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Civil Gideon and Confidence in a Just Society

Robert W. Sweet

Civil *Gideon* and Confidence in a Just Society

The Honorable Robert W. Sweet†

What needs doing to help the courts maintain the confidence of the society and to perform the task of insuring that we are a just society operating under a rule of law? For me the answer is easy to state, but until now, difficult to achieve. In short, we need a civil *Gideon*[1]—that is, an expanded constitutional right to counsel in civil matters. Lawyers, and lawyers for all, are essential to the functioning of an effective justice system, whether it be to advise or to represent.

I. LEGISLATIVE AND PRIVATE STEPS TO PROVIDE COUNSEL

Of course, our profession knows this and has acted to address the issue through the Legal Aid Society and other like organizations.

One of the most exciting efforts in this direction are the Skadden Fellowships, which permit young lawyers to use their talents to improve the society. I'm very proud that two of my clerks have become Skadden Fellows and that children and welfare recipients are going to be much the better for it. But more is required.

II. THE GAP BETWEEN DEMAND AND SUPPLY

Our present best efforts to grant access to the justice system pall in the light of the enormity of the problem. With 36.5 million people at the poverty level in 1996[2] and 77.45 million with incomes below $50,000 in 1993,[3] legal services are realistically beyond the reach of many.

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† United States district judge, Southern District of New York. The following is taken from Judge Sweet's December 2, 1997 Arps Lecture. Judge Sweet spoke about the systemic problems caused by inadequate representation that he witnesses in his courtroom. In response he proposed a "Civil *Gideon*." Taking as his model the constitutional right to counsel for criminal defendants, Judge Sweet believes the government should provide lawyers when litigants who cannot afford counsel present valid legal claims, particularly in areas such as family and housing law.

The full text of Judge Sweet's speech is available on the Web at <http://www/abcny.org/arpslec.html>.

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

2. *See* DANIEL H. WEINBERG, 1996 INCOME, POVERTY, AND HEALTH INSURANCE ESTIMATES (1997).

3. *See* UNITED STATES CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 478 cht. 740 (115th ed. 1995).

Judge Patricia Wald of the D.C. Circuit recently noted that two out of five Americans cannot afford needed legal assistance to enforce their rights.[4]

If that isn't bad enough, Congress in the Omnibus Consolidated Rescissions and Appropriation Act of 1996 barred any organization receiving funds through the Legal Services Corporation from litigating any issues under the Welfare Reform Act. The same device was also employed in connection with class action litigation. The very tools by which, in my view, the society can repair any breaches of due process or other constitutional impairment suffered by the disadvantaged have thus been barred by the Congress, probably in an unconstitutional fashion.

Some may argue that an expanded right to counsel in civil litigation is not desired by the American people. However, a national study has demonstrated that seventy-one percent of Americans favor using tax dollars to make lawyers available to anyone who needs one. Indeed, seventy-nine percent of Americans currently believe, obviously quite erroneously, that the Constitution guarantees poor people the appointment of free lawyers in civil cases.[5]

Although we like to believe we are not only the most powerful nation in the world but also the most advanced in terms of governance and human rights, the reality is that Great Britain has had a common law right to counsel for five centuries.[6] France and Germany have provided counsel for the indigent since the 1870s.[7] Switzerland has had a constitutional right for almost fifty years.[8] Austria, Spain and Greece have statutory rights to counsel.[9] The European Court of Human Rights in 1979 interpreted the European Convention on Human Rights to require member governments to provide counsel for the poor in civil cases.[10] Indeed, I believe there is a constitutional requirement to meet what appears to be an almost universal right among developed nations. Such representation will

4. *See* Patricia M. Wald, *Becoming a Player: A Credo for Young Lawyers in the 1990s*, 51 MD. L. REV. 422, 427 (1992).

5. *See* ASSOCIATION OF TRIAL LAWYERS OF AMERICA 1991-92, DESK REFERENCE SUPPLEMENT: COMMEMORATING THE 200TH ANNIVERSARY OF THE SIGNING OF THE BILL OF RIGHTS (1991).

6. See Earl Johnson, Jr., *Toward Equal Justice: Where the United States Lands Two Decades After*, 5 MD. J. CONTEMP. LEGAL ISSUES 199, 205 (1994); F. Johnson Schwartz, *Beyond* Payne*: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants, Part One: The Legal Arguments*, 11 LOY. L. REV. 249, 258 (1978).

