

Right to Counsel in Civil Cases

Clearinghouse REVIEW Journal of Poverty Law and Policy n July–August 2006 271

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Exploration of the expansion of the right to counsel in civil cases is based in substantial part on the fact that most criminal defendants have had a right to counsel since 1963. Criminal defendants who face incarceration are always entitled to rely on an attorney’s advice as they navigate their procedurally difficult cases. The attorneys must inform the defendants of their possible defenses, test the prosecution’s version of the facts, and make the most persuasive available legal arguments on the defendant’s behalf. Judges hearing criminal cases are accustomed to the presence of defense attorneys and thus are more aware of defendants’ rights. These rights are protected to an extent largely unheard of in the civil context. Given how important a criminal defendant’s right to counsel is to the fairness of the proceedings, would not a corollary right on the civil side be just as important?

However, enthusiasm for the notion of a right to counsel in civil cases inevitably runs up against the reality that implementation of the right to counsel in criminal proceedings has been piecemeal. More than forty years after the U.S. Supreme Court posited in *Gideon v. Wainwright* a constitutional right to counsel in criminal cases, in some parts of the country serious difficulties in securing that right remain. Any exploration of a civil right to counsel—a right often labeled a “civil Gideon”—must be based on an understanding of the criminal right-to-counsel experience.

I. Securing the Right: Lessons from *Gideon v. Wainwright*

The opinion in *Gideon v. Wainwright* offers many lessons for those advocating the right in civil cases.

A. *Gideon* Came Twenty-One Years After the Supreme Court Refused to Recognize a Categorical Right to Counsel in Criminal Cases

Although the Sixth Amendment may guarantee counsel in some criminal cases, the U.S. Supreme Court ruled in *Betts v. Brady* in 1942, the right depends entirely on the facts in any particular case.¹ If special circumstances threaten to rob the proceeding of fundamental fairness, the Court held, then appointment of counsel is required. The Court relied on the fact that, at the time, a majority of the states did not provide a right to counsel for all criminal defendants. The Court noted that the logic of *Betts*’s argument would require the appointment of counsel in civil cases, too.²

Given the firmness with which the *Betts* Court rejected a categorical approach to a right to counsel, reversal seemed unlikely. However, over the next few decades, the Court found that a variety of situations required counsel.³ Twenty-one years later, in *Gideon*, the Court held that the Sixth Amendment required the appointment of counsel in all felony cases.⁴

A Right to Counsel in Civil Cases: Lessons from *Gideon v. Wainwright*

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¹*Betts v. Brady*, 316 U.S. 455 (1942).
²*Id.* at 472, 473.

³ANTHONY LEWIS, *GIDEON'S TRUMPET* 120–22 (1964).

⁴*Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁷² Clearinghouse REVIEW Journal of Poverty Law and Policy n July–August 2006

A Right to Counsel in Civil Cases: Lessons from *Gideon v. Wainwright*

What led to *Betts*'s reversal is of particular interest in the context of claims for a civil *Gideon* because in 1981, in *Lassiter v. Department of Social Services*, the Court refused to rule that the federal Constitution guaranteed appointment of counsel for all parents facing the termination of parental rights.⁵ Rather, the Court ruled, in each case courts must weigh “the private interests at stake, the government’s interest, and the risk that the procedures used would lead to erroneous decisions” and then “set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.”⁶

A number of commentators predict, hopefully, that the Court will now see fit to overrule *Lassiter* by requiring appointed counsel in at least some categories of civil cases.⁷ Some of the conditions that contributed to the reversal of *Betts* are already in place on the civil side. First, widespread academic condemnation of *Betts* led to that decision’s demise. *Lassiter* has likewise been roundly condemned.

8

Second, the Court appears to have concluded that case-by-case determinations impose too great a burden on both trial and appellate courts.⁹ Case-by-case determinations are just as unwieldy and inaccurate on the civil side. Indeed, for this reason, the Alaska Supreme Court rejected *Lassiter*'s approach in favor of a bright-line rule requiring the appointment of counsel in all termination-of-parental-rights cases.¹⁰

Third, by the time the Court heard *Gideon*, criminal defendants in federal court and in all but five states were entitled to counsel pursuant to the state constitution, a state statute, or court rulings and practice.¹¹

Unfortunately a similar state of affairs on the civil side led to a different result in *Lassiter*. There the Supreme Court recognized that “33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases.”¹² Nonetheless, the Court held that whether the appointment of counsel was constitutionally required must be decided on a case-by-case basis.

And fourth, in *Gideon*, twenty-three states urged the Court to reverse *Betts*.¹³ This astonishing development appears to have stemmed from the fact that a majority of states already provided counsel for defendants in criminal cases—most as a matter of right. Although a majority of states arguing today for the recognition of a new constitutional right that would increase their constitutional obligations is difficult to imagine, it is not out of the question. State judges and legislators express growing concern about the widespread inability of low-income people to obtain counsel in civil cases. Moreover, “access to justice” commissions in many states include legislators and high-level members of the judiciary who, through their involvement, gain an understanding of both the

⁵*Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).
⁶*Id.* at 27.

