



TUNE IN TO THE
SOUND OF DEMOCRACY

Justice Talking Radio Transcript

Are Lawyers Necessary in All Cases?—Air Date: 4/10/06

The Constitution mandates that all persons accused of a crime have a right to an attorney. If you can't afford one, a lawyer will be appointed for you. But if you are in a car accident, need to declare bankruptcy or are a victim of discrimination, you have no right to an attorney even though your job, family, home or life savings may be on the line. Join us for this edition of Justice Talking as we ask: Should all Americans have a right to an attorney when they are sued or when they want to file a lawsuit of their own? And if you don't have a lawyer, can you really get justice?

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MARGOT ADLER: From NPR this is Justice Talking. I'm Margot Adler. Coming up on today's show: the right to an attorney. The courts have guaranteed Americans the right to legal representation in a criminal case, but should we have that same right in a civil case? We'll talk about government funding of lawyers for the poor, our litigious society and whether a lawyer is really necessary for routine and simple legal proceedings.

UNIDENTIFIED MALE: So we have a sort of, if you will, a fundamental disconnect here between a court system and forms that were designed for representation and lawyers to resolve these everyday family issues. Most of the people aren't represented. It's not really designed very well for an individual person to help themselves.

MARGOT ADLER: What help is there for people who can't afford legal assistance or who want to represent themselves? After the news.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. On today's show: the right to an attorney. The Constitution mandates that all persons accused of a crime have a right to an attorney, and the Supreme Court has ruled that if you can't afford one a lawyer will be appointed for you. But if you are in a car accident, need to declare bankruptcy or are a victim of discrimination you have no right to legal representation, even though your job, family, home or life savings may be on the line. Today we'll ask: Should all Americans have a right to an attorney when they are sued or when they want to file a lawsuit of their own? And if you don't have a lawyer can you really get justice? We'll visit the Legal Grind, a coffee shop in Santa Monica, California, where you can get a cup of coffee and file for a divorce.

UNIDENTIFIED FEMALE: Soon-to-be-newlywed Andreas Kirchner bellies up to the coffee bar. He plunks down \$25 for a cup of tea and 15 minutes of legal advice.

MARGOT ADLER: You'll also hear a lively debate about whether legal representation in civil cases should be a right.

UNIDENTIFIED MALE: Four out of every five people who need a lawyer won't get it. So it's very class-based and very much about economics.

MARGOT ADLER: But before we get into the debate, I called Deborah Rhode, a law professor at Stanford University, to find out what options there are for people who need legal assistance but can't afford to pay for a lawyer. She is the director of the Stanford Center on Ethics and the author of the book "Access to Justice." Deborah, the Supreme Court decided in Gideon vs. Wainwright that defendants in a criminal case have the right to an attorney even if they can't afford to pay for one. Are there some civil cases where a person has that same right, where a person despite inability to pay for an attorney will be given one anyway?

DEBORAH RHODE: Very small category of cases.

MARGOT ADLER: Such as?

DEBORAH RHODE: Sometimes termination of parental rights for incarcerated prisoners. For example, individuals who obviously aren't in a position to earn enough for counsel and that's considered to be a fundamental right.

MARGOT ADLER: So if a person can't afford to pay for a lawyer, what are the options?

DEBORAH RHODE: Well, if they are below or just narrowly above the poverty threshold, they can in theory qualify for government-funded legal services. The problem with those offices is we don't fund them at anywhere near the level that would be necessary to meet existing needs. So at the moment, less than one percent of our expenditures on legal services go to legal civil assistance for the poor. We spend about \$2.25 per person on civil legal aid for a seventh of the American population that's eligible.

MARGOT ADLER: Now what about the use of paralegals? What about representing yourself going to small claims court? I would assume that in some cases that works.

DEBORAH RHODE: Well, in fact, in what we commonly call poor people's courts—family law, bankruptcy, landlord/tenant—in fact, self representation is more the norm than the exception. The problem is that those systems in which people are operating on their own were designed by and for lawyers, and they aren't user-friendly. Some people manage by getting form processing services, in effect independent paralegals, to prepare the papers. And increasingly a number of courts are beginning to provide some kind of either computer-based assistance or in-person assistance for the people who are proceeding by themselves.

MARGOT ADLER: The right to an attorney in a criminal case was decided in the case *Gideon vs. Wainwright*, correct?

DEBORAH RHODE: Right.

MARGOT ADLER: And why doesn't that right extend to civil cases?

DEBORAH RHODE: In theory because criminal cases pose more of a concern for individual welfare. The assumption is that when individuals' right to liberty, representation and sometimes life are at issue, they're entitled to have effective legal representation. Part of the reason for having effective assistance of counsel requirements even for defendants who you think are guilty is that that's one way to protect those who are innocent, to make sure that the system functions effectively for anyone who's accused of a crime.

