

## The Great Divide *Gideon* and Civil Cases

By John Pollock

Through the media of television and films it is common knowledge for many that a criminal defendant has a constitutional right to counsel and that “if you cannot afford a lawyer, one will be provided for you at government expense.” Because of the U.S. Supreme Court’s interpretation of the Sixth Amendment in *Gideon v. Wainwright*, the right to counsel in criminal cases exists even when a charged crime carries a sentence of just one day in jail. However, what many may not know is that indigent litigants in civil cases lack the same presumptive constitutional right to counsel even if they might be incarcerated or institutionalized.

Empirical data shows that the presence of a lawyer profoundly impacts case outcomes. The Court recognized this as early as 1932 in *Powell v. State of Alabama* by stating that “the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” However, the Sixth Amendment’s right to counsel does not reach civil cases, and in 1981 the Supreme Court held in *Lassiter v. Dep’t of Social Services* that there is a presumption *against* a due process right to appointed counsel in civil cases except where physical liberty (confinement) is at stake. Under *Lassiter*, even when confinement is a possibility in a civil case, a court must balance the strength of the litigant’s interest, the risk of error, and the state’s interest to determine whether it should appoint counsel.

The Court’s *Lassiter* ruling can be seen as dramatically impacting fundamental human needs. In *Lassiter*, the Court concluded that it could be “fundamentally fair” to ask an indigent parent with little education and no legal training to battle state government, with all of its resources and expertise, over permanently severing the relationship between parent and child. Because of *Lassiter* the results can be equally stark for other types of cases when litigants cannot afford a lawyer: families can lose their homes, women can be denied protective orders in domestic violence cases, and persons with low income can lose the very benefits (such as Medicaid) that keep them alive. The Court’s emphasis in *Lassiter* on incarceration has led to an arguably distorted set of priorities; as legal commentator Douglas Besharov famously wrote, “*Lassiter*, for all practical purposes, stands for the proposition that a drunken driver’s night in the cooler is a greater deprivation of liberty than a parent’s permanent loss of rights in a child.”

The National Coalition for a Civil Right to Counsel (NCCRC) was established in 2004 to address the issue of the right to counsel in civil cases. Its approximately 150 participants in 35 states help drive the litigation, education, and legislative advocacy efforts around this issue. The American Bar Association’s (ABA’s) Standing Committee on Legal Aid and Indigent Defendants (SCLAID), one of the five entities coordinating the NCCRC’s work, plays a key role in the involvement of state bar associations.

Nationwide efforts to afford the right to counsel in civil cases have occurred through the work of NCCRC and others. The ABA House of Delegates unanimously adopted a 2006 resolution calling on federal, state, and territorial governments to provide a right to counsel at public expense where basic human needs are at stake. An Alaska state trial court ruled that an indigent parent in child custody proceedings has a right to counsel when facing a represented opponent, and the Washington Court of Appeals found a right to counsel for children in truancy cases. State high courts in Illinois, Iowa, North Dakota, and Oregon have found a violation of their state constitutions’ equal protection clauses where counsel is denied in certain cases involving termination of parental rights. Louisiana and Alabama recently extended their statutory right to counsel in cases involving termination of parental rights to cases where the state is not a party.

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The lack of a presumptive right to counsel in civil cases can test the belief of the fundamental fairness of our legal system. As Hugo Black once wrote for a Supreme Court majority, “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” To learn more about the civil right to counsel movement and how to become involved, visit [civilrighttocounsel.org](http://civilrighttocounsel.org).

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