⁷See, e.g., Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 LOYOLA UNIVERSITY OF CHICAGO LAW JOURNAL 363, 380–81 (2005); Joan Grace Ritchey, *Limits on Justice: The United States’ Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASHINGTON UNIVERSITY LAW QUARTERLY 317, 341 (2001).

⁸LEWIS, *supra* note 3, at 120; see Boyer, *supra* note 7, at 380 n.83.

⁹In *Gideon* the Court complained, “[s]ince 1942, when *Betts v. Brady*, 316 U.S. 455, was decided by a divided Court, the problem of a defendant’s federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts.” 372 U.S. at 337–38.

¹⁰*Matter of K.L.J.*, 813 P.2d 276, 282 n.6 (Alaska 1991).

¹¹Yale Kamisar et al., *Gideon at 40: Facing the Crisis, Fulfilling the Promise*, 41 AMERICAN CRIMINAL LAW REVIEW 135, 139 (2004).

¹²*Lassiter*, 452 U.S. at 33–34 (1981).

¹³*Gideon v. Cochran*, Brief for the State Government Amici Curiae, 1962 WL 75209 (S. Ct. filed Nov. 23, 1962); *Gideon v. Cochran*, Brief for State of Oregon as Amicus Curiae, 1962 WL 75207 (S. Ct. filed Oct. 25, 1962).

Clearinghouse REVIEW Journal of Poverty Law and Policy n July–August 2006 273

A Right to Counsel in Civil Cases: Lessons from *Gideon v. Wainwright*

importance of civil legal representation and the extreme paucity of resources for lawyers for the poor.¹⁴

B. Practical Difficulties Need Not Preclude Recognition of the Right to Counsel

Opponents of expanding the right to counsel to civil cases often argue that the Supreme Court issued its *Gideon* opinion in a more innocent time, when courts and

legislatures were unfamiliar with the expense and practical difficulties that would accompany the right to counsel in criminal cases. But the *Gideon* Court was warned that granting a right to counsel in felony cases would require the Court to rule next on a right to counsel in misdemeanor and civil cases and on the adequacy of counsel, would lead to holdings that states must cover other vital expenses of criminal proceedings, would impose an enormous financial burden on the states, and would be unworkable due to an insufficient number of attorneys.¹⁵

The *Gideon* opinion itself does not indicate why the Court decided to recognize the right to counsel despite these problems. Nonetheless, the fact that the Court was undaunted demonstrates that awareness of similar obstacles on the civil side need not doom a litigation initiative to establish a civil *Gideon*. However, the *Gideon* example does suggest that courts will find it easier to evaluate the claim for a civil right to counsel in the face of solutions to these practical issues.

Notably the Supreme Court continues to expand the scope of the right to counsel in criminal cases, notwithstanding clear recognition of the difficulties that states face in implementing *Gideon*. For example, the Court extended the right to defendants charged with misdemeanors and facing incarceration and to defendants subject to a suspended sentence that might result in incarceration.¹⁶

II. Implementing the Right:

Post-*Gideon* Lessons

In the four decades since the *Gideon* decision, the Court's ruling has had profound effects on the representation of low-income criminal defendants. At the same time, the quality of representation that defendants receive varies widely, and many defendants receive constitutionally inadequate representation. Civil *Gideon* advocates need to be familiar with this experience. Perhaps the most important post-*Gideon* lesson, however, is what we now know about what is likely to make a publicly funded counsel system

successful.

A. Successes and Failures in Implementing *Gideon*

Gideon transformed criminal prosecutions and generated significant funding for indigent defense nationally. Although nationwide data seem nonexistent, in 1996 the nation's seventy-five most populous counties alone spent a combined \$1.2 billion on indigent defense.¹⁷ This far exceeds what the entire country spends on civil legal services for the poor.¹⁸

Gideon resulted in the eventual provision of counsel, most of it publicly financed, for all criminal defendants facing incarceration.

19 Some publicly financed counsel

¹⁴See Robert Echols, *The Rapid Expansion of "State Access to Justice" Commissions*, 19 MANAGEMENT INFORMATION EXCHANGE JOURNAL 41-44 (2005), available at www.nlada.org/DMS/Documents/1125688879.69/MIE%20Journal%20summer%2005-ATJ%20article.pdf.

¹⁵See Brief for the Respondent, *Gideon v. Wainwright*, 1963 WL 66427, *47, 48, 50, 53 (Jan. 2, 1963); LEWIS, *supra* note 3 at 161, 167, 187; Brief for the State Government Amici Curiae, *Gideon v. Wainwright*, 1962 WL 75209, *21 (Nov. 23, 1962).

¹⁶*Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Alabama v. Shelton*, 535 U.S. 654 (2002).