MARGOT ADLER: One thing that we haven't talked about in regard to getting representation for the poor is the whole question of pro bono work, of providing legal assistance to the poor, you know, through groups of lawyers and so forth. What is the situation in regard to that at this present moment?

DEBORAH RHODE: Well, the American Bar on the whole averages about a half an hour a week and a half a dollar a day in support of pro bono services. So that's not a lot of due process. And, of course, a lot of those services don't go to the poor, those most in need of assistance. They go to friends or favorite charities of the lawyers, you know, opera guilds, museums, their brother-in-law. So it's not an organized way to deliver legal services. Every major progressive social movement in this country has been in part supported by lawyers' pro bono work over the last quarter century.

And we simply wouldn't see the progress that we've seen in many areas of civil rights, civil liberties, even poverty law, if it hadn't been for the pro bono work of lawyers. *Gideon vs. Wainwright*, the case that you mentioned earlier that established a right to counsel in criminal cases, was handled by a pro bono Washington lawyer.

MARGOT ADLER: That was Deborah Rhode. She is a law professor and the director of the Stanford Center on Ethics at Stanford University. She has written a number of books including “Access to Justice.”

MARGOT ADLER: The high cost of getting a lawyer means many Americans have limited access to the civil justice system. Not every one can afford to hire lawyers at \$100 an hour or in many cases much more. But some people also earn too much to qualify for government subsidized aid.

In Los Angeles, the court system has stepped in to offer self-help services and as Robin Urevich reports so has one lawyer turned café owner. He offers legal advice, along with your cup of joe.

ROBIN UREVICH: It’s family law night at the Legal Grind coffee shop in the beachside town of Santa Monica. As customers, some with kids in tow, trickle in, it feels a lot like your neighborhood Starbucks with a little more tension in the air. Soon-to-be-newlywed Andreas Kirchker bellies up to the coffee bar. He plunks down \$25 for a cup of tea and 15 minutes of legal advice. He heads to a table to talk with family law attorney Elizabeth Hill.

ELIZABETH HILL: So okay how can I help you today?

ANDREAS KIRCHKER: Well, we are getting married like ten days from now and I’m in desperate need of one of these.

ROBIN UREVICH: In his hand is a 15-page prenuptial agreement downloaded from the Internet. Kirchker says if his marriage doesn’t last he wants to hang onto his condo and avoid the sort of messy divorce his parents had.

ELIZABETH HILL: You don’t have to necessarily sign a premarital agreement to keep your property separate. If you are coming into a...

ROBIN UREVICH: Aside from these \$25 coffee and counsel sessions, the Legal Grind also offers lawyer referrals and legal document preparation. You can order up a power of attorney for \$75, or a simple will for \$125. Throw in \$3 and you get an “LA Latte” or a “coppuccino.” Legal Grind founder Jeff Hughes explains why he started up the place.

JEFF HUGHES: Poor people have access to legal aid, and wealthy people have their own private attorneys, while the middle class, they just don’t know really who to use. And that’s why they come here.

ROBIN UREVICH: Hughes now runs two Legal Grind coffee shops and plans to open a third within weeks. Demand for do-it-yourself law is growing because legal fees are so high. It can cost \$5,000 to \$10,000 just to start a divorce. At a self-help law center at a San

Fernando Valley courthouse about two dozen people, most of them women, huddle with attorneys and paralegals, pouring over legal forms as if they're cramming for exams.

At stake are issues like who gets the kids on Christmas day and who will pay for the kids' health care. This center is one of four that guides do-it-yourselfers through mazes of forms and procedures. The centers are open to all regardless of income. Neil Dudavitz directs a legal aid group that helps to set up and run the centers.

NEIL DUDAVITZ: So we have a sort of, if you will, a fundamental disconnect here between a court system and forms that were designed for representation and lawyers to resolve these everyday family issues. Most of the people aren't represented. It's not really designed very well for an individual person to help themselves.

ROBIN UREVICH: Dudavitz says that in LA County, as in most parts of the country, more than half of those who fight evictions, get divorces or struggle with spouses over custody, represent themselves in court.

UNIDENTIFIED FEMALE: So she's afraid that he might take the child out of the state and the county?

UNIDENTIFIED FEMALE: Yes.

ROBIN UREVICH: Richard Zorza, an attorney and self-help advocate says California is in the forefront of efforts like these, along with Maryland and New York. Eight other states also offer comprehensive do-it-yourself services. Zorza says states and counties have embarked on self-help projects out of necessity—non-lawyers who don't know legal procedures clog up the courts, and because of some reflection on what the courts are all about.

