

Reproduced with permission from The United States Law Week, 81 U. S. L. W. 1797, 06/18/2013. Copyright © 2013 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Civil Procedure

Right to Counsel

The right to counsel in criminal cases has been around for almost 50 years, but the author champions the growing movement to expand the right in civil cases. He notes that the right to counsel is supported by the ABA in civil cases where basic human needs are at stake, many states recognize a right in some civil proceedings, and a federal district court recently concluded that the right to representation applies in immigration removal proceedings for detainees with mental disabilities.

“You Have a Right to a Lawyer . . . If You Can Afford It”: A Look at the History of the Right to Counsel in Civil Cases And the Current Efforts to Expand It



By JOHN POLLOCK

John Pollock is a Staff Attorney for the Public Justice Center who serves as the Coordinator of the National Coalition for the Civil Right to Counsel. He focuses entirely on working to establish the right to counsel for low-income individuals in civil cases involving fundamental rights such as child custody, housing, safety, and public benefits.

Introduction

At some point or another, everyone in America has probably seen a TV show or movie where a police officer has told someone that, “You have a right to a lawyer. If you cannot afford one, one will be provided to you.” That right in criminal cases stems from *Gideon v. Wainwright*, a case marking its 50th anniversary this year.

But many would be surprised to learn that this right, for the most part, does not extend to civil cases, regardless of what is at stake or what limitations the litigant may have. They might also be surprised to learn that the United States stands mostly alone in this regard; much of the rest of the industrialized world provides a right to counsel in civil cases.¹

This article explains how the law on the right to counsel in both criminal and civil cases has developed, then focuses on historical and current efforts to expand the

¹ Earl Johnson, Jr., *Equality Before the Law and the Social Contract: When Will the United States Finally Guarantee Its People the Equality Before the Law the Social Contract Demands?*, 37 *Fordham Urb. L.J.* 157 (Feb. 2010).

right to counsel in civil cases, a movement called either “civil *Gideon*” or “civil right to counsel.”

The U.S. Supreme Court on the Criminal and Civil Rights to Counsel: Two Different Trajectories

The U.S. Supreme Court has made a number of rulings on the right to counsel for indigent litigants, but the results have been quite different depending on whether the case in question was a criminal or civil case.

The first major case to address the right to counsel in criminal cases was *Powell v. Alabama*.² There, the Supreme Court held that any indigent defendant in a capital case who is “incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like” is entitled to free counsel under a combination of the Sixth and 14th amendments.

Given that *Powell* dealt with one of the most extreme types of cases (death penalty cases), one might have expected a judicial reluctance to extend the right to less serious criminal cases; after all, the court has long said that “death is different” from other types of punishments.³ But only six years later, the court held in *Johnson v. Zerbst* that the Sixth Amendment guarantees the right to state-funded counsel for all criminal cases in federal court where liberty is at stake.⁴

On the civil side, the Supreme Court has shown more reluctance to use the 14th Amendment to recognize the right to counsel.

Four years after *Johnson*, the court in *Betts v. Brady* refused to extend *Powell* and *Johnson* to felony cases in **state** court, finding that the right to state-funded counsel it had read in the Sixth Amendment in *Johnson* was not “so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment.”⁵

The *Betts* court left it up to state judges to decide whether to appoint counsel in each individual case. However, only two decades later, the court in *Gideon v. Wainwright* reversed *Betts* and found that **all** indigent felony defendants are entitled to state-provided counsel under the 14th Amendment. This was in part because, according to one commentator, *Betts* “had repeatedly resulted in messy and friction-generating factual inquiries into every case.”⁶ Indeed, the *Betts* approach was so problematic that 22 states filed an amicus brief urg-

ing the court to overrule *Betts*.⁷ Then, less than a decade later, the court extended *Gideon* to all misdemeanor cases (including petty misdemeanors), provided the defendant is facing imprisonment.⁸

On the civil side, the court has shown more reluctance to use the 14th Amendment to recognize a right to counsel. The high water mark was in 1967, where the court in *In re Gault* found a due process right to counsel for all juveniles in delinquency proceedings.⁹ Among other things, the court was persuaded by the threat of imprisonment and the fact that one-third of the states at the time provided such a right.

