Gideon’s Bullhorn: Sounding a Louder, Clearer Call for a Civil Right to Counsel

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Abstract

While the right to counsel in criminal proceedings was established by the Supreme Court in Gideon v. Wainwright, the Supreme Court has chosen not to extend that right to the civil context. Since inception, the Civil Gideon movement has sought to establish a civil right to counsel, but has been plagued by setbacks. This article examines those setbacks and advocates for the implementation of a realistic and pragmatically constructed civil equivalent to the right to counsel established in Gideon. By reconciling the heart of Gideon with modern conceptions of morality and offering both criticisms and suggestions, this article offers a renewed vision for the Civil Gideon movement, one that is rooted in the moral/formal tensions of legal liberalism, and that attempts to strike a proper balance between utopian visions of legal paradise and “realistic” understandings grounded in the pessimism of temporal and human limitation.

Introduction

In August of 2006, the American Bar Association (ABA) House of Delegates passed Resolution 112A, which specifically encouraged legislatures to provide legal counsel to low-income persons in civil proceedings involving “basic human needs” (American Bar Association 2006). This resolution in many ways embodies the heart of the “Civil Gideon” movement, a movement designed to provide civil defendants the same right to counsel given to criminal defendants. The bedrock, and namesake, of the
Civil Gideon movement is the Supreme Court’s 1963 decision in *Gideon v. Wainwright* (see Table 1), a decision as unlikely as it was radical. In it, the Court held that the Sixth Amendment of the U.S. Constitution, which provides that in all criminal prosecutions the accused should “enjoy the assistance of counsel,” is obligatory upon states through the Fourteenth Amendment’s Due Process Clause (*Gideon v. Wainwright* 1963).¹

Though *Gideon* was progressive in 1963, today, most Americans take the right to counsel in criminal proceedings for granted, as many have grown up knowing nothing but access to this right. As time passes, and as the United States continues to weather the worst recession since the Great Depression (Domitrovic 2013), it is the right time to take an honest look at what a modern equation of civil justice, couched within a rigorously moralistic framework, should look like. With the current historically high unemployment rate and overborne prisons and judicial systems, our responsibility to provide recourse for those charged with a civil wrong ought to be re-examined from both a legal and public policy perspective (Houseman 1998:369). Because “determining the correct legal outcome is rendered almost impossible without effective counsel,” (Sweet 1998: 503) we, as a just society, ought to ask whether the judiciary is providing this. In the words of Civil Gideon advocate Alan Houseman, “[n]ow is the time to reassess the mission, purposes, objectives, and structure of the national civil legal assistance system and determine how it should be changed to achieve equal justice for all” (Houseman 1998:369).

As propitious a beginning as *Gideon v. Wainwright* signaled for indigent litigants, the decision itself completed only half of the equation. Because *Gideon* applies only to criminal defendants, indigent defendants in civil suits still lack right to counsel, and are therefore left to finance the high price of counsel themselves, or, alternatively, represent themselves pro se.² Consequently, shortly after and in continuity with the Court’s decision in *Gideon*, a “Civil Gideon” movement began with the goal of “providing a constitutional right to counsel in some or all civil cases . . . [thereby ensuring] increased funding and provid[ing] access to civil legal assistance in some cases” (Houseman 1998:369). In light of this goal, it was hoped that a case similar to *Gideon* might allow the Supreme Court to establish a right to counsel in the civil context.

In 1981, Civil Gideon proponents were hopeful that *Lassiter v. Department of Social Services* (see Table 1) would be the case to establish a
right to civil counsel. Lassiter concerned the Durham County Department of Social Services’ attempt to terminate the parental rights of Abby Gail Lassiter. Lassiter lost custody of her infant child to the Durham County Department of Social Services for failing to provide adequate medical care. A year later, Lassiter was convicted of second-degree murder and incarcerated for two years. When the Department of Social Services brought suit and terminated her parental rights, Lassiter was unable to secure a lawyer and was denied court appointed counsel. Lassiter appealed, arguing that the court should provide legal counsel because she could not afford such assistance herself. Ultimately, the Supreme Court held that the Fourteenth Amendment’s Due Process Clause did not entitle Lassiter to legal counsel, and that her parental rights could be terminated without representation (Lassiter v. Department of Social Services 1981:24, 33).