RICHARD ZORZA: When you start to ask what's this institution for, rather than, you know, what do I get out of this institution? You know, to paraphrase John Kennedy a little, if it's a court the answer is justice. And then the question is whether it is providing access to that justice, and if not what do you do?

ROBIN UREVICH: But Zorza says justice still comes at price in many courthouses around the country where self-help services have yet to arrive.

UNIDENTIFIED FEMALE: [phone rings] Legal Grind.

ROBIN UREVICH: Back at the Legal Grind coffeehouse, attorney Elizabeth Hill has given soon-to-be-wed Andreas Kirchker a crash course in prenuptial agreements.

ELIZABETH HILL: You are getting married in ten days, you said? Okay, there may be a presumption of undue influence if you sign the agreement at this time.

ROBIN UREVICH: So Kirchker makes a decision.

ANDREAS KIRCHKER: We're going to stay out of the hands of the lawyers and keep it on a civil basis between the two of us and a notary. And then we'll just be good to each other every day and it will work.

ROBIN UREVICH: For those who can't avoid the legal system, self-help advocates say that you can expect smoother sailing in the future if you have to go it alone. They've organized at the national level with the goal of simplify forms and procedures in courts nationwide in the next five years. For Justice Talking, I'm Robin Urevich in Los Angeles.

MARGOT ADLER: Coming up: a debate at the National Constitution Center in Philadelphia over whether poor people should get free legal assistance in civil cases. Don't go away.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. On today's show we're talking about the right to a lawyer. The courts have guaranteed the right to an attorney in a criminal case, but should you have the same right in a civil case? In this part of our program you'll hear a debate about this issue recorded at the National Constitution Center in Philadelphia in front of an audience of lawyers. They were participating in a conference about civil Gideon, or the right to an attorney in civil cases.

Our debaters are attorneys Martin Kaufman and Danny Greenberg. Martin Kaufman is the senior vice president of the Atlantic Legal Foundation in New York City, a public interest law firm that works on cases involving individual liberty, free enterprise and limited government. Danny Greenberg is the former president of the Legal Aid Society in New York, which calls itself the country's largest full-service law firm for poor people.

There's a right to counsel enshrined in the Sixth Amendment in the Supreme Court case Gideon vs. Wainwright. I began by asking Martin Kaufman to help me understand who gets a lawyer and who doesn't in our justice system.

MARTIN KAUFMAN: Well, as you point out, under Gideon every defender in a criminal case is entitled to legal representation, that is, if he can't afford to pay the lawyer the government will pay his lawyer. So the government in that case is really funding both sides. In civil cases it's less clear and there are many different classes of civil cases. There are some cases which are technically civil, but where there may be a quasi-criminal penalty, such as jail time or a heavy fine. And the Supreme Court has held that in cases like that, which they call cases that implicate a liberty interest, you're also entitled to a lawyer in the same way that you are under Gideon.

MARGOT ADLER: Danny would you add to that or disagree with that?

DANIEL GREENBERG: I think that we could sum it up even easier in one way. You do get a right to a lawyer in a criminal case. In *NYPD Blue*, before Sipawitz beats you up, he says you have a right to a lawyer, and criminal defendants get the right to a lawyer. I think that we could sum it up, though, by saying if you're poor you don't get a lawyer. The reality for civil cases and the irony of them is that for really important things—evictions from your home, the right to keep your family intact, access to health care, all the things that poor people need so much more in a sense than people who could afford to get it on their own—they will not get a lawyer for that. There are some legal services, organizations, but every study shows that four out of every five people who need a lawyer won't get it. So it's very class-based and very much about economics.

MARGOT ADLER: So there are thousands of civil lawsuits filed in the United States each year, ranging from disputes between neighbors, paternal custody, etc. Let's just put that issue right out there. Should the right to an attorney granted in *Gideon vs. Wainwright* be extended to civil cases? Let's start with you Danny.

DANIEL GREENBERG: Well, I'm a lawyer so I have to answer that by saying that it depends. For really important things, as I said, let's just sort of basically say they are the most basic needs—right to shelter, right to health care, access to the things that keep people going—my answer to that would be yes. And there aren't just thousands of those, there are actually hundreds of thousands and millions of those cases. On the other hand, I'm not that concerned if two people who could either be on "Judge Judy" or in Philadelphia civil court are arguing about who should get access to the potatoes or something, it doesn't bother me at all that neither of them have lawyers or one of them has lawyers. So my answer would be somewhat nuanced. I want to see lawyers for those cases that really genuinely affect people lives in the kinds of ways that all of us would really agree profoundly affect family autonomy.

