



The Trouble with the Civil Gideon Movement

By Ted Frank

With little debate, the American Bar Association (ABA) has proposed enshrining a new right to legal counsel for low-income people in civil cases. Civil Gideon is ill advised. Aside from the tremendous cost to taxpayers, it will be counterproductive in its supposed goals of helping the poor and making the legal system more accessible.

On August 7, 2006, the ABA House of Delegates unanimously passed Resolution 112A:

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.

This far-reaching idea is given the misnomer “civil Gideon,” after the landmark *Gideon v. Wainwright* decision, which enshrined the idea of a right to court-appointed counsel for the indigent in criminal cases.¹ The difference, of course, is that the unanimous *Gideon* decision was based on a plainly expressed right in the Sixth Amendment and acts as a limitation on the government’s power to prosecute someone criminally. *Gideon* itself simply applied the rule of *Johnson v. Zerbst*² to state courts. In civil cases, however, there is no corresponding constitutional provision. Moreover, the vast majority of applications of civil Gideon will use taxpayer-

funded attorneys to litigate cases against private citizens, aggrandizing rather than limiting government power.

The first attempts to accomplish this goal directly through the courts by claiming this to be a constitutional right failed: the Washington State Supreme Court rejected the idea in 2007,³ and Maryland’s Supreme Court sidestepped the issue in 2003.⁴ In 1981, long before the ABA action, the U.S. Supreme Court rebuffed the idea.⁵ But each of these decisions was by a one-vote margin. These near misses—combined with the 2006 ABA resolution; an affirmative push by several George Soros-funded groups, including New York’s Brennan Center for Justice, its Brennan Center Strategic Fund lobbying arm, and the Baltimore-based Public Justice Center; and the formation of the 150-member National Coalition for a Civil Right to Counsel—suggest that the battle will continue in the courts and legislatures.

In Ohio, attorneys have attempted to delay foreclosures by demanding court-appointed counsel for their clients⁶—pro bono representation is apparently available to the homeowners for demands for judicial activism rather than for the underlying problems of the client. And twenty-two New York City Council members sponsored legislation to require city-funded counsel for tenants in thousands of landlord/tenant disputes.⁷

If the goal is to get taxpayers to spend more money on lawyers, then ABA Resolution 112A

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will certainly accomplish that. But if the goal is really to increase access to justice or to help the poor, then one needs to turn a skeptical eye on the way the legal system will respond to implementation of Resolution 112A to see whether it will accomplish its purported goals. To date, that inquiry has been missing. The debate on the issue has been one-sided. The ABA resolution was unanimous, as stated earlier. And when I was asked to be the token free-market advocate on a six-person dais discussing civil Gideon at the American Constitution Society's annual meeting in June, I found in preparing for the panel that literature critical of the proposal is close to nonexistent. Responsible leaders in the legal community need to stand up against these socially wasteful proposals.

Criminal *Gideon* shows why a civil version will create problems. Public defenders' offices often have a thankless task, but the record of court-appointed defense counsel has generally been one of triage at best, which is often executed for political ends rather than the good of their individual clients. Take the case of the Atlanta public defenders' office that blew nearly half of its 2007 budget on a single case,⁸ that of the plainly guilty Brian Nichols, who murdered a judge, a court reporter, and two others after escaping from an undersized guard. The goal appears to be a cynical and political effort to make seeking the death penalty wildly expensive rather than to serve the interests of the offices' clients.⁹ Indeed, the office has dropped representation of dozens of Fulton County defendants, claiming a lack of resources.¹⁰ On the civil side, Legal Services Corporation (LSC) taxpayer funding has paid for first-class airfare, limousine service, and \$14 cookies.¹¹ Government Accountability Office and inspector general reports have found a lot of waste.¹² Before Congress stepped in in the 1990s, the LSC focused its budget on political causes and regulation through litigation rather than providing legal services to the poor.¹³

Meanwhile, as any economist would tell you, if you lower the price of something, you get more demand for it. Because it is costless for convicted defendants to file meritless criminal appeals, the court system is inundated with them: 83 percent of federal criminal appeals result in affirmances,¹⁴ and the vast majority of the remands reflect recent Supreme Court confusion over sentencing law¹⁵ rather than questions of guilt or innocence. We

accept these costs in the criminal context because of Western notions that it is better that *n* guilty defendants go free than one innocent be convicted and because of the Sixth Amendment right to criminal counsel

enshrined in the Constitution. Both of these factors are absent when it comes to civil Gideon. Absent these benefits, all that criminal *Gideon* has accomplished is a vast increase in expense—not just in defense costs, but in the cost of prosecution—and a clogged justice system; worse, there is no evidence of increased accuracy and every reason to think that the cases of real innocents may be getting lost in the haystack of bogus appeals.¹⁶

