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A PUBLICATION OF THE AMERICAN BAR ASSOCIATION

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## INDIVIDUAL RIGHTS AND RESPONSIBILITIES: Immigration, Deportation, and the Right to Counsel

Vol. 30 No. 5

By Lucas Guttentag, Ahilan Arulanantham

Lucas Guttentag ([lucas.guttentag@yale.edu](mailto:lucas.guttentag@yale.edu)) teaches at Yale Law School, where he is a Robina Foundation Distinguished Senior Fellow, and at Stanford Law School, where he is a lecturer in law. He is the founder and former national director of the ACLU Immigrants' Rights Project. Ahilan Arulanantham is senior staff attorney at the ACLU Immigrants' Rights Project, deputy legal director of the ACLU of Southern California, and counsel for the class in *Franco-Gonzalez v. Holder*. Benjamin Good, Stanford Law School JD 2013, provided outstanding research assistance.

Long before *Gideon v. Wainwright*, 372 U.S. 335 (1963), the U.S. Supreme Court in *Bridges v. Wixon*, 326 U.S. 135 (1945), recognized that deportation may deprive an immigrant of "all that makes life worth living" and that "meticulous care" is required to ensure that the "depriv[ation] of liberty . . . meet the essential standards of fairness." Yet one of the most essential guardians of fairness—a lawyer to represent immigrants in deportation hearings against government prosecutors—is denied in nearly 50 percent of all cases, and even more often in cases involving detained immigrants. This denial persists even as the Court has recognized and reaffirmed repeatedly in the last dozen years that for non-citizens facing expulsion, deportation is often a far more severe consequence than a criminal sentence.

This year, the 50th anniversary of *Gideon*, coincides with the most serious prospect for congressional immigration reform in a generation. As we grapple with an immigration system mired in failure, the *Gideon* anniversary is a reminder that despite salient similarities between the immigration and criminal systems, the right to appointed immigration counsel lags far behind the right in criminal cases.

Superficially, any person charged with being "removable" is

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entitled by statute to be represented by counsel—but only “at no expense to the Government.” As a result, half of those who face the drastic sanction of deportation have no lawyer. A recent study of New York immigration courts showed that immigrants who are compelled to proceed without representation are five times more likely to lose their cases as those who have counsel.

This should not be surprising. First, immigration law is notoriously complex and continually changing. Second, the United States is always represented by counsel in removal hearings. Third, immigration judges charged with overseeing the hearings lack the legal authority to adequately supervise U.S. Immigration and Customs Enforcement (ICE) prosecutors, are subordinate to the attorney general, and are notoriously overworked and under-resourced.

**The doctrinal birth of Gideon.** The indigent criminal defendant’s right to appointed counsel evolved as judges came to recognize that proceedings pitting a well-trained “repeat player” against an untrained layperson are fundamentally unfair. In the criminal setting, courts first explicitly pronounced this principle in cases involving particularly vulnerable defendants and defendants facing particularly severe forms of deprivation. The Supreme Court first recognized a constitutional right to appointed counsel in state criminal prosecutions in 1932, holding in *Powell v. Alabama*, 287 U.S. 45, 71 (1932), that defendants facing capital punishment must receive appointed counsel. In 1938 the Court held in *Johnson v. Zerbst*, 304 U.S. 458 (1938), that court-appointed counsel was constitutionally required in all federal prosecutions. Yet, a few years later in *Betts v. Brady*, 316 U.S. 455, 472 (1942), the Court declined to recognize a categorical right to appointed counsel in every state felony prosecution under the 14th Amendment. Instead it imposed a case-by-case approach that required judges to appoint counsel only under special circumstances. Gradually, the Court recognized such circumstances in a variety of settings, including where complex legal issues were presented, or where the defendant was mentally disabled, particularly young, uneducated, or unable to understand English. Twenty years after *Betts*, Gideon adopted a more categorical approach by requiring appointed counsel for all felony cases. Finally, almost a decade later, *Argersinger v. Hamlin*, 407 U.S. 25 (1972), extended Gideon to all cases resulting in incarceration as punishment.

**Developments in the “Civil Gideon” doctrine.** The Supreme Court first extended Gideon to the civil context in *In re Gault*, 387 U.S. 1 (1967), which held that juveniles in delinquency proceedings facing civil confinement had a right to appointed counsel. However, subsequent cases declined to continue *Gideon’s* expansion in this context.

The most striking evidence of the retreat from *Gideon* in the civil

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context may be *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), a case in which the Supreme Court denied a claim for appointed counsel on behalf of an indigent parent who lost custody of her child in a parental termination proceeding. The decision suggested that the critical factor justifying the denial of appointed counsel was that the case involved no loss of “personal freedom.” However, just two years ago the Court rejected a claim for appointed counsel in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), even though the unrepresented litigant—a father facing imprisonment for civil contempt based on failure to pay child support—was jailed. Nonetheless, all the factors relied on by the Court to deny appointed counsel in *Turner* support the need for counsel in immigration proceedings.

**Meaningful appointed counsel in Immigration Court.** Today, advocates are trying to extend the logic of both *Gideon* and *Turner* to the deportation context by establishing a right to appointed counsel for especially vulnerable immigrant populations, through both legislation and litigation. For example, the Trafficking Victims Protection Reauthorization Act of 2008 requires the secretary of U.S. Department of Health and Human Services to “ensure, to the greatest extent practicable . . . that all unaccompanied alien children who are or have been in the custody of the federal government . . . have counsel to represent them in legal proceedings or matters. . . .” The Ninth Circuit has also strongly encouraged immigration judges to ensure legal representation for unaccompanied minors.

Although efforts have focused on the most vulnerable immigrant populations, the ultimate goal should include appointed counsel for many, if not all, immigrants. To give just two obvious examples where the right to appointed counsel should apply: individuals facing complex deportation proceedings and those for whom the stakes may be particularly high, either because they have a fear of persecution or torture upon return or because they have deep ties to this country that render them eligible for relief. Although the rationale for appointed counsel is especially compelling for some—such as those with serious mental disorders or unaccompanied children—the requirements of fundamental fairness must be assessed in all cases in light of the complexity of immigration law, the role of government prosecutors, and the severity of the harm caused by deportation.

**From *Gideon* to appointed counsel in deportation cases.**


Although *Gideon* has plainly not cured the ills of the criminal justice system, its promise remains the essential starting point for ensuring fairness to immigrants facing expulsion. The vulnerability, language impediments, and cultural barriers that immigrants face make fairness more difficult to achieve and oversight of systemic failures more difficult to accomplish. In this context, the right to

Staff Editor  
American Bar  
Association  
321 N. Clark St.  
Chicago, IL  
60654-7598  
Phone: 312-988-6076  
Fax: 312-988-6081

**Jeffrey Allen**  
Editor-in-Chief

**Kimberly Anderson**  
Director  
ABA Solo, Small Firm,  
and General Practice  
Division

appointed counsel is the essential starting point for ensuring fairness in the deportation system.

The procedural protections afforded immigrants today are fewer even than those provided for criminal defendants in the pre-*Gideon* era. Yet, the similarities are clear and the need is compelling, as counsel for immigrants facing removal must be understood as "implicit in the concept of ordered liberty." 

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**This article** is an abridged and edited version of one that originally appeared on page 14 of *Human Rights*, April 2013 (39:4).

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