7. *See* Johnson, *supra* note 6, at 209.

8. *See id.* at 206.

9. *See id.* at 208.

10. *See* Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) (1979) (holding that the failure to provide legal aid to indigent women in a separation proceeding violates the European constitution).

guarantee the diversity of interests that are essential to a fully developed justice system.

III. EXPANDED DUE PROCESS RIGHT TO COUNSEL

The link between the right to counsel and procedural due process has already been recognized. In *Gideon*, the Court held that the due process clause of the Fourteenth Amendment mandated application to the States of the right to appointed counsel in criminal matters. The due process right, however, was not tethered solely to the Sixth Amendment hook. The Supreme Court in *In re Gault* held that in "proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed,"[11] the juvenile has a right to appointed counsel even though commitment proceedings may be styled as civil and not criminal.

The Supreme Court addressed the issue again in 1981 in *Lassiter v. Department of Social Services*.[12] In a 5-4 decision, the Court held that the right to counsel in a state-initiated proceeding to terminate parental rights must be evaluated by trial courts on a case-by-case basis according to the due process analysis set forth in *Mathews v. Eldridge*,[13] and that in Ms. Lassiter's case the net of the *Mathews* factors did not overcome what the majority called a presumption against granting appointed counsel in non-liberty interest cases.

I am going to pass on Justice Blackmun's dissent concerning this presumption and on the majority's case-by-case conclusion. I think the most rewarding focus is on the *Mathews* three-factor procedural due process calculus applied by the Court which balances (1) the private interests at stake, (2) the government's interest, and (3) the risk that the procedures used will lead to erroneous decisions.

To place the last first, then, analysis of the risk of erroneous decision dictates appointed counsel whenever *in forma pauperis* status exists. As every trial judge knows, the task of determining the correct legal outcome is rendered almost impossible without effective counsel. Courts have neither the time nor the capacity to be both litigants and impartial judges on any issue of genuine complexity. As recognized by the *Lassiter* dissent, "By intimidation, inarticulateness or confusion, a [litigant] can lose forever"[14] the right she sought to protect.

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11. 387 U.S. 1, 41 (1967).
12. 452 U.S. 18 (1981).
13. 424 U.S. 319 (1976).
14. *Lassiter*, 452 U.S. at 47 (Blackmun, Brennan, and Marhall, JJ., dissenting).

As far as the second factor is concerned, society's paramount interest must be in a just determination of a person's fundamental rights and privileges. While there will undoubtedly be a cost to providing counsel to impoverished litigants, erosion of faith in the judicial system would exact an even higher price. To put it simply, denial of representation constitutes denial of access to real justice.

As for the money to finance such a constitutional right, it must come from the public fisc as it does for the representation of criminals, security for the aged, and protection for the poor and the infirm. I also believe it would be appropriate to tax for-profit legal services for the direct benefit of not-for-profit legal services.

Finally, *Mathews* mandates as a third factor consideration of the private interest at stake. As my brother the Honorable Jack Weinstein has said:

> Accessibility to the courts on equal terms is essential to equality before the law. If we cannot provide this foundational protection through the courts, most of the rest of our promises of liberty and justice of all remain a mockery for the poor and oppressed.[15]

Because of the vital interest held by the government in a just outcome, and the extremely high risk of injustice where adequate counsel is not available, I propose that a right to counsel should arise whenever access to the justice system is warranted. Lest pragmatists abandon ship at this point, let me point out that the Supreme Court has already established a mechanism in the criminal context which could be adapted to the civil context to screen frivolous civil claims. By this I mean the *Anders* brief, by which appellate criminal attorneys faced with groundless appeals direct the court's attention to "anything in the record that might arguably support the appeal,"[16] and request to withdraw.

To seek to limit this proposed right to counsel to particular causes would simply serve to defeat the right. A right to property or economic justice, to custody, or to housing, for example, is as significant in real terms as a right to a constitutional guaranty. Without representation, a litigant does not truly have access to our legal system, and it is the system, even more than the litigant, that will be the worse for the lack.

The time has come to reverse *Lassiter* and provide counsel in civil litigation just as the Supreme Court in *Gideon* in 1963 reversed its holding in *Betts v. Brady*[17] twenty-one years earlier and found for a right to counsel in all criminal proceedings.

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15. Jack B. Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 655 (1981).

16. Anders v. California, 386 U.S. 738, 744 (1966).

17. 316 U.S. 455 (1942).