Some studies purport to show that lawyers make a big difference in the results of civil cases.¹⁷ But such studies

are usually measuring two different populations of cases.¹⁸ Pro bono and legal aid societies have scarce resources, and they (one hopes) focus those resources on the better cases in their queue, passing on the clearly meritless cases. And judges know this. An immigration judge has the tough job of distinguishing among the hundreds of people claiming to be eligible for asylum, and the unfortunate reality is that a lot of them are lying. When the scarce resources are used to hire an attorney, that signals to the judge that the litigant thought the claim was worth spending money on or that the pro bono attorney thought the claim was meritorious.¹⁹ If everyone gets an attorney, someone with a strong asylum case does not have an easy way to signal she is not one of the liars. In the criminal context in which everyone gets an (often overburdened) attorney, the defendants who represent themselves do as well as those with representation,²⁰ though, again, the confounding factor of different populations comes into play. But courts typically have internal rules of decision that are "less stringent" for *pro se* civil litigants.²¹ Indeed, there is evidence that courts bend over backwards on their behalf. As a front-page article in the *Wall Street Journal* recently documented, an Ohio *pro se* litigant was able to use meritless litigation to stall foreclosure and live rent-free in his home for over eleven years.²²

We can expect that the flood of meritless criminal defense appeals will be duplicated in the civil context if legal access is costless to both the client and the attorney. A lot of big-firm pro bono work is self-serving or socially counterproductive. There is little evidence that poor

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people with meritorious civil cases could not be served by the current legal system of legal aid societies and pro bono work by attorneys. “Contingent-fee lawyers take many weak cases; if a given plaintiff cannot persuade any lawyer to assist, his case must be weaker than the most feeble of these.”²³ Let us use the resources we have before we ask the taxpayers to kick in; though pro bono work by law firms is at an all-time high,²⁴ a disproportionate amount of it is in the service of left-wing political causes rather than legal aid on behalf of the poor with meritorious cases.

Take, for example, the highly publicized *Caliente Cab* case in New York City. A masculine-looking woman, Khadijah Farmer, was thrown out of a restaurant when the bouncer mistook her for a man in the ladies’ room after a similarly confused customer complained. Granted, Farmer has a colorable objection to the bouncer’s actions, and the restaurant offered her a free meal to try to make amends. Not enough. Instead, three lawyers from a big law firm brought a pro bono lawsuit over the misunderstanding and shook down a small business for \$35,000.²⁵ That gets headlines, but making mountains out of molehills is not legal service for the public good. If there are indeed poor people with meritorious cases who need lawyers, there is something obscene about spending substantial resources on a bathroom spat that could easily have been resolved without attorneys and without advertising the suit as pro bono.

Such a case—frivolous in the colloquial sense, albeit not in the technical legal sense—is not an outlier. Two top law firms in Boston are suing the state of Massachusetts to demand that taxpayers pay for a convicted murderer’s sex-change operation;²⁶ another Boston firm won nearly \$100,000 in attorneys’ fees from taxpayers after successfully bringing a lawsuit on behalf of triple-murderer Daniel LaPlante’s right to pornographic pictures and shower shoes.²⁷ Dozens of top law firms are spending thousands of hours litigating against the death penalty on behalf of convicted murderers whose guilt is not in dispute, throwing political wrenches into the works and adding years to the appeals process. A similar amount of lawyering is done on behalf of unlawful combatants held at Guantanamo Bay in an effort to extend to former members of al Qaeda unprecedented rights unavailable to

American prisoners—though government-funded lawyers are already available to the detainees.