MARTIN KAUFMAN: But what about the case, for example, where you have an individual sole proprietor, he owns a business, and the EPA says: you're violating some environmental law, we're putting you out of business, or we're going to impose a fine that affectively puts you out of business? His livelihood is taken away. Is that as important as whether a tenant has to pay back rent or can't afford to pay back rent and gets evicted?

MARGOT ADLER: Danny?

DANIEL GREENBERG: If the EPA person is going to be thrown out on the street if he loses, I would say it probably has the same importance. My guess is that if he runs a business and even the EPA goes ahead and does what it does, at most what's going to happen is there will be that heavy fine. But I certainly think that there is a difference, Marty you may disagree with this, but I think there is a difference between if you can't pay the rent and if you don't have a lawyer to show you why you can't pay the rent and the other side does have a lawyer. The consequence of that is you will be homeless; you will with your children be living on the street or living in a shelter. We may well disagree that an

economic loss that may even put somebody out of business doesn't rise to that level, but I don't think it does.

MARGOT ADLER: Martin, before you go on, just give me your basic thrust about, you know, what do you believe, when do you believe that a lawyer is justified in a civil case and when is it not?

MARTIN KAUFMAN: Well, I think the problem is that I'm not sure that I can draw a line and the problem is that it's so difficult to draw a line. I don't know that you can make principled distinctions between classes of people or between classes of cases that sort of meets any rigid standard of logic. If you do it on an income or wealth basis you're essentially discriminating against the middle class. If you do it on the basis of certain kinds of cases but not other kinds of cases, again you're eliminating whole groups of people from coverage by this government funding program.

DANIEL GREENBERG: But we do that all the time. I mean, think of health care. There's a Medicaid program. It's income based. If you have below a certain threshold you will have access to it. Do I think that we should live in a society in which there is universal access? Of course I do. But I think that there is a difference in understanding that for the poorest of the poor you think that there is a value, we think there is a value, society thinks there's a value, in making sure that if they have tuberculosis they don't sit home and try to cure that themselves.

MARGOT ADLER: I'd like to step back for a second and ask the constitutional question. We got a letter from Judd Serotta from Cherry Hill, New Jersey, who wrote us this question. He's also president of the Philadelphia Chapter of the Federalist Society. He writes: "Just as our Constitution contains no mention of a right to a doctor if you get sick, it contains no mention of a right to an attorney if you get sued. Can we agree that any right to an attorney in a civil case is a decision best left up to legislatures that are designed as reflections of the will of the people, rather than courts that are set up to interpret a written constitution that contains no mention of this issue?" Danny, how do you respond?

DANIEL GREENBERG: Well, it will not come as a great shock that I disagree with the head of the Federalist Society. There are lots of things that aren't mentioned in the Constitution that doesn't lead you to the consequence that therefore we should leave it to the legislature. Some of the most important issues that animate our life, issues around a woman's right to choose, issues around privacy, there's no explicit statement in the Constitution about it. I well understand that the Federalist Society may have principles that say we should all live in 1776 and if it isn't there we shouldn't worry about it. But my life is actually animated by living in the 21st century. I'm actually interested in courts trying to make decisions about what the Internet means and what it means to have a cell phone. And if we're going to leave it to what somebody thought back in the founding fathers' days, it doesn't move me.

Now the right to counsel, for most of this country's life, if we were sitting here today and Marty and I were sitting here in 1962, I presume the head of the Federalist Society would have said that there is no right to counsel in a criminal case.

MARGOT ADLER: Let's let Martin Kaufman respond.

MARTIN KAUFMAN: But there he would be wrong, because the Sixth Amendment, the last clause of the Sixth Amendment, specifically provides for a right to assistance by counsel in a criminal matter.

DANIEL GREENBERG: But it doesn't provide for the right of the government to have to do it. So during the era of the 30s you could be lynched in the South, you could be put on trial, and you didn't get a lawyer in the Powell case, and then it took us to *Betts vs. Brady*, where they said let's do it on a case-by-case basis. You can't go back to the Constitution, argue that the Constitution gives you the right to counsel in a criminal case paid for by the government, because it doesn't. The only time it did was in *Gideon vs. Wainwright*, which was nearly 190 years after the Constitution.

Now if you buy that there is a right to counsel, and my friend at the Federalist Society today won't go back on that, then there is no reason that I have to agree that there is no right to a counsel in a civil case, because the Constitution doesn't mention it there. It didn't mention the right to counsel paid for by the government in the Constitution in the criminal context. So there doesn't necessarily have to be a difference. We could argue about it as a policy matter, but he's just wrong if he says that the Constitution required one in criminal and not in civil cases.