In 1980, the court held in *Vitek v. Jones* that prisoners being involuntarily transferred to a mental health facility have a right to “competent help” in the form of a “qualified and independent adviser,” but the decision fell one vote short of requiring the “adviser” to be an attorney.¹⁰

One year later, the court in *Lassiter v. Dep’t of Soc. Servs.* declined to recognize a categorical right to counsel in termination of parental rights proceedings.¹¹ The *Lassiter* court recognized that termination of parental rights cases involve an “extremely important” and unquestionably fundamental right, that 33 states plus the District of Columbia provided a statutory right to counsel at the time, that courts had “generally held” that the federal constitution required counsel in termination proceedings, that the risk was often “insupportably high,” and that the state had a “relatively weak” financial interest at stake.

Nonetheless, the court relied on the lack of the threat of prison to hold that appointment of counsel in termination cases should be determined on a case-by-case basis. The court did not explain how this approach would avoid the problems that had plagued criminal cases during the time *Betts v. Brady* was in effect. The court then suggested that there was a presumption against providing counsel in all civil cases that did not involve a threat to “physical liberty” (i.e., jail).

Finally, in 2011 the court held in *Turner v. Rogers* that parents jailed for civil contempt due to failure to pay child support are not automatically entitled to counsel, regardless of the amount of time they are jailed.¹² The court relied on its belief that child support cases were simple matters, as well as the fact that the opponent in *Turner* was the unrepresented mother and not the state. The court expressly declined to rule on whether counsel would be required in cases where the opponent is either the State or a party represented by counsel.

The States’ Approach to Civil Right to Counsel

In a unanimous 2006 resolution, the ABA called on all state and local jurisdictions to recognize a right to counsel in civil cases implicating basic human needs.¹³ The

² 287 U.S. 45 (1932).

³ Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 Ohio St. J. Crim. L. 117, 118-19 (2004).

⁴ 304 U.S. 458 (1938).

⁵ 316 U.S. 455, 465 (1942).

⁶ Kevin W. Shaughnessy, *Note, Lassiter v. Department of Social Services: A New Interest Balancing Test for Indigent Civil Litigants*, 32 Cath. U. L. Rev. 261, 282 (1982).

⁷ Brief for the State Government Amici Curiae at 3, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155).

⁸ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁹ 387 U.S. 1 (1967).

¹⁰ 445 U.S. 480 (1980).

¹¹ 452 U.S. 18 (1981).

¹² 79 U.S.L.W. 4553 (U.S. 2011).

¹³ American Bar Association, *Resolution 112A* (Aug. 2006), available at <http://www.americanbar.org/content/dam/aba/>

resolution was cosponsored or subsequently adopted by 17 state and local bar associations.

The ABA resolution gave five examples of basic human needs cases: shelter, safety, sustenance, health, and child custody. Of these, no state currently provides a right to counsel in shelter, and there is very little on the subject of sustenance. Very few states provide a right to counsel in private custody or domestic violence (safety) cases, and while the states generally provide a right to counsel for some proceedings involving mental health (such as civil commitment), there is no state providing a right to counsel for proceedings involving physical health, other than quarantine.

This is not to say, however, that the states have been idle. Every state has its own constitution with its own “due process” equivalent. While state courts must follow the U.S. Supreme Court with respect to the 14th Amendment’s Due Process Clause, the same is not true when they are interpreting their equivalent state constitutional provisions, even if those provisions are worded exactly the same.

The decades following *Lassiter* saw a broad rejection of the *Lassiter* ruling for termination of parental rights cases; courts in 10 states that had found a federal constitutional right prior to *Lassiter* now placed that right under their state constitutions.¹⁴ A number of state

administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.

