



## IT'S ALL ABOUT JUSTICE: GIDEON AND THE RIGHT TO COUNSEL IN CIVIL CASES

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For some, the fiftieth anniversary of *Gideon v. Wainwright* might seem to be a strange or even inappropriate time to talk about the right to counsel in



civil cases. However, many of us in the civil right to counsel movement, as well as some who work in indigent defense, feel such a view comes from perceiving the criminal and civil justice worlds as inherently distinct. Some of this is structural,

as James Neuhard observed in his National Legal Aid & Defender Association *Cornerstone* article “Gideon Redux: A Defender’s View,” “The United States is one of the only countries that separates civil and criminal legal services so completely.” Yet, it is not difficult to see how the fates of criminal and civil cases are significantly intertwined.

The deplorable state of indigent defense funding and consequent Gideon violations lead to needless and avoidable criminal convictions that have a tremendous impact on defendants’ civil interests, such as housing, employment, and public benefits. But in the same fashion, civil litigants who cannot effectively protect their housing or employment interests in court may wind up in the criminal justice system, worsening the indigent defense crisis. Some public defender systems have recognized this, choosing to take a holistic approach by having their attorneys handle both the criminal and civil issues of their clients. Another holistic approach would be providing a right to counsel in civil cases, which, as Neuhard put it, “offers the opportunity to look at common problems and combined solutions for the clients of both civil and defender programs.”

The rights to counsel in criminal and civil cases are mirrors of each other for more reasons than just the collateral consequences that each has on the other. They also share an identical reality as to what it means to be a litigant trying to protect basic needs on one’s

own. Gideon held that it was an “obvious truth” that providing counsel to those too poor to afford it is “fundamental and essential to a fair trial.” Gideon also recognized the fact that the government and wealthier defendants hire attorneys in criminal cases demonstrates a “strong” and “widespread” belief that lawyers are “necessities, not luxuries.” The Court concluded, “in our adversary system of criminal justice, 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.” These statements are no less applicable to adversarial civil cases implicating basic human needs: most wealthy people would hire an attorney to avoid losing their home, their children, or, in cases that involve health or safety (such as domestic violence), potentially their very life. The typical indigent civil litigant cannot hope for a “fair trial” when facing off alone in an adversarial proceeding against a landlord’s attorney, or a bank, or a state’s social services agency, or an abuser that brings the full force of intimidation into the courtroom. Moreover, in the end, litigants do not care whether their proceeding is labeled “criminal” or “civil;” they care about what they stand to lose. And what they stand to lose in basic human needs civil cases is every bit as precious as that at stake in most criminal cases.

At this point in the conversation, the question that inevitably arises is, “How can we be talking about adding new rights to counsel when we’re not funding the ones we already have?” The answer to this is both practical and philosophical.

As a practical matter, the National Coalition for the Civil Right to Counsel and other civil right to counsel advocates are committed to ensuring that all new rights are accompanied by new funding streams. Sometimes criminal and civil cases already tap or can tap entirely separate sources of funding, meaning that the expansion of a right to counsel in civil cases does not necessarily compete with the needs of indigent defense. But more generally, future expansions will require

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careful coordination between civil and criminal attorneys to develop mutually responsive (and potentially collaborative) funding strategies and targets. Additionally, there is a significant effort afoot to develop research demonstrating that when the state refuses to pay for counsel in civil cases, it simply is paying that money in other ways. For instance, evicted tenants and victims of domestic violence wind up in government-funded shelters or hospitals. Parents who are errantly ordered to pay more child support than they can actually afford wind up in jails. The failure of courts to issue protective orders to victims of domestic violence can very well lead to hospitalization or increased police involvement. Those who lose their employment or are denied unemployment benefits may be forced to rely on public benefits, and those who lose public benefits that had been providing access to preventative health care or ongoing treatment for chronic illnesses may require substantially more expensive emergency medical care that all taxpayers ultimately bear. Convincing the states to direct some of the money spent on emergency programs back into civil counsel can be almost like the discovery of new funding. Much data already exists that providing counsel not only provides substantially more accurate outcomes, but also helps prevent these negative social/financial consequences. We continue to develop additional data of this nature.

The philosophical answer takes less time to explain but is no less important: something does not stop being a “right” when money gets tight. After the Supreme Court held that an examination of the “government’s interest” is one of the three prongs of the due process test for appointment of counsel, many courts equated this solely to be the government’s financial interest. But such a simplistic construction threatens to make the protection of constitutional rights subject to the whims of state budgets, and that could not have been the intent of the founders. In fact, it is not hard to think of other interests the government has in providing counsel in civil cases: it protects the interests of its citizens against wrongful deprivation, helps effectuate the purpose of many of the statutes governing such proceedings (for instance, providing counsel in custody proceedings can help expedite stability for the children), and increases public faith in the fairness of the judicial system.

There is one final aspect to the conversation that relates to understanding what the civil right to counsel movement is really seeking, an understanding that

helps explain why the movement prefers the term “civil right to counsel” over “civil Gideon.” Part of that nomenclature preference relates to the problems with the implementation of Gideon: It is our hope, and our mission, to ensure that new rights to counsel are accompanied by sufficient funding in order to avoid the nightmare caseload scenario that has plagued indigent defense. But also, the scope of the right we pursue is markedly different. For one, Gideon ensures a right to counsel for all indigent criminal defendants (provided they face jail time), whereas our movement focuses only on cases implicating basic human needs. Additionally, the American Bar Association (ABA) Model Access Act, which was designed to suggest a flexible implementation framework for civil new rights to counsel, contemplates a merit test to screen out cases where a lawyer could do little.

The gap between Gideon’s promise and the reality for criminal defendants is large, unsustainable, and unjust. So is the “justice gap” between civil legal needs and the actual provision of assistance (as large as eighty percent, according to the Legal Services Corporation). This justice gap existed even in better economic times, but the already-inadequate funding for legal aid became even more inadequate as the financial crisis worsened. By establishing a right to legal assistance, advocates can push back against the governmental inclination to treat the provision of civil legal assistance as more of a luxury for good times rather than an essential service for all times. We should therefore not be content with the U.S. Supreme Court’s refusal to provide any protection whatsoever to indigent civil litigants that are “haled into court” and left to fend for themselves in an adversarial civil proceeding (fortunately, state courts have done much under both state and federal constitutions, recognizing rights to counsel in abuse/neglect, civil contempt, paternity, and civil commitment cases, to name a few). The Gideon Court realized that “[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.” With respect to civil cases, however, the exact reverse is true: all countries in the European Union have had a right to counsel in civil cases for decades, and in the 2012 Rule of Law Index, the World Justice Project ranked the United States toward the bottom in access to civil justice when compared to countries similar to ours. If we really believe in the rule of law, we cannot afford to allow this to continue. The time has come for indigent litigants to receive the justice they deserve, for their

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criminal cases certainly, and for their critical civil ones as well.

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