MARGOT ADLER: Danny Greenberg, former president and attorney of the Legal Aid Society in New York, and also with us is Martin Kaufman, senior vice president and general counsel of the Atlantic Legal Foundation. Martin, there are many civil cases where your job, your family, your home is on the line. Shouldn't the poor have access to adequate representation when the stakes are high?

MARTIN KAUFMAN: But the stakes are high, as I indicated earlier, in many different kinds of cases, and it's a policy dispute as to which kind of case is more important to which kind of person, and I think that I want to step back and ask what the source of "a right" is. Clearly one source is the Constitution and the Constitution as interpreted by the courts. In this instance, with respect to this issue, the Supreme Court has in fact spoken, because in *Laciter* it drew a distinction between cases...

MARGOT ADLER: What's *Laciter*?

MARTIN KAUFMAN: Well, *Laciter* is a 1980 decision of the U.S. Supreme Court, *Laciter* against the department of social services of some county in North Carolina, and had to do with, I think, child custody. And the court distinguished the criminal line of cases and other cases that implicated so-called liberty interests, and all other cases. And the court

in *Laciter* in effect limited a trend that had been developing prior to 1980, to extend the right to counsel to large classes of cases.

MARGOT ADLER: Well, what do you do about the situation? Let's take a child custody case where one parent can afford to hire a lawyer and one can't.

MARTIN KAUFMAN: Well, it's interesting, because in many child custody cases there is, either by state statute or even by some federal court decision, a right to counsel where the government is trying to take your child away from you. I don't know of any case which holds that where it's a private dispute between two parents, one parent who is less financially capable has a right to a publicly paid attorney.

MARGOT ADLER: Well, actually, in New York State they're actually talking about a bill right now that would in fact give counsel to the non-moneyed spouse.

DANIEL GREENBERG: But let's stay with *Laciter* for a second. *Laciter* was a five-to-four decision, and I'll just say it was wrong. It's a poorly reasoned, badly decided case. And I'll say it in a way that I think is accessible to your radio audience, in a very simple way. *Laciter* basically said, as Marty said, that there is no liberty interest in a case where the government, the state, was coming in and trying to permanently terminate the rights of a parent to be with their child. Now I don't know anybody who would say that between going to jail for ten days or losing your child permanently that there is a greater loss to go to jail. And yet you get a lawyer in every criminal case in which you have a threat of jail. The Supreme Court said that unless it's something that's a bright line like that, if it's merely that you're going to lose your child for the rest of her life and you don't get a lawyer, that's bad law, it's bad policy. But I think that it's also bad constitutional law.

MARGOT ADLER: Now Danny, you said before that you didn't care if there was an argument over potatoes, let's say, that they had a right to a lawyer. Do you think that plaintiffs as well as defendants should have the right to a lawyer in a civil case? I mean, aren't we a hugely litigious society already?

DANIEL GREENBERG: Well, you know, one of the ironies of it is that we're hugely litigious in part because people don't have lawyers. One of the things that lawyers do is they make rational the choice about whether to go to court. Every time we have this kind of debate it's always thrown to me: boy this is going to be incredibly expensive and think of all the frivolous lawsuits to begin with. Well, everybody in legal services who does this kind of work knows that one thing you do as a lawyer is turn to clients who walk in the door and say that's a stupid case, I'm not going taking it, you just don't have anything here. It seems to me if we gave people lawyers we might actually cut down on some of the litigation, because instead of leaving all these pro se cases where people just run into court you might have a lawyer saying don't waste your time, you're going to lose this one.

MARGOT ADLER: Marty?

MARTIN KAUFMAN: Well, first of all, I think Danny's comment is purely speculative because if the legal services lawyer says don't bother going to court, you're going to lose, that's not necessarily going to stop the prospective plaintiff from going to court. Many of these people are motivated by emotional issues, not rational consideration. So that a lawsuit against your neighbor because he's playing his music too loudly is not really based necessarily on a rational cost-benefit analysis, which is what you're saying the lawyer will input into this decision.

DANIEL GREENBERG: Here's what I'm saying. I'm saying that nobody wants to sit at the extremes of either of these cases. Nobody who talks about a civil Gideon believes that every person for everything that they think they want to go to court for should get a government lawyer who must go to court for that. All of life is nuanced, Marty. It's not an acceptable thing either to say I'm speculating, because, of course, if it's not the reality today, all I can do is speculate.

MARGOT ADLER: Now speaking of nuances, I'm just wondering what the reality is as far as state law. Some states I gather have already established the right to an attorney in some civil cases.

MARTIN KAUFMAN: That's exactly right.