Such cases may be a popular recruiting tool to attract liberal law students and a good way to rack up hours for the purely quantitative statistics comparing law firms’ pro bono programs in *American Lawyer* magazine,²⁸ but the bono is clearly in the eye of the beholder. There are two possible scenarios explaining why law firms are devoting substantial resources to such cases at the same time the ABA is demanding additional taxpayer funding for representation of the indigent. One is that the poor with meritorious cases are already represented by existing legal aid and pro bono programs, and all these frivolous cases are prompted by law firms having nothing better to do with the resources they wish to donate to charitable causes. Or, if poor people with meritorious cases are under-represented, as advocates claim, the question becomes why large law firms are instead devoting substantial pro bono resources to political causes that most of their paying clients, who are effectively subsidizing such litigation, would find abhorrent or against their interests. Under either scenario, devoting additional taxpayer money to guaranteeing civil counsel for the poor seems an unwise use of resources.

Indeed, most estimates of the expense of government provision of attorneys are huge underestimates because they are based on static statistics of current unmet needs without regard to the change in demand that will result if attorneys are free. Nor do the estimates consider the secondary costs to society.

If a dispute over shelter entitles one to a free attorney on the government’s dime, it will be much easier for people to intentionally refuse to pay rent or fight evictions when they violate a lease in ways that threaten other tenants. This will have costs far beyond simply paying for the plaintiffs’ attorneys. Landlords and mortgage-holders will have to hire their own attorneys and raise rents and costs for their honest customers.²⁹ Canada does appoint attorneys to litigate in family disputes. The perniciousness of government-appointed lawyers who manufacture legal disputes to interfere in the private affairs of citizens is readily evident in a recent Quebec family-law case, where a government attorney persuaded a Quebec judge to overrule a father’s

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disciplinary decision to ground his daughter—even though the father had full custody.³⁰ Meanwhile, as the demand for attorneys on both sides increases, lawyers will benefit, but everyone else will have to pay more to obtain legal counsel.³¹ Middle-class people with meritorious cases will find it harder to find legal counsel, reducing their access to justice; at the same time, because their income makes them ineligible for the new government benefit, the result is a substantial increase of the de facto marginal tax-rate for the middle class.

Meanwhile, the honest poor will be worse off as a group: they will trade higher rents and higher taxes for the right to legal services that often will not help them. And, as in the criminal context, parties with meritorious cases will find it harder to signal to overwhelmed judges that their cases are distinguishable from the vast majority of meritless cases with appointed counsel that the courts will see every day. And if the right to civil counsel is of constitutional import, the problem of a litigation explosion is only exacerbated. Now, every loss in a civil court can be collaterally attacked as a constitutional violation because of lack of adequate counsel, and the *habeas* disaster we face in the criminal context will be repeated here.

The ABA argues that civil Gideon will give American citizens the same right to counsel as in foreign countries. But as George Liebmann of the Calvert Institute notes, these foreign countries do not have American legal institutions:

[They have] limitations on contingent fee litigation; restrictions on legal advertising, barratry, and maintenance; mandatory fee-shifting against unsuccessful plaintiffs; heavier reliance on lay magistrates; discretionary powers in courts to deny rights of suit or legal aid certificates; severe limits on punitive and other damages; highly limited use of juries in civil cases; the reservation to public authorities of the right to sue for employment discrimination, environmental impairment or antitrust violation; and much smaller court systems and more elaborated systems of administrative law.³²

If the goal is to improve access to civil justice, it seems strange that we are looking first to the taxpayers and not to the rules within our own legal system that restrict

access to justice. If we were to move to a “loser pays” rule, private attorneys would happily take meritorious cases no matter what the income level of the plaintiff or defendant; moreover, we would increase access to civil justice for defendants who are currently forced to settle extortionate meritless cases because they cannot afford the overwhelming costs of defense—costs that would only be

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exacerbated by the ABA resolution. An obvious example of this is the disgruntled District of Columbia administrative law judge who sued his dry cleaner for tens of millions over allegedly lost pants. The only reason the irrational plaintiff walked away with nothing is that he was not willing to accept a \$12,000 payoff. The immigrant defendants instead had to pay their lawyers much more to defend themselves and were forced to close their business as a result.³³

We can end unjust laws against the “unauthorized practice of law” that reserve to a cartel basic legal work—like simple wills and uncontested divorces—that can be performed by trained paralegals. We can end wasteful requirements like a third year in law school, bar examinations, and continuing legal education requirements that do nothing to prepare future lawyers; we can similarly strip the ABA of its cartelizing function of “accrediting” law schools by insisting on expensive features that do nothing but increase barriers to entering the legal profession and pursuing legal education.³⁴ Passing sensible tort and regulatory reform so that so much of the nation’s economy is not subject to perpetual litigation would free up lawyers to help average people when they really need it instead of condemning thousands of the best and brightest graduates to doing document review in multibillion-dollar class actions that largely benefit attorneys.