¹⁷ Press Release, Bureau of Justice Statistics, Two of Three Felony Defendants Represented by Publicly Financed Counsel (Nov. 29, 2000), available at www.ojp.usdoj.gov/bjs/pub/press/iddcpr.htm.

¹⁸As of 2005, programs funded by the Legal Services Corporation (LSC) received \$331.8 million from LSC and \$352.3 million from other sources. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 18 & n.22 (2005), available at www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf.

¹⁹CAROLINE WOLF HARLOW, U.S. DEPARTMENT OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 7 (2000), available at www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf.

²⁷⁴ Clearinghouse REVIEW Journal of Poverty Law and Policy n July–August 2006

A Right to Counsel in Civil Cases: Lessons from *Gideon v. Wainwright*

systems offer extremely high-quality representation.

The Public Defender Service

of the District of Columbia, which requires its attorneys to undergo rigorous training before they can represent clients and to continue training throughout the course of their employment, is one example.²⁰ The Bronx Defenders and Neighborhood Defender Service of Harlem, pioneers in providing holistic representation to their clients, are others.²¹ And the quality of defense lawyering overall has improved in the past forty years, no doubt in part because of *Gideon*.²²

Beyond the benefits for individual clients, the universal right to counsel in criminal cases has positively influenced the way the criminal justice system operates. The mere presence of lawyers in all cases means that criminal courts often pay more attention to due process and other constitutional rights than many civil courts do.²³ Public defenders inform legislators and other policymakers about the reality of their clients' lives and identify policy reforms

that will help prevent crime and reduce unintended and unfair effects of criminal justice policy.²⁴

However, for too many defendants, representation falls far below widely accepted standards.²⁵ Just ten years after

Gideon, Judge David Bazelon wrote that many defendants were represented only by “walking violations of the Sixth Amendment.”²⁶ Thirty years later, Stephen Bright warned that “[n]o constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel.”²⁷ Clients with private attorneys speak to their attorneys more quickly after arrest and more often throughout the representation than clients with publicly financed counsel do.²⁸ The procedures used by private attorneys and publicly financed attorneys also differ, with defendants whom the latter represent being more likely to plead guilty and less likely to go to trial or to a trial by jury.²⁹ The catalogue of the ways in which states have failed to implement *Gideon* is long. In the worst case no counsel is appointed at all.³⁰ More often counsel is appointed too late—after a defendant has been incarcerated for longer than his potential sentence, for example.³¹ Appointed counsel may have no training or experience in criminal

²⁰Charles Ogletree, *An Essay on the New Public Defender for the 21st Century*, 58 LAW AND CONTEMPORARY PROBLEMS 81, 90–93 (1995).

²¹Malia Brink, *Indigent Defense*, CHAMPION, May 2005, at 30, 33.

²²Malia Brink, *Interview with Norman Lefstein—2005 Champion of Indigent Defense Award Winner*, CHAMPION, Jan.–Feb. 2006, at 38, 38–39.

²³E.g., in the Chicago Housing Court, where only 5 percent of tenants facing eviction have lawyers, hearings typically last less than two minutes, and judges frequently fail to observe important procedural protections such as swearing in witnesses, asking tenants if they have a defense, and examining the landlord’s eviction notice. LAWYERS’ COMMITTEE FOR BETTER HOUSING, NO TIME FOR JUSTICE: A STUDY OF CHICAGO’S EVICTION COURT 4 (2003).

²⁴Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEORGETOWN JOURNAL OF LAW AND ETHICS 401, 439–41 (2001).

²⁵The American Bar Association catalogued many of the indigent defense delivery system’s fundamental flaws. See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE (2004), available at www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

²⁶David Bazelon, *The Defective Assistance of Counsel*, 42 UNIVERSITY OF CINCINNATI LAW REVIEW 1, 2 (1973), quoted in Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANNUAL SURVEY OF AMERICAN LAW 783, 815 (1997).

²⁷Stephen B. Bright, *Turning Celebrated Principles into Reality*, CHAMPION, Jan.–Feb. 2003, at 6.

²⁸HARLOW, *supra* note 19, at 8.

²⁹*Id.*

³⁰See AMERICAN BAR ASSOCIATION, *supra* note 25. Evidence suggests that many states violate their obligation under *Alabama v. Shelton*, 535 U.S. at 654, to appoint counsel for defendants facing a suspended sentence in misdemeanor cases. See, e.g., Gerald Lippert, *Affiliate News*, CHAMPION, Aug. 2004, at 26; Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS LAW JOURNAL 835, 843 n.35 (2004).

³¹SARAH GERAGHTY & MIRIAM GOHARA, NAACP LEGAL DEFENSE & EDUCATION FUND, ASSEMBLY LINE JUSTICE: MISSISSIPPI’S INDIGENT DEFENSE CRISIS 3, 6, 8 (2003), available at http://naacpldf.org/content/pdf/ms_indigent/Assembly_Line_Justice.pdf; see also Barbara E. Bergman, *Verbatim*, CHAMPION, Sept.–Oct. 2005, at 41.

