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Keynote Address: The Evolution and Importance of Creating a Civil Right to Counsel

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Cover Page Footnote

25-1

**KEYNOTE ADDRESS:
THE EVOLUTION AND IMPORTANCE OF CREATING A CIVIL
RIGHT TO COUNSEL**

*Wade Henderson**

INTRODUCTION

Good morning, ladies and gentlemen. I am really honored to be part of this inspiring, exciting, and historic conference. This is a wonderful facility, and is just an incredible place to be. I am grateful to have been selected as a participant in the distinguished public interest lawyer-in-residence program here at Touro Law.¹ I have enjoyed meeting with faculty and students, and I know that the adjective “distinguished” really applies to each and every one of you. During my all too brief visit here, I have been impressed by what a remarkable and invaluable institution the Touro Law Center is, not only for New York, but also for the entire nation. Here at Touro Law, the students are encouraged “to examine the moral goals of the law” while participating in community service and promoting social

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¹ Press Release, Touro Law Center, Wade Henderson Named Touro Law Center’s Public Interest Lawyer in Residence, *available at* <http://www.tourolaw.edu/news/press113.asp> (“[T]he Distinguished Public Interest Lawyer in Residence program [at] Touro Law Center recognizes attorneys who have made significant contributions to society by representation of individuals or groups historically denied access to justice.”).

justice.² I know their experience as students here will make them better lawyers upon graduation and their work as lawyers will make America a better, fairer society.

In that spirit, I am proud to bring you the greetings of the Leadership Conference on Civil Rights, the nation's leading civil rights coalition, consisting of 200 national organizations with literally millions of members.³ I also bring you warm regards from the David A. Clark School of Law at the University of the District of Columbia ("U.D.C."). You will note from my bio, I serve as the Joseph L. Rauh, Jr. Professor of Public Interest Law at U.D.C., so I am especially proud to be here in that capacity as well.⁴

I. *GIDEON V. WAINWRIGHT* AND THE CONCEPT OF A RIGHT TO COUNSEL

The topic of this conference, creating an action blueprint for a civil right to counsel in New York State, could not be timelier. At a time when the nation's economy is sinking into a recession, where hundreds of thousands of our fellow citizens are living in fear of losing their homes, their jobs, and their dreams of a decent life, it is more important than ever that every American have access to legal

² Touro Law, About Touro Law Center, <http://www.tourolaw.edu/about> (last visited Sept. 1, 2008).

³ CivilRights.org, About LCCR—Leadership Conference on Civil Rights, <http://www.civilrights.org/about/lccr> (last visited Sept. 1, 2008).

⁴ The Rauh Professor of Public Interest Law was established in the memory of Joseph L. Rauh, Jr., who created and supported the public law school at the University of the District of Columbia, and was a "lifelong crusader for equal justice." Law.udc.edu, The Rauh Professor of Public Interest Law, <http://www.law.udc.edu/faculty/rauh.html> (last visited Sept. 1, 2008). In recognition of his work, Joseph L. Rauh, Jr. was posthumously awarded the Medal of Freedom, the highest civilian award given in our nation, by President Clinton. *Id.*

representation in their greatest time of need.⁵ That is what we mean by the deceptively dry phrase, “a civil right to counsel.” Sometimes we call this concept “Civil Gideon.”⁶

Looking back to my own days as a law student, and an apprentice activist for civil rights, civil liberties, and social justice, I remember the importance of the Supreme Court’s decision in the historic case *Gideon v. Wainwright*.⁷ It was important then, and remains equally important to this very day.⁸ We have all heard the story, but it is worth telling and retelling, because it exemplifies our country’s capacity for correcting its’ injustices. Early in the 1960s, a man

⁵ Steven R. Weisman, *Bernanke is Pessimistic, But Bush Urges a “Deep Breath,”* N.Y. TIMES, July 16, 2008. The Chairman of the Federal Reserve testified that the economy is growing “at a sluggish pace” and that the housing market “continues to weaken. . . . [T]he problems of unstable markets continue[] because of ‘declining house prices, a softening labor market and rising prices of oil, food and some other commodities.’ ” *Id.* See also Data.bls.gov, U.S. Dep’t of Labor—Bureau of Labor Statistics, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=lns14000000 (last visited Sept. 24, 2008) (showing unemployment in July 2008 was the highest since January 2004); BEA.gov, Bureau of Economic Analysis—Gross Domestic Product, <http://bea.gov/national/xls/gdpchg.xls> (last visited Sept. 24, 2008) (showing that the 2007 gross domestic product grew at the slowest rate since 2003); Census.gov, U.S. Census Bureau—Housing Vacancies and Homeownership, <http://www.census.gov/hhes/www/housing/hvs/historic/files/histtab6.xls> (last visited Sept. 25, 2008) (showing that single unit home vacancies at highest rate since prior to 1970).

