sup> The only cause of action for which an indigent plaintiff could not obtain appointed counsel appears to be “an action on the case for words” (i.e., defamation)<sup>49</sup> and perhaps legal malpractice.<sup>50</sup>

### C. Procedure

#### 1. Screening Meritless Claims or Unworthy Plaintiffs

Sir Francis Bacon, writing in 1622, denigrated 11 Hen. 7, c. 12 as a law “whereby poor men became rather able to vex than unable to sue.”<sup>51</sup> Available sources indicate, however, that English courts of law and equity developed relatively standard rules to screen vexatious suits and not-poor-enough plaintiffs.

The most important screening mechanism was a relatively standardized application to invoke the right: a two-part application for prospective plaintiffs in law or equity, or a one-part application for defendants in equity. The first part of the application (for plaintiffs only) comprised a petition with a short statement of the case and an attorney’s certification that the plaintiff had a merito-

46. Anonymous [Trevanion], (1702) 88 Eng. Rep. 1535 (K.B.).

47. BAKER, *supra* note 31, at 490–96.

48. See LAW, *supra* note 33, at 34 (stating that paupers not worth five pounds will have “an advocate and proctor” assigned to them); see also *id.* at 62–64 (elaborating on *in forma pauperis* procedures); LEONARD SHELFORD, A PRACTICAL TREATISE OF THE LAW OF MARRIAGE AND DIVORCE 300 (Philadelphia, John S. Littell 1841) (“[a] person may be admitted *in forma pauperis* if he swears that he is not worth 5*l.*, his debts being paid”). But see *infra* notes 55–57 (discussing the five pound threshold in law and equity). Following the Matrimonial Causes Act 1857, 20 & 21 Vict., c. 85, the *in forma pauperis* threshold increased to twenty-five pounds. JOHN FRASER MACQUEEN, A PRACTICAL TREATISE ON DIVORCE AND MATRIMONIAL JURISDICTION UNDER THE ACT OF 1857 AND NEW ORDERS 164 (London, Stevens & Norton 1858).

49. 5 BACON & GWILLIM, *supra* note 39, at 300; 16 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 259† (London, n.p. 1793). Certain sources also state that 11 Hen. 7, c. 12 did not apply to an action for penalties. See, e.g., 1 WILLIAM TIDD ET AL., THE PRACTICE OF THE COURTS OF KING’S BENCH AND COMMON PLEAS 97 (Philadelphia, Robert H. Small 1856). The purported authority for this statement is *Hawes v. Johnson*, (1826) 148 Eng. Rep. 566 (Exch. of Pl.). *Hawes* discussed the issue, but left it open and decided the case on other grounds. *Id.* at 567.

50. See *infra* Part III.C.5.

51. FRANCIS BACON, *The Historie of the Raigne of King Henry the Seventh* (1622), reprinted in 6 THE WORKS OF FRANCIS BACON 23, 161 (London, Longman & Co. 1858).

rious cause of action.<sup>52</sup> The court could then reject the application if the petition appeared meritless on its face,<sup>53</sup> although some courts developed the “custom . . . [of] rely[ing] entirely upon the certificate of counsel” as proof of merit.<sup>54</sup>

The second part of the application (for plaintiffs and defendants) was an affidavit swearing that the poor person’s net worth was less than five pounds, exclusive of clothing.<sup>55</sup> The origin of the five-pound requirement at common law is not clear, but the courts of equity borrowed the practice from common law as early as 1584, meaning the common law courts had likely adopted it some time before.<sup>56</sup> Once adopted, the five-pound threshold remained unchanged for hundreds of years.<sup>57</sup>

If satisfied that the case had merit and the applicant was sufficiently poor, the court appointed an attorney to represent the litigant.<sup>58</sup> One treatise writer stated that a pauper’s court-appointed counsel could not refuse to serve “unless he satisfie[d] the Court . . . that he ha[d] some good reason for his forbearance[.]”<sup>59</sup>

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52. 5 BACON & GWILLIM, *supra* note 39, at 298 (practice at law); DANIELL, *supra* note 36, at 45 (practice in equity). At least one source states that the indigent litigant needed the certification of two attorneys, rather than one, and that the indigent litigant’s petition needed to specify the attorney whom he or she wished the court to assign. 16 VINER, *supra* note 49, at 259†. The opposing party was not permitted to see the attorney’s certification. *See Sloane v. British Steamship Co., Ltd.*, [1897] 1 A.C. 185, 186 (Q.B.) (citing *Bryant v. Wagner*, (1839) 7 Dowl. 676).