Clearinghouse REVIEW Journal of Poverty Law and Policy n July–August 2006 275

A Right to Counsel in Civil Cases: Lessons from *Gideon v. Wainwright*

law. One Georgia real estate attorney had to

sue the court system to prevent it from appointing him to any more criminal cases, and one-third of the lawyers who represented people sentenced to death in Illinois had been disbarred or suspended.³² Some counsel face financial pressures so overwhelming that they fail to perform tasks essential to an adequate defense.³³ Some attorneys have fallen asleep or been drunk during their clients' trials.³⁴

B. Conditions that Result in Adequate Representation

More than forty years of experience attempting to implement *Gideon* has shed light on the conditions that result in constitutionally adequate representation of indigent criminal defendants. Many of these factors are likely to apply in the civil context, too.

1. Adequate Funding

The most important factor is clearly adequate funding.³⁵ Without it, even the brightest, most hardworking defense attorney cannot provide adequate representation. Funding often depends on the state's fiscal health but also on the inclinations of its legislature, governor, attorney general, and judiciary.

Although raising funds to finance civil legal aid may be extraordinarily difficult, it may be less difficult than raising adequate funding for indigent criminal defense. For several decades—and with increasing vigor since Congress cut federal Legal Services Corporation funding in 1996—civil access-to-justice advocates have been educating state legislatures, judiciaries, and executive branch personnel about how society benefits when low-income people are represented in civil cases. Even absent a right-to-counsel mandate, more states are funding civil legal services.³⁶ The relative attractiveness of civil litigants, as contrasted with people charged with crimes, should also help make courts and legislatures more amenable to claims for financing a civil right to counsel. Indeed, commentators have noted the gross disparity in not providing counsel for civil litigants who face serious consequences such as domestic

violence or loss of housing, while providing counsel for criminal defendants facing nominal prison time.³⁷

2. Manner of Providing Counsel

How counsel is provided—whether through institutional providers, private attorneys appointed for individual cases or with a contract to handle all cases for a jurisdiction, or a combination—has an enormous impact on quality.³⁸ Contractors who agree to take on all of a jurisdiction's cases have a financial incentive to spend as little time as possible on each case and to avoid travel and legal research costs.³⁹ When the contract comes with little compensation and permits maintenance of a private caseload, defenders have every incentive to spend even less time on their indigent clients. Compounding the problems, some jurisdictions award contracts to the lowest bidder, with no quality control whatsoever.⁴⁰

In jurisdictions where attorneys are appointed on an hourly basis, fees are often

³²Bright, *supra* note 27.

³³Kate Jones, *Indigent Defense*, CHAMPION, Aug. 2001, at 35 (2001); GERAGHTY & GOHARA, *supra* note 31.

³⁴Stephen B. Bright, *Death in Texas*, CHAMPION, July 1999, at 16, 18 (noting that the Texas Court of Criminal Appeals has confirmed three death sentences in cases in which defense attorneys slept during portions of the trial).

³⁵See Bright, *supra* note 26, at 816.

³⁶BRENNAN CENTER FOR JUSTICE, STRUGGLING TO MEET THE NEED: COMMUNITIES CONFRONT GAPS IN FEDERAL LEGAL AID 7 (2003), available at www.brennancenter.org/resources/atj/atj8.pdf.

³⁷See, e.g., Deborah L. Rhode, *Access to Justice*, 69 FORDHAM LAW REVIEW 1785, 1799; Minutes of the ABA Task Force on Access to Civil Justice Meeting, Nov. 20, 2005.

³⁸CAROL J. DEFRANCES, U.S. DEPARTMENT OF JUSTICE, STATE-FUNDED INDIGENT DEFENSE SERVICES 1999, 3 (2001), available at www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf.

³⁹"[C]ontract systems were developed in the 1970's as a response to budget pressures faced by states and counties post-*Gideon*." Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONSTITUTIONAL LAW QUARTERLY 625, 679 (1986).

⁴⁰Bright, *supra* note 27, at 8. See also Bright, *supra* note 26, at 788.

276 Clearinghouse REVIEW Journal of Poverty Law and Policy n July–August 2006

A Right to Counsel in Civil Cases: Lessons from *Gideon v. Wainwright*

far too low to allow the attorneys to recoup their costs. The problems are particularly severe where fees are capped at a low level, making it difficult for attorneys to afford to engage in vigorous representation in time-consuming cases.⁴¹

Representation by adequately funded institutional providers will almost always be of higher quality than representation by attorneys in private practice.⁴² An institutional provider can offer centralized training and continuing education, shield individual attorneys from pressure by judges and legislators, and take advantage of economies of scale.