⁶ PublicJustice.org, Civil Gideon, <http://www.publicjustice.org/current-focus-area/index.cfm?subpageid=36> (last visited Sept. 25, 2008) (“In issues involving child custody, domestic disputes, access to healthcare, or other civil disputes involving fundamental interests and basic rights . . . Civil Gideon would grant those who cannot afford it the right to legal representation in these critical civil cases.”).

⁷ 372 U.S. 335 (1963).

⁸ See M. Katherine B. Darmer, *Miranda Warnings, Torture, the Right to Counsel and the War on Terror*, 10 CHAP. L. REV. 631, 649 (discussing how the Sixth Amendment and the holding in *Gideon* clearly entitle defendants in terrorism cases the right to counsel); Margaret Graham Tebo, *Rebuilding Project: Hurricane Katrina Washed Out Louisiana’s Justice System. Now it May be on the Verge of Moving Into the 21st Century*, 95 A.B.A. J. 39, 65 (2007) (discussing the influence of the *Gideon* decision on post-Hurricane Katrina criminal justice reforms); David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn’s Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 601 (2007) (suggesting that *Gideon* should be viewed through the lessons of therapeutic jurisprudence and evolve to fit twenty-first century needs).

named Clarence Earl Gideon was arrested, charged, and convicted of breaking into a pool hall in Panama City, Florida.⁹ Because he was too poor to afford a lawyer, he had to represent himself in court. Although he insisted on his innocence, the jury found him guilty and sentenced him to “five years in the state prison.”¹⁰ From his cell at the Florida state prison, using the prison library and prison stationery, he took his case all the way to the nation’s highest court. He contended that he had been denied counsel and, therefore, his Sixth and Fourteenth Amendment rights had been violated.¹¹ Ultimately, he was assigned an attorney, the great Abe Fortas, a future Supreme Court Justice.¹² Early in 1963, the last year of the “New Frontier,” now remembered for the historic civil rights march and tragic assassination of President Kennedy,¹³ the Supreme Court found in his favor.¹⁴ In an opinion written by Justice Hugo Black, the Court declared that a fair trial for a poor defendant could not be guaranteed without the assistance of counsel.¹⁵

Those familiar with the American system of justice, commented Justice Black, recognized how “lawyers in criminal courts are necessities, not luxuries.”¹⁶ In a phrase that resonates today, Justice

⁹ *Gideon*, 372 U.S. at 336.

¹⁰ *Id.* at 337.

¹¹ *Id.* at 337, 338 n.1.

¹² *Id.* at 335, 338; SupremeCourtUS.gov, Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Aug. 30, 2008) (Abe Fortas served as an Associate Justice from October 4, 1965 to May 14, 1969).

¹³ See WORLD ALMANAC AND BOOK OF FACTS 566 (2006).

¹⁴ *Gideon*, 372 U.S. at 345.

¹⁵ *Id.* at 344 (“[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”).

¹⁶ *Id.*

Black called this “an obvious truth.”¹⁷ Thanks to former Vice President Al Gore, we are accustomed to hearing about “an inconvenient truth,”¹⁸ but Justice Black was even more emphatic. He called the defendant’s need for legal representation “an obvious truth.”¹⁹

For all Americans who know our bible, there is something wonderfully resonant about the name Gideon. In the Book of Judges, a brave man named Gideon defended Israel’s freedom by leading an army equipped with trumpets and torches.²⁰ When the time came, Gideon’s freedom fighters blew their trumpets and lit their torches.²¹

II. THE CREATION OF A CIVIL RIGHT TO COUNSEL IN THE AFTERMATH OF *GIDEON*

The Supreme Court’s *Gideon* decision was like a clarion call that empowered innocent but vulnerable defendants to illuminate the truth that would set them free.²² In the years that followed the *Gideon* decision, many of the worst abuses of our nation’s system of law enforcement and criminal justice began to be eliminated once and for all.²³ In theory, and increasingly in practice, even the most vul-

¹⁷ *Id.*

¹⁸ See AN INCONVENIENT TRUTH (Lawrence Bender Productions 2006) (documenting Al Gore’s campaign to achieve worldwide recognition of the problem of global warming).

¹⁹ *Gideon*, 372 U.S. at 344.

²⁰ See Judges 6:1-8:35 (New King James).

²¹ See Judges 7:15-7:22 (New King James).