Consequently, the Court held that a case-by-case decision was appropriate indetermining when due process required representation, and that such analysis should be based on three factors previously identified in Matthews v. Eldridge (1976). The Court concluded that, “an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty” (Lassiter v. Department of Social Services 1981:26-27). This ruling was not ideal for Civil Gideon proponents hoping for legal recognition of a civil right to counsel. By setting the standard for required counsel at the deprivation of “physical liberty,” while denying extension of Gideon’s holding to the civil context, the Court both instituted similar case-by-case judgment previously repudiated by the Court in Gideon, and ensured that very few litigants could satisfy the constitutional standard for required appointment of counsel (Brown 2011:901).

Despite the fact that the Supreme Court decided not to extend Gideon to the civil context in Lassiter, the time is ripe for a re-examination of the values espoused in both Lassiter and Gideon. In addition to its legal holding, the Court’s decision in Gideon stands beside the American conception of “due process” guaranteed by the Constitution. The Court’s reasoning represents both a moral and a legal statement about what fundamental fairness the U.S. judiciary should provide citizens as mandated by the Constitution.

In light of this clarion call, and in furtherance of the vision established by the sounding of Gideon’s trumpet, this article argues for the implementation of a pragmatically constructed civil equivalent to the right to counsel established in Gideon. Such a right must simultaneously...
convince the ambivalent and appease the zealot, and in so doing strike the appropriate balance between utopian visions of legal paradise (Lee 2004:367) and “realistic” understandings grounded in the pessimism of temporal and human limitation. If middle ground between the law-policy dichotomy can be found, it is plausible to ensure for all the principle enshrined on the Supreme Court’s marble portico: “Equal Justice Under Law.”

Part I of this article discusses case law established after Gideon and offers a resolution to the law-policy dichotomy by reconciling the Gideon decision with modern conceptions of morality. Part II provides an overview of alternatives to the civil right to counsel and discusses recent advances in the Civil Gideon movement. Part III argues for the refashioning of key elements of Civil Gideon, and articulates a new, streamlined version of the movement that might enable it to achieve recognition of a constitutional right to counsel in civil cases (see Table 1 for a summary of cases discussed in this article).

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Supreme Court’s Holding</th>
</tr>
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<tbody>
<tr>
<td>Powell v. Alabama</td>
<td>1932</td>
<td>Court appointed counsel must be capable of providing “effective and substantial aid”</td>
</tr>
<tr>
<td>Gideon v. Wainwright</td>
<td>1963</td>
<td>Every criminal defendant is entitled to counsel</td>
</tr>
<tr>
<td>Lassiter v. Department of Social Services</td>
<td>1981</td>
<td>Civil defendants are not entitled to counsel</td>
</tr>
<tr>
<td>Strickland v. Washington</td>
<td>1984</td>
<td>Two-pronged inquiry for establishing ineffective assistance of counsel</td>
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**Part I: Gideon’s Flaws and Reconciling the Inherent Law-Policy Dichotomy**

**Gideon’s Foundational Fissures, Wrought By Antithetical Precedent**

The historically unprecedented advances made by the Gideon decision for indigent defendants permanently changed the face of legal representation in the United States. However, despite the evolution of constitutionally-required representation, counsel provided to America’s
poorest citizens (Matthew 25, Bible)\textsuperscript{5} is often woefully inadequate, and attempts to challenge the inefficacy of such representation have been onerous (Cole 2006:101). Despite the fact that criminal defendants enjoy the right to an attorney, there are few quality control mechanisms in place for appointed counsel. In his book \textit{Gideon v. Wainwright and Strickland v. Washington: Broken Promises in Criminal Procedure Stories}, Georgetown Law Professor David Cole exposes numerous examples of inadequate court-appointed counsel, including instances in which appointed counsel slept during portions of the trial, used drugs throughout the trial, admitted to having insufficient knowledge of the facts of the case, or was unable to name a single Supreme Court case on the death penalty (Cole 2006:101). As illustrated by these examples, appointing counsel who provide sub-par representation strips \textit{Gideon} of its radical dexterity, and significantly undermines its core objective.