53. 6 EPHRAIM A. JACOB, AN ANALYTICAL DIGEST OF THE LAW AND PRACTICE OF THE COURTS OF COMMON LAW, DIVORCE, PROBATE, ADMIRALTY AND BANKRUPTCY, AND OF THE HIGH COURT OF JUSTICE AND THE COURT OF APPEAL OF ENGLAND 9844 (New York, John C. Remick 1884).

54. *Hawes*, 148 Eng. Rep. at 567.

55. 5 BACON & GWILLIM, *supra* note 39, at 298 (practice at law); DANIELL, *supra* note 36, at 45, 232–33 (practice in equity).

56. *See* Book Note, *supra* note 37, at 268 & n.3. Charles Petersdorff, writing in 1831, stated that the earliest instance he found of a wealth threshold in the common law courts was ten pounds, rather than five. 13 CHARLES PETERSDORFF, A PRACTICAL AND ELEMENTARY ABRIDGMENT OF THE CASES ARGUED AND DETERMINED IN THE COURTS OF KING’S BENCH, COMMON PLEAS, EXCHEQUER, AND AT NISI PRIUS 189 n.† (New York, W.R.H. Treadway & Gould & Banks 1831). *See also* Maguire, *supra* note 32, at 376 n.83 (opining that reported instances of a ten-pound threshold are probably mistakes).

57. *See* Book Note, *supra* note 37, at 267 (noting that, as of 1848, the five-pound threshold was still the requirement, and encouraging revising it upward so that “a much larger class of persons . . . can . . . take advantage of the statute of Henry VII”); *see also infra* note 79 and accompanying text.

58. *See Dooly v. Great N. Ry. Co.*, (1854) 119 Eng. Rep. 131, 132 (Q.B.); 1 TIDD ET AL., *supra* note 49, at 97.

59. DANIELL, *supra* note 36, at 47.

## 2. Proper Parties

Not every poor person, otherwise qualified, could sue *in forma pauperis*. A married woman could not sue “as of course.”<sup>60</sup> One treatise interprets this case as requiring that a married woman’s application to sue *in forma pauperis* “must be special.”<sup>61</sup> And at least two English equity cases held that a litigant could not sue *in forma pauperis* as an executor or administrator.<sup>62</sup>

## 3. Consequences of Failure

Suing *in forma pauperis* was not a risk-free affair, at least not after 1531. In that year, Parliament enacted a statute requiring unsuccessful plaintiffs to reimburse the opposing party’s court costs.<sup>63</sup> Although the statute provided that poor plaintiffs “admitted . . . to have their process and counsel of Charity . . . shall not be compelled to pay any costs,” it nonetheless directed that such plaintiffs “shall suffer other punishment as by the discretion of the Justices or Judge . . . shall be thought reasonable.”<sup>64</sup>

Numerous sources indicate that this “other punishment” was perverse: a choice between paying costs anyway or whipping and pillory. Matthew Bacon’s treatise, for instance, states that “if [the pauper] be dispaupered or non-suited, the . . . usual practice is to tax the costs, and for non-payment to order him to be whipped.”<sup>65</sup> Another source states “if the matter shall fall out against the Plaintiff, he shall be punished with whipping and pillory.”<sup>66</sup> This source further states that a female litigant was ordered flogged under this practice in 1596, but it contains nothing about whether the order

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60. Coulsting v. Coulsting, (1845) 50 Eng. Rep. 182, 182 (Ch.).

61. HUBERT AYCKBOURN & THOMAS H. AYCKBOURN, THE NEW CHANCERY PRACTICE 375 (London, Henry Butterworth 1846).

62. Oldfield v. Cobbett, (1845) 41 Eng. Rep. 765, 766 (Ch.) (“[I]n no instance has the privilege ever been exercised either by a Plaintiff or Defendant suing in a representative character, as executor or administrator.”); Paradice v. Sheppard, (1745) 21 Eng. Rep. 220, 220 (Ch.) (“[T]he indulgence intended poor persons not of ability to sue for their rights *in forma pauperis*, extends only to persons suing in their own rights, and not as executor or administrator . . .”).

63. 23 Hen. 8, c. 15 (1531), reprinted in 3 STATUTES OF THE REALM 380 (1817) (spelling modernized).

