

On the Anniversary of *Gideon*, an Argument for Free Civil Representation

THIS YEAR OUR NATION IS CELEBRATING the 50th anniversary of the historic *Gideon v. Wainwright* decision, in which the U.S. Supreme Court guaranteed indigent citizens the right to state-paid legal counsel for most criminal prosecutions. *Gideon* is well known to the American public, though not necessarily by name. Its fundamental holding makes up part of the famous *Miranda* warning that arrestees have the right to an attorney, and that if they cannot afford an attorney, one will be appointed at no cost.

The anniversary of this influential decision has led to renewed debate about the efficacy of the public defender system, with many commentators decrying the uneven provision of legal services, especially in this era of underfunded government programs. Today, with more than 10 times the number of inmates incarcerated than when *Gideon* was handed down, many believe that the good intentions of *Gideon* have not been fulfilled and that indigent criminal defendants are not getting equal access to justice.

Civil *Gideon*

However one may view the legacy of *Gideon* for criminal defendants, they at least have an established constitutional right to paid counsel. Another group of citizens who are unable to afford legal counsel may have even more to worry about: those who are on the brink of being deprived of such vital needs as food, shelter, and parental visitation rights. With them in mind, what is often called the “civil *Gideon*” movement has been born. In 2007, the American Bar Association’s House of Delegates unanimously called for free legal counsel, paid for by the government, to “low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody...”

Just over two years ago, California’s legislature passed the nation’s first civil *Gideon* law, the Sargent Shriver Civil Counsel Act. The Shriver Act became the first step toward a comprehensive plan for providing government-paid lawyers to qualifying litigants in civil cases, just as *Gideon* requires government-paid defense counsel in criminal cases.

At the time of the enactment of the Shriver Act, Assemblyman Mike Feuer framed the issue as follows: “How ironic that you can be arrested for stealing a small amount of food—a box of Twinkies from a convenience store—and you’re entitled to counsel. But if your house is on the line, or your child is on the line, or you’re being abused in a domestic relationship, you don’t have the same right to counsel.” It is ironic, indeed, that the words “Equal Justice Under Law” grace many of the finest courthouses in this wealthiest of nations while millions of poor citizens are denied the right to legal counsel in life-altering civil cases.

A poor person without a lawyer often fares much worse in the legal system than those who do have lawyers. Sitting judges recognize that the unrepresented poor are much more likely to experience uneven results in the civil justice system. However, judges are almost powerless to do anything about it, lest they be accused of advocating for one side and against another in a civil dispute.

The need for reform is unquestionable, but there are many who object to the government’s getting involved in the way envisioned by the Shriver Act, especially in this age of high taxes and imbalanced budgets. While these critics may understand the need for taxpayer funding for criminal defense lawyers, they assert that civil *Gideon* laws will unfairly skew the system in favor of the poor and will lead to increased costs in a judicial system that is already teetering on the brink of insolvency. Let us analyze this argument.

Consider housing cases. Landlord-tenant laws are notoriously complex, and even specialists in the field sometimes make serious errors in court. Residential landlord-tenant laws provide procedural and substantive protections for tenants. Given the law’s complexity and its appreciation of tenants’ rights, there are undoubtedly cases in which landlords succeed in evicting unrepresented tenants who simply do not know how to raise viable defenses that may otherwise prevail. In other cases, evictions can occur when landlords have not followed proper legal procedures, but no one apprised the court of the technical defects because the tenant defaulted for financial reasons. Critics of civil *Gideon* would claim that a free lawyer for tenants in these situations would allow them to game the system, leading to clogged courtrooms and increased societal costs. Is that argument sound?

First, the argument suggests that following legal procedures in eviction cases is voluntary instead of mandatory. In truth, everyone should follow the law, including landlords. If tenant families are being evicted pursuant to incorrect legal procedures, should not that practice be ended? If that practice continues because poor families cannot afford legal counsel, would not a fairer approach help solve a grave problem?

Second, in terms of effects on the system, most judges would prefer a contested case in which the adversaries are skilled professionals who can spot and frame the real issues in the case, as compared with a case in which one party is almost totally clueless about legal procedures and legal rights. Cases involving pro se litigants often take much more court time than cases staffed by attorneys. An unrepresented party’s unfamiliarity with court procedures tends to clog court calendars, leading to much less efficient courtrooms.

Third, providing free counsel for qualifying tenants would, in the long run, motivate landlords to follow the law and respect tenant rights, thus better assuring that the laws that are in place are followed.

The civil *Gideon* movement can be a critical component of the entire legal aid system, not just housing cases. The future success or failure of initiatives such as the Shriver Act will speak volumes about whether this nation and its people truly support the concept of equal justice under law. All California lawyers should educate themselves about the civil *Gideon* movement and about the benefits that will accrue to our justice system when indigent civil litigants enjoy the right to counsel in a meaningful way. ■

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