Any expansion of the right to counsel in civil cases will increase the importance of

carefully considering which scheme can best provide the mandated level of representation. Institutional legal aid programs that the Legal Services Corporation and other sources fund already provide most civil legal services for low-income people who lack a right to counsel. Some civilright-to-counsel schemes currently provide counsel through court-appointed private attorneys; others do so by contracting with public defenders or civil legal aid lawyers.⁴³

3. Manner of Appointing Counsel

Who does the appointing is just as important as who is appointed. Attorneys will inevitably feel pressure to please whoever appoints them, causing serious problems if the appointer is the presiding judge.⁴⁴ Whoever makes the appointments must not be subject to political pressures. The best practice is to have an independent agency or board appoint counsel.⁴⁵ At the very least, if the judiciary is involved, the one who appoints should be court personnel or a judge other than the one presiding over the defendant's case.

4. Judicial Culture

Judicial and legal culture have an enormous impact on the quality of representation.

In many parts of the country, "poor representation resulting from lack of funding and structure has become a part of the culture of the courts, and it has been accepted as the best that can be done with the limited resources available."⁴⁶

Whether tolerance of inadequate representation results from malice, a desire for fast-moving dockets, or a chronic shortage of funds, at least some judges turn a blind eye to inadequate representation about which they are fully aware.⁴⁷

At the same time, a litigation and public education campaign waged by the National Legal Aid and Defender Association, the American Bar Association, the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, the Brennan Center for Justice, and others is educating judges about the extent to which the Constitution requires the appointment not just of counsel but of constitutionally

adequate counsel. This campaign is changing the prevailing judicial culture in many places.

5. Minimum Standards for Counsel

Without standards, a funding entity has no way to know how much funding to allocate, and an appointing entity has no guidance as to whom it should retain, what level of

⁴¹Bright, *supra* note 26, at 818.

⁴²*Id.* at 828; Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 UNIVERSITY OF PITTSBURGH LAW REVIEW 293, 304–5 (2002); Robert Spangenberg & Marea Beeman, *Indigent Defense Systems in the United States*, 58 LAW AND CONTEMPORARY PROBLEMS 31, 36–37 (1995); *Nicholson v. Williams*, 203 F. Supp. 2d 153, 238–40, 260 (E.D.N.Y. 2002).

⁴³E.g., in New York City children’s representation mandated by the New York Family Court Act is provided through contracts with institutional providers, while statutorily mandated representation for adults is provided by private attorneys selected from a panel. *Nicholson*, 203 F. Supp. 2d at 223.

⁴⁴See Kim Taylor-Thompson, *Tuning Up Gideon’s Trumpet*, 71 FORDHAM LAW REVIEW 1461, 1484 (2003); Bright, *supra* note 27, at 8. See also GERAGHTY & GOHARA, *supra* note 31, at 18.

⁴⁵See AMERICAN BAR ASSOCIATION, *supra* note 25; Bright, *supra* note 26, at 828; Bernhard, *supra* note 42, at 304–5.

⁴⁶Bright, *supra* note 27, at 9.

⁴⁷Bruce Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY LAW JOURNAL 1169, 1193–94 (2003).

Clearinghouse REVIEW Journal of Poverty Law and Policy n July–August 2006 277

A Right to Counsel in Civil Cases: Lessons from *Gideon v. Wainwright*

compensation to set, and what activities it should expect attorneys to perform.

Standards are an essential counterweight to the competing financial pressures facing state or county legislatures and to the desire of the judiciary to move their dockets along.⁴⁸ Standards help trial judges determine whether representation is adequate and help appellate courts determine adequacy after the fact.⁴⁹ In institutional reform litigation, standards can reliably compel a state or county to bring its indigent defense system in line with the Constitution.⁵⁰

The American Bar Association, the National Legal Aid and Defender Association, and others have developed standards setting minimum training and experience requirements for lawyers (sometimes called eligibility standards), establishing what tasks an attorney must perform (sometimes called performance standards), and governing how institutional providers should be administered (sometimes called administration standards).

⁵¹ The national guidelines are quite specific in some areas, and specificity has proven extremely valuable to courts attempting to determine what constitutes constitutionally adequate representation.

⁵² However, observers have noted, some of the existing guidelines are

extremely vague.⁵³ This may be because of the difficulty of prescribing standards for all criminal cases and for all jurisdictions.

⁵⁴ Thus the onus falls on the states to prescribe minimum standards for their jurisdictions, and while a few have done so, many have not.⁵⁵

Of course, some entity must be responsible for enforcing standards, but surprisingly many jurisdictions have no such entity.⁵⁶ Instead jurisdictions make contracts or appointments with no inquiry into attorneys' training and experience, and no one ever evaluates caseloads, plea rates, whether attorneys conduct investigations or engage in motion practice, or any other indicia of competent representation.

Given the experience on the criminal side, establishing and enforcing standards can predictably be extremely useful in helping secure the right to counsel in civil cases. Existing civil-side standards can serve as a useful guide,

⁴⁸See David Carroll, *Primer on Indigent Defense Workload Standards & Case Weighting 1* (2006) (unpublished manuscript on file with Laura Abel) ("[T]he strong pressures of favoritism, partisanship, and/or profits on public officials underscore the need for standards to assure the fundamental quality in all facets of government.")