²² See generally 16B AM. JUR. 2D *Constitutional Law* § 955 (1998); William E. Ringel, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS (SECOND) § 31:2 (2008) (describing the effect and scope of *Gideon* and future Supreme Court decisions expanding its scope to lesser crimes); David A. Simon, Note, *Equal Before the Law: Toward A Restoration of Gideon’s Promise*, 43 HARV. C.R.-C.L. L. REV. 581, 583 (examining the public defender systems in Minnesota and Mississippi and advocating statewide systems, as opposed to local systems, to ensure that indigents are adequately represented).

²³ In the decade subsequent to *Gideon*, the Supreme Court eradicated law enforcement and prosecutorial mistreatment of defendants by explicitly broadening the right to counsel to par-

nerable defendants could no longer be arrested, charged, convicted, and imprisoned without court-appointed attorneys protecting their rights and arguing their cases.²⁴ As a young lawyer with an interest in civil rights, civil liberties, and social justice, I saw this slow but steady progress toward a system of justice worthy of that word.

Four and a half decades later, this conference is addressing an issue that is one of the newest frontiers of equal justice under law.²⁵ Just as defendants now have the right to legal representation in criminal cases, should not all Americans have the right to legal representation in civil cases? Should not those whose only crime is low income and economic insecurity have access to lawyers when their homes and livelihoods are on the line? When it comes to this “civil right to counsel,” the need is great, the cause is just, and the time is now.

Study after study has shown there is a great and growing gap between the need for legal representation in civil cases and the legal services that are available. In 1993, an American Bar Association (“ABA”) study showed that seventy percent of poor people did not

ticular phases of the criminal justice system. See, e.g., *Escobedo v. Illinois*, 378 U.S. 478 (1964) (extending the right to counsel to custodial interrogation); *United States v. Wade*, 388 U.S. 218 (1967) (extending the right to counsel to post-indictment lineups); *Coleman v. Alabama*, 399 U.S. 1 (1970) (extending the right to counsel to preliminary hearings).

²⁴ Following *Gideon*, Congress enacted the Federal Criminal Justice Act, creating a system for the appointment of lawyers to represent indigent defendants within the federal system. 18 U.S.C. § 3006A (2000) (original act adopted in 1964). See also *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (expanding *Gideon* and ruling that an indigent defendant’s Sixth Amendment right to counsel extends to misdemeanor cases in which the defendant may face imprisonment).

²⁵ See Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367, 367-68 (2008) (“The flood of unrepresented litigants in civil cases over the past decade has caused a fundamental reexamination of the operation of many of our courts. The phenomenon has inspired conferences, publications, and websites replete with information, analysis, and guidance.”).

obtain legal help for serious legal problems.²⁶ In the years that followed, many studies suggested that number is closer to ninety percent.²⁷ Only one year later, in 1994, the American Bar Association's Comprehensive Legal Needs study found that nationally, on average, low income families had civil legal problems about once a year.²⁸

These problems affect many of the most basic necessities of life and the most fundamental elements of people's lives. Now that the economy is flatlining and falling, low and moderate income families are facing even more serious legal problems.²⁹ The fact is, being poor is terribly expensive. Your rent is higher for what you get, your mortgage is prohibitively expensive, payday lenders make loan sharks look like philanthropists, and you pay more at the corner store than folks in wealthy suburbs.³⁰ These reasons explain why poor folks face situations where they need to see lawyers. When tenants are being evicted from their apartments, they just might need to see a lawyer. When a family is facing foreclosure on their home, often because they suffer from predatory mortgage loans, they just might

²⁶ Mark Hansen, *A Shunned Justice System*, 80 A.B.A. J. 18, 18 (1994) (analyzing the results of the ABA study).

²⁷ See LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA—THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW INCOME AMERICANS 13 (2007) [hereinafter DOCUMENTING THE JUSTICE GAP], available at <http://www.lsc.gov/JusticeGap.pdf> (“[A]ll of the recent state studies found a level of need substantially *higher* than the level found in the 1994 ABA study.”).

²⁸ See *id.*

²⁹ See, e.g., Posting of Free Exchange to Economist.com, http://www.economist.com/blogs/freeexchange/2008/05/how_low_can_america_grow.cfm (May 22, 2008) (noting that “the economy is essentially flatlining”).