MARGOT ADLER: What states have done this and what has the experience been?

MARTIN KAUFMAN: The differences among states in this area are not unlike the differences among states in the criminal defense area. There is an absolute right to a criminal defense lawyer, but we know the sorry state of funding and the sorry state of even capital defense in many of the places in the south where there are too many people on death row. So leaving it to the states will always leave you in a position where some will do better and some will do less.

DANIEL GREENBERG: Well, first of all, what is the theoretical basis for saying the federal government can impose on the states in state court litigation the duty to provide counsel to anybody who needs counsel?

MARTIN KAUFMAN: Gideon vs. Wainwright.

DANIEL GREENBERG: No, Gideon vs. Wainwright is based on a federal constitutional provision, which is the Sixth Amendment as applied to the states through the 14th Amendment. There's no equivalent I would submit for civil litigation.

MARTIN KAUFMAN: And my answer is Gideon vs. Wainwright, because in 1962 there was no equivalent for criminal cases. So the only way there became an equivalent was when the Supreme Court looked at the loss you get by going into prison and said we're going to discover now what for 180 years wasn't there, because it's fundamentally fair. And you, Marty, and everybody in the Federalist Society today, embraces it. I assume that you're not sitting there today saying that somebody could go to jail and shouldn't have the right

to counsel, but show me where in the Constitution it says and if you cannot afford a counsel the state must pay for it.

MARGOT ADLER: That was Martin Kaufman, senior vice president and general counsel of the Atlantic Legal Foundation. Also with me is Danny Greenberg, special counsel of pro bono initiatives at the New York Law Firm of Schulte Roth and Zabel. Coming up: more of our conversation from the National Constitution Center about the right to an attorney in civil cases, and I'll ask my guests if they think it should be mandatory for lawyers to do pro bono work. Stay with us.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. People who can't afford an attorney in a criminal case can get one at no cost. Should this be the same in a civil case? In a moment we'll continue our debate over this issue between attorneys Danny Greenberg and Martin Kaufman. The debate was recorded at the National Constitution Center in Philadelphia. Danny Greenberg is special counsel of pro bono initiatives at the New York law firm of Schulte Roth and Zabel. Martin Kaufman is the senior vice president and general counsel of the Atlantic Legal Foundation. Also joining us is an audience of lawyers who are participating in a conference on civil Gideon, or in other words, the right to an attorney in civil cases.

LOU RULEY: Hi. I'm Lou Ruley from Philadelphia. I have a question for Mr. Kaufman. You seem to be searching for some constitutional mandate, something within our framework that supports civil Gideon, and yet above the doors of the Supreme Court of the United States is the phrase "equal justice under law." What can this phrase possibly mean? What can this promise mean to all Americans if those who cannot afford legal representation go without counsel?

MARTIN KAUFMAN: Well, it's a different question, but obviously the Supreme Court has addressed that, and because life is not clear it is the duty of the Court to try at least for a certain time until another court decides otherwise, to draw some bright lines to guide people in their behavior and to create expectations that can be fulfilled. And I'm willing to agree with the Supreme Court even if I in fact disagree with it. I mean, I recognize it as the law of the land. I may want to bring a case next week that will move the law in a certain direction, but the topic I thought today was whether there is a right to counsel in civil cases, not should there be a right. So I think the answer to the first question, is there a right, is no.

MARGOT ADLER: I want to go onto another topic. Danny, doesn't the system already provide for the needs of the poor? For example, aren't legal aid lawyers already available to people who cannot afford to hire a lawyer?

DANIEL GREENBERG: No. Not in civil cases. There is a system of federal funding for legal services. The amount that is about to be allocated is about \$325 million. When

legal services started in about 1964, the amount that was allocated was \$240 million. So think of the difference...

MARGOT ADLER: And this is for the nation?

DANIEL GREENBERG: For the nation. The profits of some of the largest law firms in the country are greater than the allocation nationally for all of legal services for poor people. There's a myth, and Marty alluded to it and actually bought the myth, that somehow poor people get lawyers and middle class people don't. Poor people do not get lawyers. There is a very, very tenuous group that is holding on by the skin of its teeth and gets cut every year that tries to do through triage the most significant cases and the cases that cause the most damage. But every one of those offices will tell you how many people they turn away for everybody who they take.

MARGOT ADLER: Now Martin, the Legal Services Corporation, the group that funds legal aid, reports that half of their potential clients are turned away because of lack of resources. So that's thousands and thousands of people. Isn't that a good argument that some kind of federal mandate is needed to provide more free legal assistance in America?