64. *Id.*

65. 5 BACON & GWILLIM, *supra* note 39, at 300.

66. Drennan v. Andrew, (1866) 1 Ch. App. 300, 301 n.7 (quoting the reportedly standard form of an order admitting a plaintiff to sue *in forma pauperis*).

was executed.<sup>67</sup> And on at least one occasion, it appears that a pauper was excused from flogging after standing in the pillory.<sup>68</sup>

But unlike the five-pound threshold, which persisted for hundreds of years, the practice of whipping and pillory (to the extent it actually happened) seemingly fell into disuse. Many of the sources that mention the possibility also doubt its continuing vitality. In 1698, Lord Chief Justice Holt denied a request to whip a non-suited pauper, stating “he had no officer for that purpose, and never knew it done.”<sup>69</sup> Matthew Bacon adds, “upon consideration of the circumstances of the case, it is in the discretion of the court to spare both [taxation of costs and whipping].”<sup>70</sup> And according to Blackstone, although “it was formerly usual to give such paupers, if non-suited, their election either to be whipped or pay the costs . . . though that practice is now disused.”<sup>71</sup>

#### 4. Appeals

The English courts disagreed about paupers’ appellate rights. In equity, it appears settled that a pauper could appeal.<sup>72</sup> At law, however, the right may not have existed. In 1677, Chief Justice North of the King’s Bench stated that “[a] man admitted *in forma pauperis* is not to have a new trial granted him; for he has had the benefit of the King’s justice once, and must acquiesce in it. We do not suffer them to remove causes out of Inferior Courts.”<sup>73</sup> North’s referral to a “new trial” seems to reflect the fact that, at common law, an “appeal” did not exist in the modern sense; and the closest analogy—suing out a writ of error—“was generally held to signal the commencement of a *new* suit.”<sup>74</sup> Courts of equity, by contrast, viewed appeals as a continuation of the same cause, similar to modern practice.<sup>75</sup>

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67. *Id.*

68. Book Note, *supra* note 37, at 268.

69. Anonymous, (1698) 91 Eng. Rep. 433, 433 (K.B.).

70. 5 BACON & GWILLIM, *supra* note 39, at 300 *n.b.*

71. 2 BLACKSTONE, *supra* note 38, at \*400.

72. *See* Drennan v. Andrew, (1866) 1 Ch. App. 300, 302–03 (concluding that paupers could appeal, although admitting that the historical record was ambiguous); *see also id.* 301–03 n.7 (summarizing historical controversy over paupers’ right to appeal in the court of chancery).

73. Anonymous, (1677) 86 Eng. Rep. 873 (K.B.); *see also* 5 BACON & GWILLIM, *supra* note 39, at 300.

74. Campbell v. Criterion Group, 605 N.E.2d 150, 154 (Ind. 1992) (emphasis added).

75. *Id.*

### 5. Ineffective Assistance and Malpractice

No located authority indicates that a pauper could bring a case against his appointed attorney for the equivalent of what American law now calls ineffective assistance of counsel. But at least one case suggests that a pauper plaintiff could bring something like a malpractice action against his attorney—although that malpractice suit could not itself be *in forma pauperis*. In 1850, the Queen’s Bench ruled on a case in which a plaintiff admitted *in forma pauperis* in a separate suit sought recovery from his attorney in that suit for the “costs of the day” the pauper was forced to pay, allegedly because of the attorney’s misconduct.<sup>76</sup> Whether the plaintiff could sue his attorney for compensation was not at issue. Rather, the Court examined whether the pauper was excused from paying costs in the action against his attorney—in essence, whether he could prosecute the malpractice action *in forma pauperis*. The Court held that the pauper was not excused.<sup>77</sup> If English courts followed this decision, they would have effectively barred poor persons from suing *in forma pauperis* in a malpractice action.

#### *D. Repeal of 11 Hen. 7, c. 12 in England*

In 1883, Parliament repealed 11 Hen. 7, c. 12.<sup>78</sup> In its place, the English courts provided by rule that paupers could be “admitted in the manner heretofore accustomed,” including the need for attorney certification and an affidavit of poverty, but raised the poverty threshold to twenty-five pounds.<sup>79</sup> These rules preserved the court’s discretion to appoint counsel.<sup>80</sup> Through various subsequent rules and statutes, the availability of civil counsel at no or reduced cost (depending on a litigant’s financial situation) continues in Eng-

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76. *Bell v. Port of London Assurance Co.*, (1850) L.J. Rep. (n.s.) (Q.B.) 89, reported in 2 ENGLISH REPORTS IN LAW & EQUITY 193 (Boston, Little, Brown & Co. 1851). The conduct remains unspecified. The attorney may have failed to prepare adequately for trial, thus requiring a continuance. Under such circumstances, the pauper plaintiff could be ordered to pay the “costs of the day for not proceeding to trial[.]” JOHN GRAY, A TREATISE OF THE LAW OF COSTS 261 (London, Edward Lumley 1853).