Despite the frequent inefficacy of appointed counsel, the threshold for successfully suing an attorney for legal malpractice remains extremely high, and as a result, such suits are rarely successful. None of the aforementioned offenses related by David Cole resulted in a successful malpractice suit.

\textbf{Gideon’s Questionable Efficacy: Examination of Two Pertinent Cases}

While the fault lines riddling post-\textit{Gideon} jurisprudence may be self-evident, the cause of Gideon’s relative failures remains speculative. Many argue that the overburdened public defender system is the obvious culprit (Brown 2011:896). Others believe the problem is rooted in a chronic lack of funding to legal aid organizations that might otherwise provide service to the underrepresented (Rhode 2004:369). Whatever the reason, the problems posed by the inadequacy of court-appointed counsel are further compounded by the Supreme Court’s 1984 decision in \textit{Strickland v. Washington} (see Table 1), which established the standard by which a client may sue his counsel for inadequate representation. Though both involve the right to counsel in the criminal, not civil, context, \textit{Gideon} and \textit{Strickland} together offer a potential conceptual framework within which the Civil Gideon movement might eventually operate. Should the Civil Gideon movement become successful in its mission to extend a constitutional right to counsel to civil defendants, the movement ought to carefully consider the evolution, or devolution, of the right to counsel in the criminal context, and adjust its strategy accordingly.
Despite the failures of *Gideon* and the setback posed by *Strickland*, it is important to note that the Supreme Court has long recognized the right to effective assistance of counsel when counsel is provided by the state. In 1932, in *Powell v. Alabama* (see Table 1), nine young black men were charged with the rape of two young white women while traveling by freight train through Alabama. The trial court attempted to appoint the defendants’ counsel by “appoint[ing] the whole bar of Scottsboro (six men) to represent them. Only one attorney agreed to do so… only on the morning of trial” (Cole 2006:106). The defendants, who had previously escaped a lynch mob when first arrested, were sentenced to death, and eventually sought appeal to the U.S. Supreme Court. The Supreme Court reversed the trial court, holding that the defendants were entitled to court-appointed counsel under the Due Process Clause of the Fourteenth Amendment but had been deprived of that right. The Court reasoned that “the designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid” (*Powell v. Alabama* 1932:287). The Supreme Court’s holding in Powell demonstrates that prior to the Court’s definitive standard for measuring efficacy of counsel in a criminal case, the Court was cognizant of two things: 1) the Fourteenth Amendment guaranteed the right to court-appointed counsel in some cases; and 2) court-appointed counsel must be capable of providing “effective and substantial aid” (Ibid.).

In *Strickland*, the Court established a two-part test for establishing a claim of ineffective assistance of counsel that today functions as the de facto standard in criminal cases. Under this test, a defendant cannot obtain relief against his former counsel unless it is established that the counsel’s performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different if counsel’s performance had been adequate (*Strickland v. Washington* 1984:694). Ironically, just as Lassiter posed a series of relatively unsympathetic facts, which in turn yielded an unfavorable result for the defendant and for the Civil Gideon movement, so the facts in *Strickland* made it what Professor Cole called “probably the worst possible case to set forth the parameters for effective assistance of counsel” (Cole 2006:108). Unsurprisingly, the standard set by the Court in *Strickland* is widely criticized as unrealistic, unsympathetic, and prohibitively high (Cole 2006:547). Beyond its limiting nature, critics argue that *Strickland*
violates “the Sixth Amendment right to effective assistance of counsel for many criminal defendants . . . [and] provides less incentive for states to fund indigent defense services adequately” (Brown 2011:547). Strickland offers another reason to lament the fact that “Gideon has not fulfilled its promise of providing competent counsel to indigent criminal defendants” (Brown 2011:895).