The goal may be to increase access to justice or to help the poor, but Resolution 112A and similar court petitions and legislative proposals to guarantee legal counsel in civil cases at public expense will decrease access to justice and hurt the poor, as well as the middle class. If the goal is to help the poor or immigrants, then let us help them directly rather than through the wasteful process of the legal system, where well over half of the money spent will end up going to lawyers on both sides rather than to the poor or immigrants.

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Notes

1. 372 U.S. 335 (1963).
2. 304 U.S. 458 (1938).
3. *In re Marriage of King*, 174 P.3d 659 (Wash. 2007).
4. *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003).
5. *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).
6. *Hill v. Myers*, No. 08-1141 (Ohio filed June 12, 2008).
7. Manny Fernandez, *Free Legal Aid Sought for Elderly Tenants*, N.Y. TIMES, Nov. 16, 2007.
8. Patrik Jonsson, *On Trial in Atlanta: Cost of Justice*, CHRISTIAN SCI. MONITOR, Oct. 29, 2007, <http://www.csmonitor.com/2007/1029/p02s01-usju.html>.
9. Brenda Goodman, *Official Quits in Georgia Public Defender Dispute*, N.Y. TIMES, Sept. 7, 2007, http://www.nytimes.com/2007/09/07/us/07georgia.html?_r=3&partner=rssnyt&emc=rss&pagewanted=all&oref=login&oref=slogin&oref=slogin.
10. *Senate Slashes Money for Public Defenders*, ASSOCIATED PRESS, Feb. 20, 2008, http://chronicle.augusta.com/stories/022008/met_188025.shtml. In other contexts, this scheme is known as the close-the-Washington-Monument ploy: respond to budget limitations by threatening to shut down popular or necessary services, and politicians might give in and increase your budget rather than insisting that waste be cut.
11. Larry Margasak, *Extravagances Cut at Legal Aid Program*, FOXNEWS.COM, Dec. 19, 2006, <http://www.foxnews.com/wires/2006Dec19/0,4670,LegalRichampPoor,00.html>.
12. *Closing the Justice Gap: Providing Civil Legal Assistance to Low Income Americans: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Senator Chuck Grassley, Member, S. Comm. on Judiciary).
13. Howard Phillips and Peter J. Ferrara, *The Real Cost of the Legal Services Corporation: A Two Trillion Dollar Bypass of Electoral Accountability?*, WASH. TIMES, Apr. 23, 1995.
14. BUREAU OF JUSTICE STATISTICS FEDERAL JUSTICE STATISTICS (2004), <http://www.ojp.usdoj.gov/bjs/fed.htm#appeals>.
15. Joan Biskupic, *High Court Ruling Sows Confusion*, USA TODAY, Jul. 12, 2004; Mark S. Hurwitz, *Much Ado About Sentencing: The Influence of Apprendi, Blakely, and Booker in the U.S. Courts of Appeals*, 27 JUSTICE SYS. J. 81, 91 (2006) (“Plainly, in the wake of Blakely, confusion was the norm in the courts of appeals—and in the district courts where judges were making specific sentencing decisions.”); Paul Rosenzweig, *Sentencing in a Post-Booker World—It’s Déjà Vu All Over Again*, Testimony Before ABA U.S. Sentencing Commission, Feb. 15, 2005, <http://www.heritage.org/research/legalissues/tst021505a.cfm>; cf. *Blakely v. Washington*, 542 U.S. 296, 324 (O’Connor, J., dissenting) (predicting “havoc” as a result of decision). Cf. also, e.g., *United States v. Higdon*, No. 07-9351 (7th Cir. July 9, 2008) (remanding for resentencing because basis of district court’s decision unclear).
16. The ability of a defense attorney to file an Anders brief (see *Anders v. California*, 386 U.S. 738, 744 (1967)) when an appeal is wholly frivolous should hypothetically limit the number of such appeals, but the de facto lack of disciplinary sanction for attorneys who file merits briefs when they should be filing Anders briefs has resulted in the underuse of the practice.
17. See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in the Legal Process*, 20 HOFSTRA L. REV. 533 (1992).
18. One notable exception, Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of A Randomized Experiment*, 35 LAW & SOC’Y REV. 419 (2001), is of questionable application outside of its limited scenario where screening took place to ensure that study participants had meritorious cases in which an attorney could make a difference in the highly arcane New York landlord/tenant system. If the multiple complicated layers of governmental housing regulation mean that unrepresented participants are at a disadvantage, it is hard to see why the solution is an additional layer of government intervention at taxpayer expense rather than elimination of aspects of the law that favor attorney representation. After all, if Barry Bonds has an advantage in baseball because he is taking steroids, most would agree that the solution is not to give every other baseball player steroids. Simplifying the rental laws would also have the benefit to tenants of increasing the quantity of housing stock in New York City. John Tierney, *At the Intersection of Supply and Demand*, N.Y. TIMES MAGAZINE, May 4, 1997; Milton Friedman and George J. Stigler, *Roofs or Ceilings? The Current Housing Problem*, FOUNDATION FOR ECONOMIC EDUCATION, POPULAR ESSAYS ON CURRENT PROBLEMS (1946).
19. I did pro bono asylum work when I was in private practice, and each time, it was on behalf of an immigrant who had hired an attorney who had unsuccessfully pursued the asylum application, rather than an immigrant who was unrepresented. One case was in front of an immigration judge notorious for rejecting asylum applications. Lisa Getter, *A Man’s Asylum Fight in the Land of the Free*, L.A. TIMES, Apr. 15, 2001 at A1. I won that case, saving from deportation a Somalian client whose family had been massacred, but I do not think I brought anything special to it through my very first court appearance or set of direct examinations as a junior associate. The fact that a big law firm was standing behind the immigrant signaled to the judge that this was not a run-of-the-mill case of someone pretending to be persecuted to get a green card.
20. Erica Hashimoto, *Defending the Right to Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423 (2007).

