

# Clearinghouse REVIEW

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Sargent Shriver National Center on Poverty Law



# A Civil Right to Counsel

# Continuing the Discussion

**M**arch 2013 marked the fiftieth anniversary of the iconic U.S. Supreme Court decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which found a constitutional right to counsel for anyone charged with a felony and too poor to hire a lawyer. Not only the legal and advocacy communities but also a broad range of mainstream media devoted substantial time to examining *Gideon*'s legacy, whether the ruling has lived up to its promise, and the current state of the indigent defense system.

Some of the commentary also focused on an aspect of the right to counsel that CLEARINGHOUSE REVIEW readers know all too well: the *lack* of any such constitutional right in civil cases, regardless of what clients stand to lose. This discussion continues in the "package" of three pieces of writing that follow. The first, by John Pollock, coordinator of the National Coalition for a Civil Right to Counsel, and Mary Deutsch Schneider, executive director of Legal Services of Northwest Minnesota, looks back at ten years of the national coalition's work. Next, Martin Guggenheim and Susan Jacobs of the Center for Family Representation, in New York City, consider the importance of, and a model for, ensuring counsel for parents at risk of losing their children to state custody. And, third, Earl Johnson Jr., who directed the Office of Economic Opportunity's Legal Services Program at the program's inception and recently retired as an associate justice of the California Court of Appeal, reflects on his nearly fifty years of scholarship and advocacy for a civil right to counsel.—THE EDITORS

# 50 Years of Gideon, 47 Years Working Toward a “CIVIL GIDEON”

By Justice Earl Johnson Jr. (ret.)

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**N**o doubt everyone who is involved in what some call the “Civil Gideon” movement—or even those who at some point considered a civil right to counsel a possibility—has a story about when that thought first came to mind. For me, it just happened sooner, mainly because I am older than most and thus closer in time to the U.S. Supreme Court’s *Gideon* decision and its penumbra.

My first epiphany occurred during a private dinner in October 1966, only three years after the Supreme Court issued its *Gideon* opinion. The location of this dinner was Memphis, Tennessee, where the National Legal Aid and Defender Association (NLADA) was holding its annual conference. The occasion was a very private celebration of the fact that Sargent Shriver had just removed the “Acting” before my title and made me the permanent director of the Legal Services Program at the Office of Economic Opportunity (OEO). When I say “very private,” I mean there were only two of us—Howard Westwood and I.

Westwood, well into his 60s, was a partner at Covington and Burling; largely behind the scenes, he also was a key player in the creation of the Legal Services Program. Among many other actions, Westwood picked Clint Bamberger to be the program’s first director and then convinced the American Bar Association (ABA) leadership and Shriver that Bamberger was the man for the job. Before then, in 1964, Westwood had convinced me during an interview to give up the security of a federal civil service job and undertake an adventure as deputy director of an experimental Ford Foundation–funded neighborhood law office program in Washington, D.C. Having persuaded me to take the gamble, Westwood must have felt some responsibility for that decision because he took me under his wing and became my mentor. As a board member of the new organization, he pushed the notion that the program should offer poor people the same range of services as Covington and Burling provided their clients—appellate litigation, advocacy in the legislative and administrative rule-making arenas, etc., along with handling cases as traditional legal aid societies did.

By the time of our dinner at the 1966 NLADA meeting, Westwood had agreed to be NLADA’s pro bono “Washington counsel.” Because the staff was still headquartered in the ABA building in Chicago, Westwood was the only NLADA presence in the nation’s capital. At the time over 85 percent of the funding for NLADA’s civil legal aid members came from the federal government’s OEO Legal Services Program, so NLADA sorely needed Westwood’s presence and his advocacy of its members’ interests.

Our private celebratory dinner was one between mentor and mentee and, at least on the surface, between an NLADA lobbyist and a government official with influence over NLADA’s constituent organizations. But the main topic of our conversation was neither advice nor advocacy from Westwood. Instead he brought an idea to the table. Always a step ahead in his thinking, Westwood had been inspired by the *Gideon* decision. Why not a constitutional right to counsel in civil cases, he had asked. And then he posed the same question to me.

Westwood had brought along a short article he had written for the Washington, D.C., bar’s publication, making the argument for such a right. I remember that his piece pointed out how so much of the language and the rationale of *Gideon* applied to civil cases just as much as to criminal cases. One indication of the need for counsel that the Supreme Court cited in its *Gideon* opinion was that those who were in the same position as the indigent and could afford it always hired lawyers. That was just as true in civil court as in criminal proceedings. Another factor that the Court mentioned in *Gideon* was that the other side, for example, the prosecution, was represented by a lawyer. Again this was also true in civil cases when a poor person opposed a well-to-do individual or an institutional party. I recall being struck by this passage from *Gideon* quoted in Westwood’s article: “[R]eason and reflection require us to recognize that 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. This seems to us to be an obvious truth” (372 U.S. 335, 344 (1963)). Wasn’t this an equally “obvious truth” in civil as it is in criminal cases? Westwood asked.