An examination of Strickland makes clear that the low quality of court appointed counsel is not the only factor to blame for the lack of substantial change in defendants’ rights. However, it is undeniable that since Gideon, the change originally intended by the decision has not been actualized. Therefore, fashioning Gideon’s civil equivalent on the basis of a decision that has experienced trouble realizing its potential is tantamount to continuing investment in a company already on the verge of bankruptcy. But that is not to say that Gideon does not still have some validity in the marketplace of ideas. Rather, Gideon should be used as a bare-bones example of a rights-improving law from which effective civil solutions can be fashioned.

Reconciling Gideon with Modern Conceptions of Morality

The Supreme Court’s decision in Gideon derived as much from the gusto of American scruples as from constitutional requirements of the Due Process Clause. In words that would become an indispensible element of the Civil Gideon mantra, Justice Black concluded, “in our adversary system of criminal justice, any person hauled 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 be an obvious truth” (Gideon v. Wainwright 1963:344). This statement embodies both moral and legal judgment, in that one cannot say that a person ought to have access to legal counsel based on the promise of a “fair trial” without simultaneously inferring that a fair trial is a morally actionable goal. Thus, the access to justice envisaged by the Due Process Clause and mandated by the Court in Gideon concerns a fundamental moral fairness, a fairness regarded by Justice Black and others as an “obvious truth” (Ibid.).

The publicly held conception of justice and morality derive from the “moral/formal tensions of liberal legalism,” a tension produced by the dual commitments of law and moral politics (Alfieri 2005:1459). The efficacy of liberal legalistic ideology requires balancing the tension between law and advocacy, and is both relevant and necessary to any lawyer’s practice. Law
and advocacy are often perceived as incompatible because “[l]aw heralds process values, and its practice entails formal commitments to principles of neutrality, objectivity, and reason. . . . [while] Moral politics, in contrast, honors intrinsic norms and extrinsic results, and its performance involves instrumental commitments to principles of partisanship, subjectivity, and passion” (Ibid). The tension between the two is both an asset and a liability with regard to Civil Gideon, in that establishing a civil right to counsel depends upon constructing an argument that, like Gideon, appeals as much to fundamental fairness as it does to the law. A successful balanced argument depends upon achieving a delicate equilibrium between pathos and ethos, between moral fundamentalism and legal realism. An imbalance of this delicate tension significantly contributed to the disastrous decision in Lassiter, which greatly offset the advancement of a civil right to counsel. While Lassiter’s legal argument may have been convincing, the relatively unsympathetic facts of the case proved detrimental.

The heart of Gideon lies within the reconciliation of the moral/formal tensions of legal liberalism. Forward movement in either the judicial or legislative context can only be achieved by appealing to both elements of this tension. Similarly, lawyers advocating for Civil Gideon must balance a commitment to the legal process with realistic political commitments “to democratic access and racial equality norms” (Alfieri 2005:1459). Because modern conceptions of morality are significantly more inclusive than they were over 30 years ago when Gideon was decided, current conditions may be opportune for a judicial challenge, should the appropriate case surface.  

