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A Gendered Right to Counsel?

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Kathryn A. Sabbeth and Jessica K. Steinberg, *The Gender of Gideon*, 69 **UCLA L. Rev.** (forthcoming, 2022), available at [SSRN](#).

The civil and criminal justice systems are built on an adversarial model, but only in the criminal sphere does the defendant possess a constitutional right to representation at public expense. As a result, while representation is the default in criminal cases, more than three quarters of civil cases involve an unrepresented party.

That disconnect flows from the Supreme Court's decisions in [Gideon v. Wainwright](#) and [Lassiter v. Department of Social Services](#). *Gideon* held that the Constitution guarantees a right to counsel for a defendant facing imprisonment for a criminal offense, regardless of the nature of the crime or the length of the sentence. *Lassiter* held that the Constitution does not provide the same guarantee for a parent facing the termination of her legal relationship with her child.

What does any of that have to do with gender? Quite a bit, Kathryn Sabbeth and Jessica Steinberg explain in *The Gender of Gideon*.

That Clarence Gideon was a white man while Abby Gail Lassiter was a Black woman is only the starting point for their analysis. They demonstrate that, when it comes to the right to counsel, race and gender play a striking role in both the flaws in the doctrine and the facts on the ground. “[I]n *both* criminal *and* civil proceedings, the defendants unable to afford counsel are disproportionately people of color. Yet, in civil proceedings, they are also disproportionately *women* .” (Emphasis in the original.)

No governmental agency collects data about the gender of civil litigants, so the authors find information that, while indirect, provides ample support for their claim that “women face civil justice issues regularly and with highly punitive consequences.” Nearly a fifth of civil matters are evictions, and numerous studies of housing courts show that women comprise a clear majority of those facing eviction. Approximately five million cases a year involve family law, and virtually all defendants in cases involving the termination of parental rights are women. Debt collection actions constitute about a quarter of civil cases, and governmental data suggests that women carry high levels of debt and fall behind on payments more often than men do.

Women often appear in court for civil matters without counsel. As noted above, three quarters of civil litigants are unrepresented, higher in eviction and debt collection cases. Landlords and debt owners, by contrast, have representation rates upwards of 90 percent, meaning that a pro se defendant in an eviction or debt collection action likely faces a represented party. The authors caution against drawing overly precise conclusions from the available data. But it is clear that women are heavily burdened by the absence of a “civil *Gideon*” for matters affecting their lives.

Moving from data to doctrine, the authors show that the Supreme Court's right-to-counsel decisions have failed to reflect the profound importance of these matters. In *Gideon*, the Court held that principles of liberty and justice required a right to counsel in all criminal cases involving imprisonment. By contrast, the Court held in *Lassiter* that a mother's liberty interest in her relationship with her child did not automatically trigger the same right. As the authors put it, “the Court flatly concluded that the right to parent was categorically less important than physical liberty.”

Instead of announcing an across-the-board guarantee, the Court held that the right to counsel in parental-termination

proceedings would be determined on a case-by-case basis pursuant to the [Mathews v. Eldridge](#) balancing test, asking whether the private interest is significant enough, in light of the risk of an erroneous decision, to outweigh the state's interests. The authors argue that the Court analyzed those factors in a way that devalued Abby Gail Lassiter's relationship with her child. The Court showed no awareness of the long and ugly history of the destruction of Black women's bonds with their children in discussing her liberty interests and did not identify the preservation of Lassiter's family as an interest of the state.

In criticizing *Lassiter*, the authors do not idealize *Gideon*. They acknowledge the latter's many failures, but also note its successes. The development of doctrine in eviction, family law, and debt-collection cases, compared with criminal cases, supports the proposition that *Gideon* has had some positive effects. In criminal cases, the availability of representation at public expense has facilitated frequent appellate decisions about important legal issues. In the most common categories of civil cases, by contrast, the absence of representation has meant that the less powerful party seldom appeals, let alone effectively presents issues for appellate review. Doctrine stagnates, if it does not disappear altogether.

The Gender of Gideon is a terrific article. It offers a rich and empirically grounded view of parts of the justice system that receive too little attention, and it persuasively explains the role that gender has played in those areas. It asks its readers to attend to those realities, and it also asks those of us in the legal academy to consider how we might be complicit in creating and sustaining them. For example, do we treat family law cases, courses, and scholarship as unimportant or lacking in prestige? What, if anything, do we teach students about the "domestic relations" exception to federal subject matter jurisdiction? It is worth thinking about those choices and the values they reflect.

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