77. 2 ENGLISH REPORTS IN LAW & EQUITY, *supra* note 76, at 193.

78. Statute Law Revision & Civil Procedure Act 1883, 46 & 47 Vict., c. 49, Schedule.

79. Rules of the Supreme Court, 1883, Ord. XVI, rr. 22–24, reprinted in CHARLES BURNEY ET AL., WILSON’S PRACTICE OF THE SUPREME COURT OF JUDICATURE 183–84 (London, Stevens & Sons, Ltd. 1888). But the five-pound threshold may have been such a staple of common culture that an apparently ill-informed legal advice columnist cited it as a requirement as late as 1895. “Lex,” *The Penny Lawyer*, THE PENNY ILLUSTRATED PAPER & ILLUSTRATED TIMES, Sept. 7, 1895, at 159 (advising a correspondent, “[y]ou can proceed in forma pauperis if you are not in possession of £5”).

80. BURNEY ET AL., *supra* note 79, at 184.

land in modified form to this day, with participation of both publicly employed solicitors as well as private solicitors reimbursed by the government.<sup>81</sup>

### III. THE ENGLISH RIGHT TO COUNSEL IN AMERICA

The English right to counsel, whether based in judge-made law or the statute of 11 Hen. 7, c. 12, has a long history in England. But according to one commentator writing in the 1970s, “This idea was not exported to America.”<sup>82</sup> This unsupported statement is wrong: various aspects of the English right to counsel have been widely recognized in America, with express reference to 11 Hen. 7, c. 12. This section summarizes the various ways that the English right has been applied in colonial, state, and federal courts.

#### A. Colonial and State Courts

When British colonists came to America, they brought the English right to court-appointed counsel with them. Colonial Maryland, for example, granted counsel under 11 Hen. 7, c. 12 on a number of occasions.<sup>83</sup> North Carolina relied on 11 Hen. 7, c. 12 from its colonial days until the statute was superseded by a state legislative code in 1883.<sup>84</sup> In 1808, the Pennsylvania Supreme Court held that the statute survived the end of colonial rule,<sup>85</sup> and as recently as 1985, a Pennsylvania court applied the statute to determine whether a plaintiff deserved court-appointed counsel.<sup>86</sup> In 1845, a Georgia researcher under commission from the state

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81. See Joan Mahoney, *Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States*, 17 ST. LOUIS U. PUB. L. REV. 223, 226–29 (1998).

82. Stephen K. Huber, *Thou Shalt Not Ration Justice: A History and Bibliography of Legal Aid in America*, 44 GEO. WASH. L. REV. 754, 755 (1976).

83. See WILLIAM KILTY, A REPORT OF ALL SUCH ENGLISH STATUTES AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE OF MARYLAND, AND WHICH BY EXPERIENCE HAVE BEEN FOUND APPLICABLE TO THEIR LOCAL AND OTHER CIRCUMSTANCES 229 (Annapolis, Jehu Chandler 1811) (reporting application in 1664 and 1672); CARROLL T. BOND, PROCEEDINGS OF THE MARYLAND COURT OF APPEALS FROM 1695–1729 303 (1933) (reporting a case from 1721 where the court appointed counsel to persons who swore themselves worth less than five pounds).

84. *Allison v. S. Ry. Co.*, 40 S.E. 91, 94 (N.C. 1901) (Purches, C.J., concurring); see also 1 THE CODE OF NORTH CAROLINA I (1883).