Part II: Progress and Finding Effective Alternatives

Legislative Strategies, Task Forces, and Progress for Civil Gideon

While those charged with a criminal offense are now provided with court-appointed counsel, the indigent defense system exists in a state of crisis (Chen 1996; Drecksel 1991; Dripps 1997; Schulhofer and Friedman 1993). That is not to say that the Civil Gideon movement has not gained considerable ground, even in the wake of decisions like Lassiter. After the 2006 ABA passage of Resolution 112A, numerous state and local bar associations passed similar resolutions and established task forces with the goal of expanding the right to counsel in certain civil matters. In this same spirit, the California legislature enacted the Sargent Shriver Civil Counsel
Act, which funds pilot programs focused on representing clients in civil matters affecting basic human needs (Cal. Gov’t Code §68651a 2010). Additionally, just after California passed the Sargent Shriver Act, the ABA passed the Model Access Act, designed to “assist interested legislators” to establish a statutory right to counsel for indigent defendants in “those basic areas of human need identified in the 2006 Resolution” (Am. Bar Ass’n, Report To The House Of Delegates, Resolution 104 2010:6). Despite the Supreme Court’s reluctance to establish a civil right to counsel, efforts to recognize such a right at the state level enjoy greater acceptance (Brown 2011). These efforts have also begun to resolve the law-policy dichotomy through an attempt to change the policy surrounding the law solidified in Lassiter. As organizations like the ABA attempt to frame a right to civil counsel as a both an actionable goal and moral issue, the legal process will ideally evolve in tandem.

Legislative strategies employed at the state level have seen greater success in a movement toward Civil Gideon, in large part due to the sheer number of state statutes providing appointed counsel in a variety of civil cases. While ambitious, such statutes are nothing novel in themselves. In fact, when the Court decided Lassiter, 33 states and the District of Columbia already had statutes in place requiring counsel in parental rights termination cases (Young 1997). Thus, with the considerable momentum that Civil Gideon has enjoyed at the state level, efforts to put in place mechanisms providing for the representation of indigent litigants must continue to be encouraged at every possible opportunity, until such provision enjoys uniformity of recognition across the country.

Initially, progress at the state level may not even take the form of legislation, but instead surface as recommendations to implement legislation uniquely tailored to each state’s needs. For example, task forces established to determine effective ways to expand the right to counsel in specific jurisdictions offer realistic alternatives to immediate and broad legislative action. The Boston Bar Association Task Force on Expanding the Civil Right to Counsel, for instance, operates with the specific mandate to recommend that the legislature fund programs to establish a right to counsel in civil cases such as immigration, family, and housing cases (Boston Bar Ass’n 2008). Thus, with the opportunity to utilize such task forces, legislatures can move at whatever pace they desire, whether they prefer to unilaterally implement holistic legislation aimed at civil representation, or to move forward with
piecemeal legislation aimed at solving specific problems identified by task forces (Abel and Vignola 2011).

**Alternatives in the Interim: Legal Services Organizations as a Pathway to Effective Civil Representation**

While effective legislative changes are a major part of the solution to achieving equal opportunity under law, until a right is constitutionally recognized, Civil Gideon can be advanced through the utilization of alternatives to court-appointed representation. Such alternatives are currently provided by various legal services organizations dedicated to representing those who cannot afford counsel. The provision of these alternatives to court appointed counsel effectively advances resolution of the law-policy dichotomy by creating policy aimed at providing what the law, alone, cannot. As the policy surrounding civil provision of counsel changes, the law is encouraged to evolve, and the legal process becomes closer to the policy ideal.

Despite being relatively disorganized in their infancy decades ago, today legal aid organizations provide meaningful legal assistance to indigent clients across the country. Civil legal assistance for individuals unable to pay for representation began in New York City in 1876 with the founding of the Legal Aid Society of New York, a private and charitable program created primarily by lawyers (Houseman 1995; MaGuire 1928; Tweed 1954). In the years following the Legal Aid Society’s establishment, the world of civil legal aid evolved (Houseman 1995). Each diverse form of legal aid enjoyed one common and unfortunate characteristic: “impossibly inadequate resources” (Houseman 1995). Because of the endemic lack of resources, legal aid programs found it difficult to develop any sense of continuity or purpose within the general social fabric (Houseman 1995). By 1970, the basic structure of the legal services program was in place, which included federal funding.