¹⁴ *K.P.B. v. D.C.A.*, 685 So. 2d 750, 752 (Ala. Civ. App. 1996) (construing *Ex parte Shuttleworth* as requiring counsel in termination of parental rights cases under the state constitution); *In re E.H.*, 609 So.2d 1289, 1290 (Fla. 1992) (citing approvingly to *In re D.B.*, 385 So.2d 83 (Fla. 1980), which had found right to counsel in termination proceedings under both U.S. and Florida Constitutions); *M.E.K. v. R.L.K.*, 921 So. 2d 787, 790 (Fla. Dist. Ct. App. 2006) (“[U]nder the state due process clause, *D.B.* requires appointment of counsel in proceedings involving the permanent termination of parental rights to a child.” (quoting *In re D.B.*, 385 So. 2d 83, 90 (Fla. 1980)) (internal quotation marks omitted)); *In re Catholic Charitable Bureau of Archdiocese of Bos. Inc.*, 490 N.E.2d 1207, 1212 n. 6 (Mass. App. Ct. 1986) (“It is not open to dispute that the father had a right to court-appointed counsel.” (citing *Dep’t of Pub. Welfare v. J.K.B.*, 393 N.E.2d 406, 408 (Mass. 1979))); *In re A.S.A.*, 852 P.2d 127, 129–30 (Mont. 1993) (quoting approvingly from the *Lassiter* dissent); *N.J. Div. of Youth & Family Servs. v. R.B.*, No. A-3541-04T4 (N.J. Super. Ct. App. Div. Nov. 2, 2005) (relying on *Crist v. N.J. Div. of Youth & Fam. Servs.*, 320 A.2d 203 (N.J. 1974)); *In re Evan F.*, 815 N.Y.S.2d 697, 699 (App. Div. 2006) (relying on *In re Ella B.*, 285 N.E.2d 288 (N.Y. 1972)); *In re Baby Girl Baxter*, 479 N.E.2d 257, 260 (Ohio 1985) (“[T]his court has held that the state must appoint counsel for indigent parents at parental termination proceedings.” (citing *State ex rel. Heller v. Miller*, 399 N.E.2d 66, 70 (Ohio 1980))); *In re D.D.F.*, 801 P.2d 703, 706 (Okla. 1990) (“We continue to adhere to the philosophy enunciated in *Chad S.* Although the federal constitution does not require that counsel be appointed in all termination proceedings, we believe that the rights at issue are those which are fundamental to the family unit and are protected by the due process clause of the Oklahoma Constitution.” (referring to *In re Chad S.*, 580 P.2d 983, 985 (Okla. 1978)); *King v. King*, 174 P.3d 659, 662–63 (Wash. 2007) (noting that federal underpinnings of court’s right to counsel decision in *In re Luscier*, 524 P.2d 906 (Wash. 1974), may have been eroded, but that *Luscier* had been cited to favorably by the court since *Lassiter*); *In re Lindsey C.*, 473 S.E.2d 110, 122 n. 12 (W. Va. 1995) (noting that *Lassiter* did not relieve the state “of compliance with one or more of the[] protections which have been recognized in West Virginia as constitutionally mandated”).

courts have recognized a right to counsel in civil contempt, adoptions, paternity, judicial bypass of the parental consent requirement for an abortion, civil commitment, and abuse/neglect.¹⁵ The state legislatures have also provided a statutory right to counsel for many of these same rights.¹⁶ New York leads the way, with a right to counsel in all domestic violence and private custody proceedings.¹⁷

In Maryland, the high court in a 4-3 vote narrowly avoided ruling on the right to counsel in private custody matters (finding instead for the petitioner on the merits of her custody claim), but three justices concurred and said they would have found a right to counsel in all such cases.¹⁸

Some of the cases recognizing a right to counsel were based not on due process, but on some other source, like equal protection or the supervisory power of the state high court.¹⁹

Current Events

In the past five years, right to counsel activity has intensified, with cases filed in Arkansas, California, Montana, New Hampshire, New Jersey, Montana, Texas, and Washington, to give some examples. These cases run the gamut of different civil proceedings: termination of parental rights/adoption, guardianship, domestic violence protection orders, private custody, immigration, persons with disabilities, and so on.

Some activities are more advocacy-based, such as efforts to encourage the United States to adhere to international law requiring the assistance of counsel,²⁰ a model code that urges appointment of counsel in education cases,²¹ or videos demonstrating the plight of ho-

¹⁵ Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 Clearinghouse Rev. J. of Poverty L. and Pol’y 186 (2006), available at http://civilrighttocounsel.org/pdfs/pastore_lassiter.pdf.