85. See *Madden v. City of York*, 59 Pa. D. & C. 2d 367, 369–70 (Ct. C.P. York Cnty. 1972).

86. See *Zerr v. Scott*, 39 Pa. D. & C. 3d 459, 460–61 (Ct. C.P. Berks Cnty. 1985).

legislature included 11 Hen. 7, c. 12 among those statutes remaining in force in that state.<sup>87</sup>

New states—those that had never been British colonies—adopted 11 Hen. 7, c. 12 as well. Indiana’s *in forma pauperis* statute “was copied [from 11 Hen. 7, c. 12] early on by pioneer Hoosier legislators eager to establish for [their] state a respected and humane system of justice.”<sup>88</sup> The statute existed verbatim in Florida’s code as late as 1941.<sup>89</sup>

Some states, without addressing the right to counsel, adopted 11 Hen. 7, c. 12’s fee-waiver right.<sup>90</sup> California did so in 1917, in the process quoting both the fee-waiver and right-to-counsel provisions of the statute.<sup>91</sup> Today, California courts continue to acknowledge 11 Hen. 7, c. 12 as the source of Californians’ *in forma pauperis* rights, and have expanded upon those rights with regard to expenses a litigant must normally pay up front.<sup>92</sup>

Delaware’s Chancellor Allen, citing 11 Hen. 7, c. 12, similarly held (in 1987) that the persistence of English common law in Delaware law gave him inherent authority to waive court costs “in a proper case.”<sup>93</sup> Chancellor Allen set forth two factors to consider: (1) “the court should be satisfied that the plaintiff is in fact impecunious”; and (2) “the court must assess the allegations of the complaint to assure itself that, assuming the facts alleged to be true, a substantial claim is asserted and that the matter pressed is not frivolous or vexatious.”<sup>94</sup> Chancellor Allen cited no authority for these factors, but they mirror the requirements established by English courts administering 11 Hen. 7, c. 12.

In Rhode Island, pre-1750 English statutes “relating to the poor” remain in force in the state, and the state’s supreme court held that this includes the cost-waiving provisions of 11 Hen. 7, c. 12, though it did not address the right to counsel.<sup>95</sup> The Washington Supreme Court cited 11 Hen. 7, c. 12, among other authorities, as supporting the notion that courts have inherent power to waive court fees.<sup>96</sup>

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87. WILLIAM A. HOTCHKISS, A CODIFICATION OF THE STATUTE LAW OF GEORGIA, INCLUDING THE ENGLISH STATUTES IN FORCE 594 (Savannah, John M. Cooper 1845).

88. *Campbell v. Criterion Group*, 605 N.E.2d 150, 153 (Ind. 1992).

89. *In re Amendments to Rules Regulating the Florida Bar*, 573 So. 2d 800, 802 (Fla. 1990).

90. *See supra* note 30 and accompanying text.

91. *Martin v. Superior Court*, 168 P. 135, 137 (Cal. 1917).

92. *See, e.g., Baltayan v. Estate of Getemyan*, 110 Cal. Rptr. 72, 84 (Ct. App. 2001).

93. *In re Application of Motivational Center, Inc.*, 1987 WL 14626, at \*1 (Del. Ch. Nov. 3, 1987).

94. *Id.* at \*2.

95. *Jones v. Aciz*, 289 A.2d 44, 50 (R.I. 1972).

96. *See O'Connor v. Matzdorff*, 458 P.2d 154, 159–60 (Wash. 1969).



Finally, many states with their own *in forma pauperis* statutes have looked to 11 Hen. 7, c. 12 for interpretive guidance. Indiana naturally did so, having intentionally copied the statute.<sup>97</sup> Tennessee also did so as early as 1826.<sup>98</sup> And the New Jersey Supreme Court of Judicature held in 1836 that 11 Hen. 7, c. 12 governed the procedure for making an application to sue under New Jersey’s *in forma pauperis* statute.<sup>99</sup>

### B. Federal Court

Given the prevalence of English right to counsel in state courts, it should not be surprising to find that the statute was also known in the federal courts. In 1894, for example, the D.C. Circuit discussed 11 Hen. 7, c. 12 in the context of an attempt to appeal *in forma pauperis*, which the court ultimately rejected.<sup>100</sup> In 1904, a convicted criminal similarly petitioned the Seventh Circuit to appeal his conviction *in forma pauperis*. The court analyzed the potential statutory sources of authority for such appeals, beginning with the statute of Henry VII:

By 11 Hen. VII, c. 12, every poor person having a cause of action against another could have writs according to the nature of his cause without payment of fees, and assignment of counsel by the court, who should act for him without reward. This statute came to us as part of the common-law existing at the time of the Revolution. It is followed as well by the federal as the state courts, unless the matter is otherwise regulated by the Congress of the United States or by the Legislature of the respective states.<sup>101</sup>

After analyzing the other available statutes, the Court concluded that a convict could not appeal *in forma pauperis* under federal law.<sup>102</sup>

Tennessee federal courts, like their state counterparts,<sup>103</sup> had substantial experience with the English right to counsel, much of it

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97. See *Harrison v. Stanton*, 45 N.E. 582, 583 (Ind. 1896) (citations omitted); see also *Campbell v. Criterion Group*, 605 N.E.2d 150, 153 (Ind. 1992).