⁴⁹See Bernhard, *supra* note 42, at 335; Klein, *supra* note 39, at 655.

⁵⁰Bernhard, *supra* note 42, at 303.

⁵¹See *id.* The Institute for Law and Justice compiled the national standards and existing state standards. See INSTITUTE FOR LAW AND JUSTICE, *COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS* (2000), available at www.ojp.usdoj.gov/indigentdefense/compendium/welcome.html.

⁵²In its seminal opinion articulating the standard for when the assistance of criminal defense counsel is constitutionally inadequate, the U.S. Supreme Court rejected the notion that violation of the American Bar Association and other standards could constitute *per se* ineffective assistance. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Nonetheless, the Supreme Court, lower federal courts, and state courts find the existing standards to be extremely useful guidelines in assessing counsel's performance. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 2535–37 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *United States v. Gipson*, 985 F.2d 212, 215–16 (5th Cir. 1993); *State v. Peart*, 621 So. 2d 780 (La. 1993); *State v. Smith*, 681 P.2d 1374, 1380–82 (Ariz. 1984).

⁵³See, e.g., Bernhard, *supra* note 42, at 336.

⁵⁴The ABA Criminal Justice Standards say explicitly that they "are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances." ABA, *Standards for the Defense Function*, Standard 4-1.1, available at www.abanet.org/crimjust/standards/dfunc_blk.html.

⁵⁵Lefstein, *supra* note 30, at 907–8. Of the few jurisdictions that have adopted binding standards, Massachusetts and Indiana have mandatory standards covering topics such as workload, *id.* at 908, and Texas and Georgia have statutes requiring counsel to meet with clients as soon as possible after they are appointed. GERAGHTY & GOHARA, *supra* note 31, at 8.

⁵⁶E.g., the NAACP Legal Defense and Educational Fund reports: "In Mississippi, there is no supervision or evaluation of indigent defense services, nor are there uniform standards insuring that county-funded defenders are providing a basic, constitutionally adequate defense." GERAGHTY & GOHARA, *supra* note 31, at 17. See also Bernhard, *supra* note 42, at 304–5; DEFRANCES, *supra* note 38, at 8 (identifying Missouri and Maine as states where all attorneys are considered eligible to accept appointments, regardless of training and qualifications).

²⁷⁸Clearinghouse REVIEW *Journal of Poverty Law and Policy* n July–August 2006

A Right to Counsel in Civil Cases: Lessons from *Gideon v. Wainwright*

although there are no national standards for some types of civil cases in which counsel are currently appointed.⁵⁷ The development of standards for counsel in a particular type of case should accompany any expansion of the right to counsel in civil cases.

6. Uniform System of Representation

A uniform system for providing defense services throughout a state contributes to constitutionally adequate representation. In some states, counties have the primary or sole responsibility for funding indigent defense services.⁵⁸ This leads to a disastrous situation in the poorest counties, which often have the highest crime rate but lack the tax base to fund adequate representation.⁵⁹ Counties are also more vulnerable to economic downturns and to sharp increases in caseload.⁶⁰ For each county to develop its own standards and quality oversight system is inefficient. Moreover, in small judicial and legal communities defense attorneys can feel enormous pressure to accommodate the wishes of the local judges or legislatures, even if that means advocating less vigorously for their clients.

III. The Current Indigent Defense Reform Movement

Defendants and their advocates have used litigation, legislative advocacy, and public education to compel states and counties to implement *Gideon*. The willingness of judges and legislators to expand the right to counsel in civil cases may well depend on their experience with this indigent defense reform effort. In recent years indigent defense reform advocates have had some notable successes, which may be a useful road map for civil *Gideon* efforts.

Over the past decade Connecticut, Georgia, Massachusetts, Montana, New York, and Allegheny County, Pennsylvania, have all embarked on significant indigent defense reform efforts after indigent defendants and their advocates sued them.⁶¹ The reforms have included more state funding or staff for public defender programs, higher fees for appointed counsel, the creation of a statewide public defender program or new public defender offices, the adoption of statewide practice standards, the establishment of an entity responsible for oversight, and the implementation of training programs for attorneys and other staff.⁶² Although how well the reforms will be implemented remains to be seen, these

efforts are indisputably the most significant development in indigent defense reform in the past several decades. The successful reform efforts share a number of characteristics. First, they resulted from a creative combination of litigation, legislative efforts, and public education. Impact cases in Connecticut, Montana, and New York settled after important state actors—Connecticut’s governor, Montana’s attorney general, and New York’s chief judge—lobbied successfully for funding and other significant reforms.⁶³ In Georgia and Massachusetts the reforms resulted

⁵⁷See, e.g., ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC rev. version); ABA Standards for Civil Legal Aid Programs.

⁵⁸Bright, *supra* note 27, at 7; Kate Jones, *Delaware County, PA, Board of Judges Accepts Improved Assigned Counsel Plan*, CHAMPION, July 2003, at 45.