¹⁶ Laura Abel and Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 Clearinghouse Rev. J. of Poverty L. and Pol’y 245 (2006), available at http://brennan.3cdn.net/2f2ca53878e9299012_67m6ib9tv.pdf.

¹⁷ N.Y. Fam. Ct. Act § 262(a).

¹⁸ *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003).

¹⁹ See e.g. *In re S.A.J.B.*, 679 N.W.2d 645, 647 (Iowa 2004) (failure to provide counsel in contested adoptions while providing it in state-initiated termination of parental rights cases violates equal protection); *Hepfel v. Bashaw*, 279 N.W.2d 342 (Minn. 1979) (establishing right to counsel in paternity cases based on supervisory power of court over lower courts).

²⁰ See e.g. Northeastern University School of Law Program on Human Rights and the Global Economy, *Access to Civil Justice: Racial Disparities and Discriminatory Impacts Arising from Lack of Access to Counsel in Civil Cases: A Response to the 2007 Periodic Report of the United States of America on Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (Dec. 2007), available at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN24.doc>; National Law Center on Homelessness and Poverty, *Human Right to Housing Report Card* (2012), available at <http://www.nlchp.org/content/pubs/RTH%20Report%20Card,%20FINAL.pdf> (giving United States an “F” on access to counsel in housing cases). A similar effort is currently underway with respect to compliance with the International Covenant on Civil and Political Rights.

²¹ Dignity in Schools Campaign, *A Model Code on Education and Dignity: Presenting a Human Rights Framework for Schools* (Aug. 2012), available at http://www.dignityinschools.org/files/DSC_Model_Code.pdf.

meowners foreclosed without the benefit of counsel.²² The ABA has continued its advocacy, following up its 2006 resolution with a 2010 Model Access Act and Basic Principles that provide guidance to states on how to implement new rights to counsel.²³

There is also a growing effort to document the effects of providing counsel in civil cases, particularly financial benefits, judicial efficiency, and improvements in outcome. To this end, California passed legislation establishing civil right to counsel pilot projects that are funded at \$10 million per year for six years,²⁴ and the Boston Bar Association Task Force recently completed a set of pilots focusing on eviction.²⁵ And as part of its ordinance declaring itself to be the first “right to civil counsel city,” the City of San Francisco set up a pilot project to provide counsel and measure the impact.²⁶

Immigration has become a hot topic for civil right to counsel. A watershed class action in California federal court involves the right to counsel in immigration removal proceedings for detainees with mental disabilities. In April, the court found that all members of the class (which covers California, Washington, and Arizona) are entitled under the Rehabilitation Act (the federal equivalent to the ADA) to the assistance of a qualified representative.²⁷ In the same week the decision was announced, the Justice Department indicated it would implement the decision nationwide.²⁸

Additionally, the Border Security Act of 2013 proposed in the U.S. Senate would provide for a right to

counsel (not merely a qualified representative) for unaccompanied minors, mentally disabled litigants, or those “particularly vulnerable when compared to other aliens in removal proceedings.”²⁹

Not all developments are positive, such as when the Washington Supreme Court refused to recognize a right to counsel for children in termination of parental rights cases.³⁰

Some of the negative developments seem to defy logic, such as when the Louisiana Legislature unanimously adopted a right to counsel for birth parents in intra-family adoptions in 2009 and then unanimously repealed it only two years later.³¹

Similarly, the New Hampshire legislature repealed the right to counsel for parents in abuse/neglect proceedings in 2011 (an action that survived a 2012 legal challenge),³² only to introduce a bill in 2013 to restore the right.³³ And a number of state high courts have avoided addressing right to counsel questions, such as when the high courts in Arkansas and Michigan declined to accept review of cases involving the right to counsel in private and public termination of parental rights.³⁴

At the same time, some high court chief judges have been vocal in their support of right to counsel, such as New York Court of Appeals Chief Judge Jonathan Lippman.³⁵

Conclusion

As the movement around a right to counsel in civil cases continues to grow, there are concerns that are sometimes expressed. Money is the primary worry, but this has led to the creation of pilot projects (described above) to demonstrate how providing counsel can potentially save money.