From its inauspicious beginnings, modern civil legal assistance in the United States has, over the last four decades, “evolved from a relatively insignificant and disorganized program that provided limited services in only a few areas of the country, with little financial support and political recognition, into a system that provides a broad panoply of legal services to the low-income community nationwide” (Houseman 2007). In furtherance of this vision, legal services organizations have won victories in several
individual cases that forced major governmental and economic institutions to respect the rights of poor people. Foremost among these victories was a successful challenge to a $200 million cut in Medicaid in California, in which legal services went head-to-head with then-Governor, Ronald Reagan (Morris v. Williams 1967). Such victories proved potent reminders of the importance and efficacy of legal services organizations on a national scale.

The ripple effect of early legal services victories promoted the overarching goal of creating an integrated and comprehensive civil legal assistance system, while simultaneously working toward the achievement of a Civil Gideon (Houseman 1998). The method by which a sophisticated legal aid system ought to be implemented has been the subject of much discussion. Throughout the debate, Legal Aid’s goal has remained to effect change at both the micro and macro levels. With this mission in mind, and with both arms of Legal Aid working in tandem, Civil Gideon will continue to make advances in the halls of legislatures across the country, while simultaneously providing counsel to those who could not otherwise afford it.

Part III: Sounding Gideon’s Bullhorn – Fashioning a Newer, Stronger Gideon

Preempting a Civil Strickland

Without a doubt, myriad reforms must take place prior to Civil Gideon reaching its desired goal and before fundamental fairness is achieved for all criminal and civil defendants. Before beginning at the obvious starting point (Gideon), one must not overlook the debilitating nature of Strickland in the criminal context, and the often insurmountable barrier that it presents to any criminal defendant hoping to find some recourse against the ineffective assistance of counsel. Before seeking to establish a civil right to counsel, the Civil Gideon movement must be cognizant of avoiding a Strickland type decision in the civil context, so as to ensure that Civil Gideon does not become a “hollow right” (Brown 2011:916). In the event that Civil Gideon is eventually achieved at the federal level, the right to effective assistance of counsel will likely follow, as the Court has long recognized that “the right to counsel is the right to the effective assistance of counsel” (McMann v. Richardson 1970:771 n.14). Currently, most jurisdictions providing counsel in parental termination cases either expressly adopt the rigorous
Strickland standard or impliedly follow it, inevitably leading those courts to hold they “decline to find ineffectiveness” (Calkins 2004:214-15). Thus, to preempt the gradual erosion of a right to counsel that Strickland begat in the criminal context, the Civil Gideon movement ought to ensure, if possible, that “legislation granting a statutory right to counsel also provides that such counsel must be effective” (Brown 2011:919). Such a standard, which would ensure that civil defendants have a realistic standard to enforce against misbehaving counsel, should be thought of as a “Civil Gideon with teeth.”

While potentially onerous, providing a framework for the formulation of an alternative Strickland standard in civil cases may not be as difficult as one might imagine. Several civil-side standards, developed by the American Bar Association, the National Legal Aid and Defender Association, and other standard-setting bodies, exist that can serve as useful guides (Abel 2006). In 2006, the American Bar Association published its Standards for the Provision of Civil Legal Aid, which contained standards for practitioners through which courts might be able to fashion an alternative rubric to that posed in Strickland. These guidelines and strategies might effectively enable the Civil Gideon movement to push toward a more just standard in judging the efficacy of court-appointed counsel in civil cases, if and when a civil right to counsel is achieved.

Morality is as Morality Does: Applying Gideon’s Moral Framework to the New Civil Context

Consistent with the trumpet call of equality sounded in Gideon, the Civil Gideon movement must seek a fusion of liberal democracy and legal equality. In doing this, the fundamental moral fairness at once espoused and enacted in Gideon will be transposed from one analogous context to the next, and absolve the moral/formal tensions of liberal legalism. A critic may note that criminal and civil situations do not seem to be analogous with regard to the gravity of their respective outcomes. While it may be true that a defendant risks losing his physical freedom in a criminal context, it is not true, nor would it be logical to assert, that a defendant in that instance has more to lose than in a civil action. In Lassiter, for example, the defendant lost her parental rights, one of the most fundamental rights that a citizen possesses, without any court-appointed representation. The legal severing of a parent-child relationship involves one of the weightiest decisions that
a court can make. The moral decision asserted by the court in this instance is the same from one context to the next, from criminal to civil, because in either case an incarceration is being threatened through forced isolation.