⁵⁹Klein, *supra* note 39, at 661.

⁶⁰Brink, *supra* note 21.

⁶¹Texas also enacted an indigent defense reform bill in 2003 without being sued. Rodney Ellis, *Gideon’s Promise: The Texas Story*, CHAMPION, April 2003, at 61.

⁶²Bernhard, *supra* note 42, at 327–28 (Connecticut); Adele Bernhard, *Exonerations Change Judicial Views on Ineffective Assistance of Counsel*, 18 CRIMINAL JUSTICE 37, 41 (2003) (Georgia); Brink, *supra* note 21 (Massachusetts); Malia Brink, *Indigent Defense*, CHAMPION, Aug. 2005, at 34 (Montana); Jones, *supra* note 58 (Allegheny County, Pennsylvania); Lawrence C. Marshall, *Gideon’s Paradox*, 73 FORDHAM LAW REVIEW 955, 963 (2004) (New York).

⁶³Bernhard, *supra* note 42, at 327–28; Brink, *supra* note 21; John Caher, *Assigned-Counsel Rate Hike Is in Sight*, NEW YORK LAW JOURNAL, March 1, 2003, at 1.

Clearinghouse REVIEW Journal of Poverty Law and Policy n July–August 2006 279

A Right to Counsel in Civil Cases: Lessons from *Gideon v. Wainwright*

from a series of smaller lawsuits.⁶⁴ In Georgia civil rights groups, bar organizations, a judiciary-appointed blue-ribbon panel, the legislative black caucus, and others worked together to mobilize support.⁶⁵ Newspaper articles documenting the government’s failure to provide competent counsel to many defendants influenced Connecticut, Georgia, and New York.⁶⁶ These campaigns demonstrate that, despite courts’ reluctance to order legislatures to spend money, a strategic combination of litigation, lobbying, and public education can result in the allocation of funding for lawyers for the poor.⁶⁷ Ongoing public education is necessary, too, because real reform needs continued legislative and public support each year as the legislature considers the budget.

A second tool of many successful reform efforts is publicizing how the indigent defense system’s shortcomings harm individuals.

⁶⁸ Earlier efforts focusing on systemic

problems but not presenting evidence of harm to individual defendants tended not to succeed.⁶⁹ Evidence of harm to individuals makes clear to the courts that what is at stake is far more consequential than the interests of the underpaid lawyers. Moreover, the legislature's cooperation is generally essential, and evidence of harm to individual constituents is hugely persuasive to legislators.

The type of harm to individuals that may have been most significant is the increasing evidence of wrongful convictions.⁷⁰

Adele Bernhard credits exonerations for relaxing the stringent *Strickland v. Washington* standard for postconviction assistance-of-counsel claims and making courts more receptive to affirmative indigent defense reform litigation.⁷¹

Exonerations were also behind the passage of the federal Innocence Protection Act of 2004, which, among other mandates, provides grants to the states to improve representation by capital counsel and requires adoption of standards for the performance of capital counsel.⁷²

In addition to pointing to harm to individuals, indigent defense reform advocates have begun calculating the cost to the government of lack of competent counsel. A Mississippi report found that inadequate representation caused defendants to spend unnecessary time in jail awaiting trial. Counties spend as much as \$16.5 million annually unnecessarily housing inmates, defendants lose income (and government consequently loses tax revenue), and

⁶⁴In Georgia the Southern Center for Human Rights filed six different lawsuits. Adele Bernhard, *Exonerations Change Judicial Views on Ineffective Assistance of Counsel*, 18 CRIMINAL JUSTICE 37, 41 (2003). In Massachusetts at least three separate developments led to the 2005 reforms. First, attorneys began refusing to take new cases. Second, after the ACLU filed suit on behalf of county defendants who had been unable to obtain counsel, Massachusetts' high court ordered the release of pretrial detainees held for more than seven days without access to counsel and ordered charges pending for more than forty-five days to be dropped against any defendant who had not had access to counsel. Seeking an increase in compensation for counsel, Holland & Knight filed a class action on behalf of indigent defendants. The legislature acted to raise rates for court-appointed counsel after Massachusetts' high court scheduled oral argument in that case. Malia Brink, *Indigent Defense*, CHAMPION, Sept.–Oct. 2005, at 56.

⁶⁵Stephen Bright, *Indigent Defense*, CHAMPION, Dec. 2003, at 50, 55; Marion Chertoff, *Indigent Defense: The Georgia Indigent Defense Act of 2003*, CHAMPION, Aug. 2003, at 61, 62–63.

⁶⁶Bernhard, *supra* note 42, at 332 (Connecticut and New York); Steven D. Benjamin, *The Press Is Finally Getting It*, CHAMPION, April 2004, at 36 (Georgia).

