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

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

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 urging 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 imprisonment 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

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2 287 U.S. 45 (1932).
4 304 U.S. 458 (1938).
5 316 U.S. 455, 465 (1942).
9 387 U.S. 1 (1967).
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. A number of state 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. The state legislatures have also provided a statutory right to counsel for many of these same rights. New York leads the way, with a right to counsel in all domestic violence and private custody proceedings.

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.

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.

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, a model code that urges appointment of counsel in education cases, or videos demonstrating the plight of ho-


17 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); Henfel 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).

meowners foreclosed without the benefit of counsel. 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.

There is also a growing effort to document the effects of providing counsel in civil cases, particularly financial benefits, judicial efficiency, and improvements in outcomes. To this end, California passed legislation establishing civil right to counsel pilot projects that are funded at $10 million per year for six years, and the Boston Bar Association Task Force recently completed a set of pilots focusing on eviction. 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.

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. In the same week the decision was announced, the Justice Department indicated it would implement the decision nationwide.

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.”

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.

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.

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), only to introduce a bill in 2013 to restore the right. 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 proceedings.

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.

**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.

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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).


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

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