While civil and criminal cases both involve society (represented by the judge) making analogous moral decisions, the right case must come along to overrule *Lassiter*, one with sympathetic facts and a clear legal application. When this moment comes, individuals schooled in liberal legalism, including those embracing the Civil Gideon movement, ought to jump at the opportunity to embrace both rigorous legal process and moral judgment through advocating and advancing a civil equivalent to *Gideon*.

**Don’t Try Harder, Try Smarter: Igniting and Uniting Each Element of the Civil Gideon Movement**

With each element of the Civil Gideon movement, from legislative advocacy and judicial representation to the precedent-setting efforts of legal services organizations such as Legal Aid, the movement gains both momentum and legitimacy, moving closer toward eventually establishing a constitutional right to counsel in civil cases. The arguments for a civil right to counsel have been established through existing scholarship; all that is needed is the right case, the right combination of law and fact, to overrule *Lassiter*. As it was put by the Honorable Judge Robert Sweet, “[as] every trial judge knows, the task of determining the correct legal outcome is rendered almost impossible without effective counsel. . . . To put it simply, denial of representation constitutes denial of access to real justice” (Sweet 1998:505). The Supreme Court in *Gideon* recognized this, and reached its historic decision by extending the right of representation to all criminal defendants. In this same spirit, to expand the judgment made by the Supreme Court in *Gideon* to the civil context would be to take the next logical step toward ensuring that “equal justice under law” is more than empty rhetoric. To extend such a right would be more than simply fair or equitable, it would constitute the logical outworking of the fundamental moral fairness expressed in *Gideon* by Justice Black, a fairness fundamental enough to be recognized as an “obvious truth” (*Gideon v. Wainwright* 1963).

Until this right is recognized constitutionally, the sounding of Gideon’s trumpet will continue in the interim through myriad strategic avenues at both state and local levels. Legislative strategies for the furtherance of Civil Gideon have gained traction and likely stand the best chance of establishing
something close to a uniform right to counsel in civil cases in the absence of a Supreme Court decision (Brown 2011). Legal services organizations such as Legal Aid have been vigilant in their attempts at a holistic representation of indigent clients, a representation that at once takes the cause of the dispossessed to the county courthouse and the legislative floor. Perhaps the greatest asset that legal services organizations possess in furtherance of their mission is their commitment to a holistic, dualistic approach, which provides aid to those in need until a right to that aid is established in civil cases.

Significant progress has been made toward a Civil Gideon through the ABA’s Model Access Act (2010) and the numerous state-level statutory provisions requiring appointed counsel in civil contexts. Organizations such as the ABA and the Boston Bar Association are uniquely poised to shape the ongoing debate bypassing resolutions and forming task forces aimed at guiding interested legislators toward mandatory civil representation. The ABA’s passage of Resolution 112A in 2006, for example, provided a framework for states to fashion such a right. Still other organizations like Legal Aid are specially equipped and experienced to reinforce the rights of civil litigants by providing a holistic representation aimed at treating both the client and the underlying problem.

In short, the time may never have been better to reassess, recapitulate, and reengage the Civil Gideon movement through any of its various members. Through the perpetuation of liberal legalism, the best of both morality and legality are brought together and function in harmony as legal advocates work together for the movement’s advancement. Though the scars of Lassiter are still keenly felt, and the overall efficacy of Gideon is routinely called into question, just as the good that Gideon did has not been outdone entirely by Strickland, so the civil right to counsel has not been precluded by Lassiter. Gideon’s trumpet will sound again, but this time for the rights of civil defendants, and this time with all the support and advocacy that Gideon did not enjoy in its day. When that happens, advocates will have the benefit of hindsight, and will be wary of the fact that adoption of this type of law is not a panacea for indigent civil litigants. Rather, hindsight teaches that advocates should avoid a civil Strickland, so as to ensure the fundamental efficacy of counsel provided by that right. Taken together, these ongoing efforts prove the solvency of the idea at the heart of Gideon, that fundamentally equal justice under law cannot be provided without
fundamentally equal access to counsel. In the end, Gideon’s trumpet will sound again, but this time, it will be a bullhorn.