⁶⁷Prior to settlement, some of the courts hearing indigent defense reform cases indicated their willingness to step in if the legislature refused to act. See, e.g., *New York County Lawyers' Association v. State*, 742 N.Y.S.2d 16, 18–20 (N.Y. App. Div. 2002). These statements may demonstrate a similar receptiveness to arguments that the role of courts—and not only of the legislature—is to ensure that low-income people have access to counsel in civil cases.

⁶⁸Bernhard, *supra* note 42, at 325, 327, 330.

⁶⁹*Id.* at 325–26. See also *Quitman County v. State*, 910 So. 1032, 1037 (Miss. 2005).

⁷⁰Rhode, *supra* note 37, at 1022–23; Bernhard, *Exonerations*, *supra* note 62; Marshall, *supra* note 62, at 964–65; Brink, *supra* note 22.

⁷¹Bernhard, *Exonerations*, *supra* note 62, at 37–38 (citing *Strickland v. Washington*, 466 U.S. 668).

72 Marshall, *supra* note 62, at 966–67, citing Innocence Protection Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

280 Clearinghouse REVIEW Journal of Poverty Law and Policy n July–August 2006

A Right to Counsel in Civil Cases: Lessons from *Gideon v. Wainwright*

defendants' families lose child support payments.⁷³

Similar studies highlighted inaccurate outcomes due to the absence of counsel in many civil proceedings.⁷⁴ Concern over unnecessary foster care placements led Arkansas to strengthen a law providing a right to counsel for indigent custodial parents in abuse and neglect proceedings.⁷⁵

Indigent defense reform cases may have a spillover effect for civil Gideon efforts by making courts and legislatures more aware of the effect when counsel are absent or lack the resources for competent representation. However, courts and legislatures familiar with the indigent defense reform movement may be even more reluctant to support expanding the right to counsel on the civil side if they realize that implementing a meaningful right to counsel is not cheap and requires constant oversight. At a minimum, people working for indigent defense reform and people exploring a civil right to counsel must talk to each other. Through discussion and coordination they may also be able to avoid the risk that a legislature will find funding for criminal counsel by taking it away from civil counsel, or vice versa.⁷⁶

IV. Conclusion

The experience with the right to counsel in criminal cases offers clear lessons. Nothing is impossible. *Lassiter* need not be the last word—the Supreme Court does change its mind. State legislation and court rulings can both indicate to the federal courts that a right to counsel is generally accepted in the states. Support from attorneys general, the judiciary, and other state actors can also help. Analysis and documentation of the burdens that the *Lassiter* case-by-case analysis imposes on courts, states, and litigants are needed. A constitutional right to counsel can leverage enormous amounts of money to provide representation for many litigants. The presence of counsel in all

cases can also noticeably improve both court operations and observance of litigants' constitutional rights.

At the same time, winning a right to counsel is only the beginning. Many people facing criminal charges languish in jail for too long before counsel is appointed. Too often, the attorney appointed lacks the time and resources to provide a competent defense. Moreover, too many appointed attorneys are beholden to judges for their appointments and so are unable to provide truly independent representation.

Affirmative litigation can result in courts enforcing the right to counsel. The cases likeliest to succeed have support from a variety of stakeholders, are combined with legislative efforts, and can demonstrate harm to individuals and shocking results from the denial of counsel.

Widely publicized exonerations, pathbreaking litigation, and diligent legislative work have brought substantial indigent defense reform in the past few years. This may spill over to help civil Gideon efforts, or it may harm those efforts. At the very least, people interested in expanding the right to counsel in civil cases need to be aware of the criminal-side experience as they consider their own strategy for reform.

⁷³CARL BROOKING & BLAKELY FOX, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, ECONOMIC LOSSES AND THE PUBLIC SYSTEM OF INDIGENT DEFENSE: EMPIRICAL EVIDENCE ON PRE-SENTENCING BEHAVIOR FROM MISSISSIPPI 3 (2003), available at www.naacpldf.org/content/pdf/indigent/Mississippi_Economic_Study.pdf.

⁷⁴See, e.g., COMMUNITY TRAINING AND RESOURCE CENTER AND CITY-WIDE TASK FORCE ON HOUSING COURT, HOUSING COURT, EVICTION AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL iv (1993) (providing attorneys to all tenants facing eviction in New York City could prevent 4,873 families and 3,567 individuals from needing emergency shelter each year and could save almost \$160 million annually in emergency shelter costs).

⁷⁵ARK. CODE ANN. § 9-27-401 (West, Westlaw through 2006 first extraordinary session); Ark. Sup. Ct. Admin. Order 15 (2001); Telephone Interview with Jean Carter, Executive Director, Center for Arkansas Legal Services (Jan. 31, 2006).

⁷⁶For one of just many instances in which civil legal aid programs and public defenders have been pitted against each other, see Klein, *supra* note 39, at 688–92 (arguing that Interest on Lawyers' Trust Account Programs, which were set up to supplement the dwindling federal contribution to civil legal aid funding, should be used to support indigent criminal defense programs).