98. See *Philips v. Rudle*, 9 Tenn. (1 Yer.) 121, 122–23 (1826); see also *Brumley v. Hayworth*, 11 Tenn. (3 Yer.) 421, 421–22 (1832); *Andrews v. Page*, 49 Tenn. 634, 636 (1870).

99. *Sears v. Tindall*, 15 N.J.L. 399, 402–03 (1836).

100. *Ex parte Harlow*, 3 App. D.C. 203 (D.C. Cir. 1894).

101. *Bristol v. United States*, 129 F. 87, 88 (7th Cir. 1904).

102. See *id.* at 89–90.

103. See cases cited *supra* note 98.

through Judge Eli Shelby Hammond.<sup>104</sup> *Bradford v. Bradford*, an 1878 decision from the Western District of Tennessee (in which Judge Hammond concurred) may have been the first instance of its mention.<sup>105</sup> There, a plaintiff sought to sue *in forma pauperis*. The plaintiff did not seek appointment of counsel, but only waiver of posting bond for costs. The court worried that if a plaintiff could proceed without posting bond, the plaintiff could easily bring vexatious suits. No on-point federal law existed, but:

[t]he rule of the English courts adopted and acted on by some of the American courts, commends itself to our judgment as being best calculated to protect this court as well as defendants against frivolous and harassing litigation. If the applicant will supplement his affidavit by the certificate of any reputable attorney of this court, to the effect that he has investigated the case and believes the applicant has a good cause of action, he will be permitted to bring and prosecute his suit in forma pauperis.<sup>106</sup>

By requiring an attorney's certificate, the court replicated the procedure called for by English courts administering the right to counsel.

Ten years later, the Western District of Tennessee issued another opinion referring to English practice regarding *in forma pauperis* suits. The court, per Judge Hammond, faced an application by an "infant" to sue *in forma pauperis*. Judge Hammond noted that the applicant had "present[ed] a certificate of a good cause of action by a reputable attorney, as required by our ruling in *Bradford v. Bradford*."<sup>107</sup> But Judge Hammond went on to deny the application, stating that an infant could not sue *in forma pauperis* in Tennessee under either Tennessee law or English common law practice, even though English courts of equity would allow it.<sup>108</sup> The rule at law, said Judge Hammond, prevented irresponsible next-friends from too easily co-opting infants' legal claims.<sup>109</sup>

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104. Judge Hammond served as a federal judge in the Western District of Tennessee from 1878–1904. See Federal Judicial Center, *Biographical Directory of Federal Judges*, <http://www.fjc.gov/servlet/nGetInfo?jid=962&cid=999&ctype=na&instat=n> (last visited Oct. 30, 2011).

105. See *Bradford v. Bradford*, 3 F. Cas. 1129 (C.C.W.D. Tenn. 1878).

106. *Id.* at 1129.

107. *Roy v. Louisville N.O. & T.R. Co.*, 34 F. 276, 276 (C.C.W.D. Tenn. 1888) (citation omitted).

108. See *id.* at 277–78.

109. See *id.*

In 1899, Judge Hammond issued yet another opinion regarding 11 Hen. 7, c. 12 when he faced a plaintiff's *pro se* application to appeal.<sup>110</sup> Believing the plaintiff's case to be meritless, Hammond stated his desire to deny the application,<sup>111</sup> but he could find no authority permitting denial simply because the judge believed the appeal to be meritless.<sup>112</sup> Hammond therefore relied on the court's inherent authority to protect itself from meritless suits. He also noted that the court's practice of “protect[ing] defendants against the oppression of vexatious suits . . . grew up in every court under the statute of 11 Henry VII. c. 12.”<sup>113</sup> Hammond stated that the English statute was “as unqualified as any of our American statutes in granting the privilege [to sue *in forma pauperis*],” and then quoted the operative language from the English statute, including its provision for counsel.<sup>114</sup> Hammond later stated that “[c]ounsel might have been assigned in this case if the plaintiff . . . had not also taken care to indicate that he was himself a lawyer capable of managing it professionally.”<sup>115</sup>