MARTIN KAUFMAN: Well, first of all, I think that you have to know what kinds of cases they turn away. Are they really worthy cases or are they the cases that Danny said any lawyer would tell the client don't go to court on this? I assume that some of those cases are in that category. Others may not be. I don't disagree that legal services is not funded to a level that would enable it to provide legal counsel for every indigent person who wants legal counsel. The question is whether that is a priority for the country or for a particular state that deserves funding in preference to certain other priorities? And who is to make that decision?

MARGOT ADLER: You're listening to Martin Kaufman, senior vice president and general counsel of the Atlantic Legal Foundation and Danny Greenberg, former president and attorney in chief of the Legal Aid Society in New York. And now here on Justice Talking we'd like to go back into the audience and take some more questions.

EVE CLOTHEN: I'm Eve Clothen, from Swarthmore, Pennsylvania. I want to point the direction in a somewhat different direction. Isn't it in the state's best interest to have people represented, so that the laws are really enforced? And isn't that cost effective as well?

DANIEL GREENBERG: I certainly agree that that's true. Let's take simply housing. Marty has made a number of allusions to the fact that not everybody should have a lawyer. What we know, and we know this from the hard study of it, is if you have a lawyer in housing court when you face eviction, the likelihood that you will prevail is much, much greater if you have a lawyer. Now let's think of the consequence of not having a lawyer. If you don't prevail, the family will be evicted and will become homeless. What the state has to pay in shelter costs, in children not going to the schools where they had been before, in finding housing eventually for the person, for the emergency shelter, and then

balance that against giving somebody a lawyer so that if they have a valid defense they don't get evicted. It's the same thing in foster care, children going into foster care wrongly because somebody isn't gotten a lawyer. It always struck me that one other way of answering the questioner's question is if it's not so important to have a lawyer on that side why do so many people who can afford a lawyer go out and get one? So the very simple fairness question is why not give it to people who can't afford a lawyer?

MARGOT ADLER: Marty?

MARTIN KAUFMAN: If Danny is correct that the cost of housing this family in some kind of public shelter far outweighs the cost of providing counsel, it might be still more economic for the government just to pay the rent for that person. I'm not sure I'd agree with that, but that's an argument that you might persuasively make to the New York City council or to the New York State legislature or some other body that enacts laws.

MARGOT ADLER: Marty, should it be mandatory for private lawyers to do a certain amount of pro bono work? And what can be done, whether you would say yes or not to this question, to increase the number of pro bono hours?

MARTIN KAUFMAN: Well, I believe in economic liberties so I think the answer to the question is there should not be mandatory pro bono. But there is not too much difficulty, at least for certain kinds of cases, in getting lots and lots of pro bono help. The problem is that it's mostly the headline or exciting cases that attracts that help and the, I'll call it the typical skuzzy custody case between husband and wife which is awfully messy often and very emotional and both parties are probably irrational about that issue, are cases that pro bono lawyers in private practice probably avoid.

DANIEL GREENBERG: I was going to agree with Marty until skuzzy came out. I guess I would say it this way: I'm not all that interested in thinking that this issue should be solved by the legal profession taking on the lion's share of the burden of it. We don't say that Medicaid should have been solved by saying that every doctor in America should be giving to poor people a certain amount of care. We understood that it was a societal benefit and a fundamental fairness that poor people should have the right to see a doctor.

We also understood, by the way, that it was in our interest, because if somebody who's poor and has tuberculosis doesn't go to a doctor then all the rest of us are going to get infected. So I think that the solution to the kinds of issues that we're talking about is the legal profession has stepped up, maybe it should even do more. It does a lot of pro bono work. I think this is about society taking on the burden of understanding that if it sets up the monopoly in a court system that you have to go there in order to get certain legal rights. But if the only place you can do it is within a court system then it seems to me fundamentally fair that we make sure that both sides in that arena in an adversary system are adequately represented.

MARGOT ADLER: You're listening to Justice Talking and we're talking about whether there is or should be a right to an attorney in civil cases. Let's go back out into the audience.

BRENDAN LYNCH: Hi, my name is Brendan Lynch. I'm from Philadelphia. Marty has been asking about a firm constitutional basis for a civil right to counsel. I wanted to note that the Fifth Amendment to the Constitution states that no person shall be deprived to life, liberty or property without due process of law. Now, I fully understand that the Supreme Court has never held that the phrase due process of law encompasses the civil right to counsel, but part of the court's job, of course, is to interpret somewhat vague, airy phrases such as cruel and unusual punishment. Can either of you, and I don't know, maybe it's hopeless with Marty, but perhaps Danny, could you conceive of a future court perhaps giving an expansive reading of the phrase due process of law and what that really means in a broad sense and whether it would encompass such a right?