³⁰ Michael B. de Leeuw et al., *The Current State of Residential Segregation and Housing Discrimination: The United States' Obligations Under the International Convention on the Elimination of all Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337, 371-77 (2008) (discussing predatory lenders and the discriminatory practices they dispense upon low income buyers).

need to see a lawyer. When wage earners are losing their jobs, paychecks, and health coverage, sometimes for reasons that are less clear-cut than simple economic layoffs, they just might need to see a lawyer. When the repo man is coming for the family's car or the credit card company is going after their good name, they just might need to see a lawyer. When a family with kids is unjustly denied Medicaid, they just might need to see a lawyer. And when families in financial trouble are coming apart, then the husband, the wife, and even their kids just might need to see a lawyer. But, undeniable as these needs are, fewer than twenty percent of these families obtain help from a legal aid program or a pro bono, private lawyer.³¹

III. THE NEED FOR CREATING A CIVIL RIGHT TO COUNSEL

In many specialized courts, such as those that hear landlord and tenant cases, an overwhelming majority of cases have at least one party without a lawyer.³² This means low and moderate income people largely cannot afford to enforce the rights they have. This "obvious truth" that Justice Hugo Black proclaimed about criminal cases almost a half century ago is every bit as true about civil cases today. Without legal representation, there is no justice. This crisis in civil justice is cause for concern for all of us who care about civil rights.

³¹ See DOCUMENTING THE JUSTICE GAP, *supra* note 27 at 18 ("The recent state legal needs studies confirm earlier research and reveal that conservatively less than one in five—20 percent—of those requiring civil legal assistance actually receive it.").

³² See Laura K. Abel, Kira Krenichyn & Nicole Schaefer-McDaniel, *Results from Three Surveys of Tenants Facing Evictions in New York City Housing Court*, Exec. Sum. at 2 (2007), available at http://www.brennancenter.org/content/resource/results_from_three_surveys_of_tenants_facing_eviction_in_new_york_city_hous/ ("Of the 1,767 tenants facing eviction who provided information on their legal representation, at least 76% of tenants did not have legal representation.").

We know that there are almost thirty-eight million poor people in the United States, thirteen percent of the total population.³³ We know that African-Americans and Latinos are more than twice as likely to be poor than their non-Hispanic, white counterparts.³⁴ We know that even before the recession formally begins, there are about twenty-five percent of African-Americans and twenty-two percent of Latinos who live below the poverty line.³⁵ In addition to all of that, we know that the practices and procedures of the legal system can still be stacked against people of color, recent immigrants, women, people with disabilities, and others who are vulnerable to discrimination in all its forms.³⁶

IV. CONCLUSION

Forty-five years after *Gideon*, the legal system helps lock people into poverty and perpetuates the status quo, deeply divided along racial, ethnic, and gender lines. But just as it was for Clarence Earl Gideon, the right to legal counsel can be the key that unlocks the prison of injustice. Indeed, this “obvious truth” has been recognized in other centuries and is recognized today. As early as the 1200s, the

³³ FactFinder.Census.gov, http://factfinder.census.gov/servlet/STTable?_bm=y&-qr_name=ACS_2007_1YR_G00_S1701&-geo_id=01000US&-ds_name=ACS_2007_1YR_G00_-&-_lang=en&-redoLog=false, (follow “Data Sets”; then follow “American Community Survey”; then follow “2007 Subject Tables”; then select “Next”; then follow “Poverty Status in the Past 12 Months.”) (last visited Nov. 23, 2008).

³⁴ *Id.* (displaying the percentages of people below the poverty line among different ethnicities).

³⁵ *Id.*

³⁶ See, e.g., LEADERSHIP CONFERENCE OF CIVIL RIGHTS, AMERICAN DREAM? AMERICAN REALITY! A REPORT ON RACE, ETHNICITY, AND THE LAW IN THE UNITED STATES (Jan. 2008), available at <http://www.civilrights.org/assets/pdfs/cerd-2007.pdf>.

English courts provided free legal assistance for the poor.³⁷ This principle is reflected in the State of Maryland's constitution, and many other states.³⁸ Today, more than fifty foreign countries provide legal representation in cases as a matter of right.³⁹ Indeed, the European Court of Human Rights has recognized the fundamental right to a fair hearing.⁴⁰ Germany recognizes the right.⁴¹ So does Poland, recently freed from Communism.⁴² So does South Africa, recently freed from apartheid.⁴³ So does Greece,⁴⁴ so does Ireland.⁴⁵ Why is this not the same here in the United States? That is the question we are raising with this conference, and I applaud you for it. Thanks to you, Gideon's trumpet still sounds. Thanks to you, Gideon's torch still burns brightly. Thank you all for convening this conference. Thank you very much for the honor of being with you today. And good luck as New York struggles to make this ephemeral right a reality for so many who deserve it.

³⁷ Paul Marvy & Debra Gardner, *A Civil Right to Counsel for the Poor*, 32 HUM. RTS 8, 8 (2005) ("Because of our shared common-law heritage, Americans would do well to remember that there was free legal assistance for the poor in English courts as early as the 1200s.").

³⁸ *Id.* at 9 (citing Md. CONST. art. XIX).

³⁹ *Id.* at 8 ("Over fifty countries provide legal representation in civil cases as a matter of right.").

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Marvy, *supra* note 37, at 8.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*