Hammond wrote in the wake of an 1892 federal statute that gave the court discretion to assign counsel if the court “deem[ed] the cause worthy of a trial.”<sup>116</sup> A federal practice treatise predating the 1892 federal statute referred to 11 Hen. 7, c. 12 as the source of the right to sue *in forma pauperis*.<sup>117</sup> As late as 1920, subsequent editions of the same treatise, although acknowledging the relevant federal statute, continued to cite 11 Hen. 7, c. 12 as the origin of the American right to sue *in forma pauperis*.<sup>118</sup>

#### IV. MODERN “APPLICABILITY,” PARTIAL INCORPORATION AND DISCRETION

Under most states' common law adoption statutes, an old English rule of law must remain “applicable” to modern conditions before it can be considered a part of local law. Ultimately, each

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110. *Brinkley v. Louisville & N.R. Co.*, 95 F. 345, 348 (C.C.W.D. Tenn. 1899).

111. *See id.*

112. *See id.* at 350.

113. *Id.* at 353.

114. *Id.*

115. *Id.* at 353–54.

116. *See* Act of July 20, 1892, ch. 209, 27 Stat. 252.

117. *See* 1 ROGER FOSTER, A TREATISE ON FEDERAL PRACTICE IN CIVIL CAUSES § 200 (Boston, Boston Book Co. 1892). Foster's second edition was completed in January 1892, *see id.* at vi, and presumably published shortly thereafter. The federal *in forma pauperis* statute was enacted on July 20, 1892. *See* 27 Stat. at 252.

118. *See* 2 ROGER FOSTER, A TREATISE ON FEDERAL PRACTICE § 413 (1920) (governing petitions for leave to sue *in forma pauperis*).

state will interpret “applicability” in its own way, but certain common themes exist—at least concerning *inapplicability*. For example, courts have held that old English rules are inapplicable if they do not make sense in that state’s unique geography and climate.<sup>119</sup> Courts have also refused to accept English rules based on outdated notions of public policy.<sup>120</sup> And courts have rejected English rules that no longer comport with modern scientific understanding.<sup>121</sup> In general, courts agree on the maxim that a common law rule no longer applies when the reasons for its making no longer apply, or are no longer considered valid.<sup>122</sup>

Arguments that the English right to counsel remains “applicable” in modern America appear consistent with these principles. Nothing about geography, climate, or modern science is germane to the right-to-counsel question. And the provision of counsel is not based on outdated notions of public policy; it is consistent with the move toward greater legal protections for the rights of indigents. Certainly the need that prompted Parliament to enact 11 Hen. 7, c. 12—providing the poor with a means of redressing “wrongs . . . daily done”<sup>123</sup>—has not ceased to exist.

In some cases, the details of applying the English right to counsel, rather than its general purpose, may conflict with local public

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119. See, e.g., *San Joaquin & Kings River Canal & Irrigation Co. v. Fresno Flume & Irrigation Co.*, 112 P. 182, 183 (Cal. 1910) (rejecting English common law riparian rights because of the need for irrigation in California); *Morris v. Fraker*, 5 Colo. 425, 427–29 (1880) (holding that, in light of Colorado’s aridity and the need for cattle to roam as freely as possible to obtain sufficient food and water, the English rule that a farmer had no obligation to fence his fields does not apply in Colorado).

120. See, e.g., *Good v. Good*, 311 P.2d 756, 759–60 (Idaho 1957) (refusing to apply an English rule that did not comport with the state’s policy of legal equality between husband and wife); *Shaughnessey v. Jordan*, 111 N.E. 622, 626 (Ind. 1916) (noting that early English law restricting workers’ strikes “[was] hostile, not only to the statute law of this country, but to the spirit of our institutions” (internal citations omitted)); *United Ass’n of Journ. & App. of Plumbing, etc. v. Stine*, 351 P.2d 965, 972–78 (Nev. 1960) (holding that English common law rule proscribing prospective arbitration clauses is not applicable in Nevada, given modern public policy in favor of easing burdens on commerce).

121. See, e.g., *Lovato v. District Court*, 601 P.2d 1072, 1075–76 (Colo. 1979) (abandoning the English common law definition of death in light of modern science).