DANIEL GREENBERG: I don't think it will happen. Not in that kind of broad-based way and not at this moment in time. I think one of the things the advocacy community has to do is be realistic. The courts are not the place that we should be running to, those of us who believe in a larger sense of equality, a larger sense of fairness, a larger sense of the role of what government should be doing for people. I don't think that this is the time that we should be running into courts thinking that it's going to change a lot of the things. That doesn't mean that we ever give up, nor does it mean that we shouldn't stop trying to educate people and when in other fora other than the court. But I don't think that this Court is ready to say that the Fifth Amendment encompasses the right to counsel for poor people.

MARTIN KAUFMAN: Since I've been called hopeless, let me respond. The Court, of course, has already recognized the right to counsel and due process for life and liberty. That's why it has extended the right to counsel to civil cases that involve a liberty interest. So we're not talking about the potential loss of property. Would that mean that if there's a private property dispute between two landowners over a parcel of land that both are entitled to public funding? And if one can afford his own lawyer he doesn't get public funding but the other one does? That's what I mean by the difficulty in drawing lines in these kinds of cases. You have to make distinctions which may not in my view be principled between classes of cases and classes or groups of people. These are difficult decisions and that's why I find it impossible to create a right to counsel in civil matters.

MARGOT ADLER: Martin Kaufman. In other industrialized countries like The Netherlands or Italy there is an explicit recognition of a right to counsel for the poor in civil cases. These countries spend much more money for representation. England spends about eight times what the U.S. does. Why is this? Is it that their legal system is so different than ours or is it because they generally spend more on social services than we do?

DANIEL GREENBERG: Well, I think that this is a society that actually doesn't value poor people. It doesn't value poor people in many areas well beyond law. I've spent my life doing law but people who are in every other profession, in education, in health, in all of the things that a rational, fair, just, compassionate, humane—the adjectives could keep going—society would say your wealth shouldn't determine your ability to have those resources. This society has made some fundamental decisions that it's not that important.

And I think that other societies, other much more civilized societies, have made other kinds of decisions. It's not surprising to me; I'm not so naïve as to think that there isn't a right to counsel in this society. The places you mentioned had universal health care long before our system thought to do it. And I don't think that the choices are always the one that Marty makes. It's very easy to say you should get a lawyer or you should get a doctor or you should get an education.

Needless to say, there are those of us who would say should you get a lawyer or should you be fighting a war in Iraq, should you be getting a lawyer or should you be spending the hundreds and billions of dollars that you're doing subsidizing oil companies? This is not a zero sum game for poor people.

MARGOT ADLER: Danny Greenberg. Marty?

MARTIN KAUFMAN: I think that the answer to your question is that there is a different social view in those countries that you named, which spend a lot of money on legal representation for the poor, and the United States. I mean, Danny characterized them as more civilized. I'm not sure that I would share that adjective. They are different. We are different. And there are consequences to those differences. One of the consequences may in fact be economic growth. Most of the countries you've named have stagnated economically and have certainly not achieved the same kind of average individual wealth that the United States has achieved. There are greater disparities in the United States to be sure, and I would agree with that. But I'm not sure that the United States is a worse place to live, even for most people, than any of the countries that you name.

DANIEL GREENBERG: My statement was meant to be self-reflective. I actually do measure the civilization of a society by the way it treats its poorest people. And if the poorest people in a land that's the wealthiest, as Marty has pointed out, are treated so badly, that seems to me right for us to take a question as to whether we're being the kind of civilized society we want to be. It's our very wealth that to me makes the way we treat poor people so much more damaging and so much more incomprehensible.

MARGOT ADLER: Marty, I'm going to give you the last word.

MARTIN KAUFMAN: I think the answer to the question that was put before us originally, is there a right to representation paid for by the government in civil cases, is no. The answer to the question, should there be public funding of lawyers for all people or classes of people who can't afford lawyers, I would submit is a decision to be made as a policy matter by legislatures and not by the courts.

MARGOT ADLER: That was Martin Kaufman and Danny Greenberg. They joined me in Philadelphia at the National Constitution Center for debate about the right to an attorney in civil cases. Martin Kaufman is the senior vice president and general counsel of the Atlantic Legal Foundation. Danny Greenberg is special counsel of pro bono initiatives at the New York Law Firm of Schulte Roth and Zabel. I would also like to thank our

audience for their participation, and the National Constitution Center for hosting Justice Talking.

MARGOT ADLER: To get more information about Justice Talking or to learn more about the issues raised in today's show, go to our website, justicetalking.org. While there you can hear past shows or sign up for our podcasting service. Thanks for listening. Until next week, I'm Margot Adler.