If Westwood wanted to spark my interest in the possibility of a constitutional right to counsel in civil cases, he certainly succeeded. For the remaining nearly two years of my tenure as the OEO Legal Services Program director, I spent almost every spare moment researching that issue. I soon discovered that the *Gideon* decision had triggered interest among

several law reviews in this possible extension to civil cases. The Columbia and Yale law reviews, among others, either had already published notes on this topic or did while I was engaged in my hobby research on the issue.

I also took advantage of a “Law and Poverty” seminar I was teaching at Georgetown law school on Saturdays during the fall of 1967. All students were assigned to brief and argue one side or the other of the many constitutional issues that legal services lawyers would be asking American courts to decide over the next few years—welfare residency statutes (*Shapiro v. Thompson*, 394 U.S. 618 (1969)), man-in-the-house rules (*King v. Smith*, 392 U.S. 309 (1968)), prior hearings in welfare terminations (*Goldberg v. Kelly*, 397 U.S. 254 (1970)), etc. One student, Mickey Kantor, drew the pro side of another issue, that of a civil right to counsel. (Upon graduation, Kantor joined the Florida migrant legal services program, later was the lobbyist for the legal services community during the first two attempts to create a Legal Services Corporation, and eventually served as Pres. Bill Clinton’s trade representative and secretary of commerce.) He produced a good-enough brief and oral argument to earn the “book” in that class. His brief also provided valuable input for his professor’s research.

By March 1968 I was far enough along with my research to go public. On March 24, while addressing the Jacksonville Bar Association, I devoted the entire speech to this topic. Among other things, I said:

Due process refers to deprivations of life, liberty, and *property*, therefore to civil proceedings.... There is no valid reason why the basic concepts of due process which have been introduced in criminal proceedings should not also be incorporated in civil proceedings....

In *Douglas v. California*, the Court squarely held “there can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has.”

The Court could as well have substituted the word "trial" for "appeal".... Once one accepts the equal protection argument for a right to free counsel there is again no logical reason for limiting its scope to criminal proceedings.

My second epiphany occurred in 1973, when a brilliant Italian law professor, Mauro Cappelletti, asked me to come to his comparative law center at the University of Florence for a summer and work with him on a book comparing legal aid programs around the world. I arrived rather confident that the United States had the best and best-funded legal aid system of all. I left that summer with my eyes opened to the fact that England had had a statutory right to counsel in civil cases since 1495 and most European countries had created such statutory rights during the nineteenth century. Furthermore, several of those countries were funding their legal aid systems at a level several times higher than we were in the United States. This reactivated my commitment to do something about creating such a right in our country by sharing this foreign experience with American audiences and law review readers.

A third epiphany happened while I was attending the 1979 International Access to Justice Conference held in Florence. During the conference, attendees received the exciting news that the European Court of Human Rights had just filed an opinion finding a right to counsel in civil cases that controlled litigation in the regular courts for all members of the European Community. That decision, *Airey v. Ireland* (2 Eur. Ct. H.R., Report 305 (1979-1980)), was based on the European Community's human rights guarantee that civil litigants are to receive a "fair hearing" in civil as well as criminal cas-

es. If a "fair hearing" requires governments to provide free counsel to indigent litigants in Europe, why didn't "due process" and "equal protection" require the same in the United States?

Two years later, however, the U.S. Supreme Court issued its 5-to-4 decision in *Lassiter v. Department of Social Services* (452 U.S. 18 (1981)), apparently without knowing about and certainly without citing the European court's decision. The *Lassiter* opinion adopted a constricted view of due process which allowed the majority to deny a mother a right to counsel in proceedings terminating her parental rights. This ruling appeared to slam the door on the claim that due process *automatically* guaranteed a right to counsel in all parental termination cases. But many judges honored only the decision's headline: that there was a presumption against a right to counsel unless physical liberty was at stake. What these judges ignored was the text of the opinion requiring state courts to evaluate requests for counsel on a case-by-case basis, applying a three-factor test which, if satisfied, overcame that presumption.

A year after the *Lassiter* opinion I was appointed to the California Court of Appeal and was no longer in a position to litigate right-to-counsel cases. I did write a number of articles and gave a few speeches on the subject over the next two decades. But it was others who finally resurrected the right-to-counsel movement in the early twenty-first century, first in Maryland and Washington State and shortly thereafter on a national level with the creation of the National Coalition for a Civil Right to Counsel. I am sure Howard Westwood would be gratified to see that the torch he passed to me in 1966 is now being carried forward by so many willing hands.



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