122. See, e.g., *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1103–04 (Fla. 2008) (“Florida adopted the English common law as it existed on July 4, 1776 . . . [but] [w]e have explained that the common law must keep pace with changes in our society and may be altered when the reason for the rule of law ceases to exist . . .” (citation omitted)); *Morton v. Merrillville Toyota, Inc.*, 562 N.E.2d 781, 784 (Ind. Ct. App. 1990) (stating that although Indiana has adopted the English common law, a common law rule “should be discontinued” “when the reasons for a rule of law cease to exist”); *Bernot v. Morrison*, 143 P. 104, 106 (Wash. 1914) (“[C]ourts . . . will not blindly follow the decisions of the English courts as to what is the common law without inquiry as to their reasoning and application to circumstances.”).

123. See *An Act to Admit Such Persons as are Poor to Sue in Forma Pauperis*, 1495, 11 Hen. 7, c. 12 (Eng.), reprinted in 2 STATUTES OF THE REALM 578 (1816) (spelling modernized).

policy. Indeed, the foregoing analysis of the English courts’ administration of the right raises many questions for modern implementation. Must an indigent litigant get an attorney’s certification of merit? In which causes of action does the right to counsel attach? Is the right still restricted to plaintiffs at law, but open to both plaintiffs and defendants in equity?

These questions are important,<sup>124</sup> but they should not preclude courts from recognizing the underlying right, given the flexibility courts have in determining how old law applies in modern contexts. The Colorado Supreme Court, for example, rejected the notion that incorporation of an English rule or statute necessarily means wholesale incorporation of every particular. In 1902, the Court held that the statute of 43 Eliz., c. 4, enacted in 1601, governs charitable trusts in Colorado “so far as it recognizes or indicates what are charitable uses, and in so far as it gives validity to gifts for such uses[, but] the details of the statute, and the remedies provided therein, are not applicable to our conditions or institutions, and are not in force here.”<sup>125</sup> Seemingly, to the extent that the “details” of an English rule of law do not fit in modern contexts, courts need not adopt them.

Similarly, nothing in any English law incorporation statute that we are aware of requires that a rule, once incorporated, cannot be modified through case-by-case adjudication. This seems particularly true where states have incorporated common law and statutes in support thereof. Rules incorporated under these statutes have historically been subject to continued refinement by both English and American courts. At the very least, a court applying English law should not be afraid to do as the English courts did with respect to 11 Hen. 7, c. 12 and create procedural requirements suitable to the times.

Finally, English law incorporation statutes usually recognize the state legislature’s authority to repeal incorporated English law. To the extent the courts establish a system that the legislature finds unworkable, the legislature has the final word. A court worried about overstepping its authority by recognizing the English right to counsel in America might therefore take comfort from the

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124. The question of where to get attorneys is especially thorny. See, e.g., REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 100–01 (1919); Steven B. Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 *CARDOZO L. REV.* 255, 272–79 (1981); Shapiro, *supra* note 12, at 739–62; Judy E. Zelin, Annotation, *Court Appointment of Attorney to Represent, Without Compensation, Indigent in Civil Actions*, 52 *A.L.R.4TH* 1063 (1987).

125. *Clayton v. Hallett*, 70 P. 429, 434 (Colo. 1902) (relying on a previous codification of *COLO. REV. STAT. ANN.* § 2-4-211).

legislature's ability to make the ultimate determination regarding whether the right should continue in force.

#### CONCLUSION

In states that incorporated old English law, many other rights besides the right to counsel may be lurking in the “mists of early English [legal] history.”<sup>126</sup> Nonetheless, if litigants argue for old English law, they should not do so halfheartedly. An abbreviated argument on a historically rich issue is a disservice to the court, is unlikely to succeed, and may create bad precedent.

Such should not be the case with the English right to counsel. Whether the English right still applies in any particular state turns on the requirements of that state's English law incorporation statute. At the very least, however, the existence and application of a civil right to counsel under old English law has substantial historical support. It therefore deserves serious consideration as the primary argument in support of Civil Gideon efforts. Perhaps more importantly, it reframes the Civil Gideon debate. Rather than an attempt to create a novel right, Civil Gideon can be legitimately seen as seeking to revive and perpetuate historically established rights—an area of common interest for many judges, regardless of ideological persuasion.

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126. *Quail v. Municipal Court*, 217 Cal. Rptr. 361, 366 (Ct. App. 1985) (Johnson, J., concurring and dissenting).