21. See, e.g., *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam).

22. Amir Efrati, *The Court House: How One Family Fought Foreclosure*, WALL ST. J., Dec. 28, 2007.

23. *Pruitt v. Mote*, 472 F.3d 484, 487 (7th Cir. 2006) (Easterbrook, J.).

24. *The American Lawyer* reports that the two hundred largest law firms contributed over 4,842,063 hours of pro bono time in the last twelve months. Nate Raymond, *Pro Bono Report 2008: A Silver Lining*, THE AMERICAN LAWYER, July 2008. If half that time had been spent on paying clients, the proceeds could fund the federally funded Legal Services Corporation several times over.

25. Jennifer 8. Lee, *Woman Wins Settlement Over Her Bathroom Ouster*, N.Y. TIMES, May 14, 2008, <http://www.nytimes.com/2008/05/14/nyregion/14gender.html>. Overlawyered.com, *Khadijah Farmer v. Caliente Cab Co.*, <http://overlawyered.com/2008/05/khadijah-farmer-v-caliente-cab-co/> (last visited July 23, 2008).

26. *Kosilek v. Department of Corrections*, No. 1:00-cv-12455-MLW (D. Mass. filed on Nov. 21, 2000).

27. Brian McGrory, *Injustice for Almost All*, BOSTON GLOBE, Sept. 16, 2005.

28. Raymond, *supra* note 24.

29. John Bolton & Stephen Holtzer, *Legal Services and Landlord-Tenant Litigation: A Critical Analysis*, 82 YALE L.J. 1495 (1973).

30. Lorne Gunter, *Court Says No to Sensible Parenting*, EDMONTON JOURNAL, June 22, 2008.

31. Cf. *Pruitt*, *supra*, 472 F.3d at 487 (“Contingent-fee lawyers take many weak cases; if a given plaintiff cannot persuade any lawyer to assist, his case must be weaker than the most feeble of these. When a judge nonetheless directs legal assistance to that case, he displaces the collective judgment of the bar and likely leaves some other client unrepresented in the process—for the lawyer recruited to assist Client X won’t have time to work for Client Y. That X is a prisoner, and Y a free person seeking help for injuries from an auto accident, is a weak reason to divert legal services in X’s direction.”).

32. George Liebmann, *Counterpoint—‘Civil Gideon’: An Idea Whose Time Has Passed*, DAILY RECORD, July 18, 2003.

33. Walter Olson, *The Great American Pants Suit*, WALL ST. J., June 18, 2007, <http://www.opinionjournal.com/editorial/feature.html?id=110010225>.

34. Cf. Larry Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299 (2004).