Endnotes

1 The Fourteenth Amendment’s Due Process Clause states: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]” U.S. CONST. amend. XIV, § 1. In Gideon, the Court worried that a criminal defendant, without counsel and facing a possible deprivation of life or liberty, would not receive Constitutionally guaranteed “process” because:

Left without the aid of counsel [the defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. ... He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. (Gideon v. Wainwright 1963:345).

2 Pro se is defined as “[a]ppearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court.” BLACK’S LAW DICTIONARY 1099 (5th ed. 1979). Adverse outcomes are significantly more likely for unrepresented litigants. (Engler2010, 46–66) (surveying studies finding that lack of counsel is a significant variable affecting outcomes in housing, family, small-claims, and administrative agency actions).

3 The three factors identified in Eldridgewere “the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.” Lassiter, 452 U.S. at 27.

4 “Gideon’s Trumpet” refers to a book of the same name, which drew its title from the book of Judges, in the Bible, which reads: “But the Spirit of the Lord came upon Gideon, and he blew a trumpet.” BIBLE, Judges 6, 34. See also ANTHONY LEWIS, GIDEON’S TRUMPET 1 (Random House, 1964).

5 Or “the least of these” as it was put in the Gospel of Matthew. (BIBLE, Matthew 25).

6 (COLE 2006:108); (Thomas III, 2010:549) (describing Strickland as “The Case from Hell”). Professor David Cole writes about the history behind the
case that would eventually establish the limits upon the Sixth Amendment right to appointed counsel in criminal cases:

On a two-week crime spree in September 1976, David Leroy Washington robbed and killed a minister … robbed and killed a woman in her home … and then shot all three of the sisters-in-law in the head; and kidnapped a man, stabbed him repeatedly, and eventually killed him. (COLE 2006).

7 Another reason that the Strickland standard is frequently criticized is the fact that courts do not generally attach Strickland’s “strong presumption” in favor of reasonable performance when reviewing the performance of other professionals, such as physicians, surgeons, accountants, and architects (Klein 1986:640).

8 By “the right case,” I simply mean a case that balances both legal and moral arguments, a case that simultaneously advances a convincing legal argument and a sympathetic set of facts, just as was accomplished in Gideon. Such a balance is achievable in either legislative or judicial settings, and should be pursued in both.


10 In fact, commentators have found that legislative efforts may be far better poised to achieve success for the Civil Gideon movement than judicial efforts. Judicial efforts toward a Civil Gideon are fought primarily on three different fronts: due process claims, federal equal protection claims, and state constitutional claims. Those claims have found most of their success in cases involving the termination of parental rights (Schwinn 2006:606).

11 “Many legal aid programs were private corporations; others were part of local bar associations, relying primarily on the donated time of lawyers. Some were part of governmental units (usually municipalities) or other social agencies. Still others were run by law schools or clinics.”

12 “Court appearances were rare. Appeals were nonexistent. Administrative representation, lobbying, and community legal education were not even contemplated. Legal aid had little effect on the individuals it served and no effect on the client population as a whole.”

13 Such a system “should have the capacity to: (1) educate and inform low-income persons of their legal rights and responsibilities and the options and services
available to solve their legal problems; and (2) ensure that all low-income persons have meaningful access to a full range of high-quality legal assistance providers when they have chosen options that require legal aid and assistance.”

14 This term is the author’s own.

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Bible, Matthew 25.


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