Some have also worried that the crisis in indigent defense funding would only be worsened by new civil rights to counsel. But even before this 50th anniversary year for *Gideon*, there had been talk in the legal community about how the lack of counsel in civil cases and the failure of the states to fully fund the *Gideon* right to counsel can have serious collateral consequences on each other.³⁶

²² Brennan Center for Justice and National Coalition for a Civil Right to Counsel, *Fighting Foreclosure: Why Legal Assistance Matters* (2011), videos available at <http://www.brennancenter.org/analysis/fighting-foreclosure-why-legal-assistance-matters>.

²³ American Bar Association, *Resolution 104* (Model Access Act) (Aug. 2010), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf; American Bar Association, *Resolution 105* (Basic Principles of a Right to Counsel in Civil Legal Proceedings) (Aug. 2010), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf.

²⁴ Cal. Gov. Code § 68651 (previously AB 590).

²⁵ Boston Bar Association Task Force on Expanding the Civil Right to Counsel, *The Importance of Representation in Eviction Cases and Homelessness Prevention* (March 2012), available at <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>; D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Hennessy, *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court* (Oct. 24, 2011) (draft), available at <http://ssrn.com/abstract=1880078>; D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 Harv. L. Rev. 901 (Feb. 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948286.

²⁶ The 2012 ordinance (#1189, Declaring San Francisco to Be a Right to Civil Counsel City and Creating One-Year Pilot) is at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/committees/materials/rls111189tdr.pdf>.

²⁷ *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), (C.D. Cal. April 23, 2013).

²⁸ Julia Preston, *In a First, Judge Orders Legal Aid for Mentally Disabled Immigrants Facing Deportation*, NY Times (April 24, 2013), available at http://www.nytimes.com/2013/04/25/us/legal-aid-ordered-for-mentally-disabled-immigrants.html?ref=politics&_r=0.

²⁹ S744, available at <http://www.govtrack.us/congress/bills/113/s744/text>.

³⁰ *In re MSR & TSR*, 271 P.3d 234 (Wash. 2012).

³¹ La. Child Code Ann. art. 1245.1, repealed by 2010 La. Acts 738 Sec. 2.

³² *In re C.M.*, 48 A.3d 942 (N.H. 2012) (2-1 plurality decision found no categorical constitutional right to counsel under New Hampshire Constitution).

³³ N.H. HB 2 (2013).

³⁴ *Lucas v. Jones*, 2012 Ark. 365 (2012); *In re McBride*, No. 136988 (Mich. 2009).

³⁵ Jonathan Lippman, *Remarks at the Central Synagogue on Lexington Ave. in New York City: “Justice, Justice, Shall You Pursue.” The Chief Judge’s Perspective on Justice and Jewish Values* at 13-14 (Feb. 5, 2010) (“The time has come for New York State to make good on the promise of *Gideon* and ensure that there is a right to counsel at public expense in at least those types of cases where basic human needs are at stake, like shelter, sustenance, safety, health, and children.”)

³⁶ See e.g. James Neuhard, *Gideon Redux: A Defender’s View*, 28 Cornerstone 5, 31 (Fall 2006), available at <http://www.civilrighttocounsel.org/pdfs/Neuhard - Gideon Redux A Defender’s View.pdf>. For more on the interplay between the criminal and civil rights to counsel, see National Coalition for

As the expansion efforts continue, so too will the conversations among the bench, the bar, and the advocacy

a Civil Right to Counsel, *Why Are We Talking About the Right to Counsel in Civil Cases on the Anniversary of Gideon?* (2013), available at <http://gideonanniversary.org/NCCRCanniversaryflyer.pdf>; John Pollock and Michael Greco, *It's Not Triage if the Patient Bleeds Out*, 161 U. Penn. L.R. 40

community to figure out the wisest approach for each particular state.

(2012), available at <http://pennumbra.com/responses/11-2012/PollockGreco.pdf>.