

May 2004

Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest

Deborah Perluss

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/sjsj>

Recommended Citation

Perluss, Deborah (2004) "Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest," *Seattle Journal for Social Justice*: Vol. 2: Iss. 2, Article 29.
Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol2/iss2/29>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons.

**WASHINGTON'S CONSTITUTIONAL RIGHT
TO COUNSEL IN CIVIL CASES:
Access to Justice v. Fundamental Interest**

Deborah Perluss¹

If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.²

I. INTRODUCTION

In 1932, the United States Supreme Court decided the case of *Powell v. Alabama*,³ involving eight young African American boys. The boys had been convicted of the rape of two white girls and sentenced to death by an all white jury in Scottsboro, Alabama. The case became known famously as the *Scottsboro Boys Case*. The case was called to trial just six days after the indictments were issued. Upon separate consolidated petitions for *habeas corpus*, the Supreme Court considered the question of whether, on the basis of the record before the court, the defendants were denied the right to counsel. The Court further asked, if the boys' right to counsel was in fact denied, does such denial violate the Due Process Clause of the Fourteenth Amendment?⁴

In reversing the convictions, the Court determined that under the circumstances, the right to appointed counsel was compelled as a matter of due process under the Fourteenth Amendment.⁵ Importantly, the Court did *not* rest its decision on the dictates of the Sixth Amendment, which expressly guarantees a right to counsel to persons charged with crimes in federal cases. It took another thirty-one years before the guaranty of the Sixth Amendment right to counsel in all criminal cases was extended to the

states through the Fourteenth Amendment. That occurred, of course, in *Gideon v. Wainwright*,⁶ a case involving an indigent criminal defendant convicted in a Florida court of felony breaking and entering and sentenced to five years in prison. The fortieth anniversary of *Gideon* was recently celebrated.

In the years between *Powell* and *Gideon*, the Court affirmatively determined that the appointment of counsel to a criminal defendant in all circumstances is *not* a fundamental right essential to a fair trial and, thus, is not required as a matter of due process in state criminal proceedings.⁷ Rather, the Court relied upon the proposition and firm understanding set out in *Powell* and corollary state court precedent that “[e]very court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness”⁸ regardless of the lack of a specific textual right set out in the Constitution or by statute.

Only subsequent to *Gideon* did the Court begin to read into the Sixth and Fourteenth Amendments a conditional right to counsel based on the extent to which a criminal defendant risks deprivation of physical liberty.⁹ That limitation became firmly ensconced in constitutional jurisprudence when the Court introduced the presumption that counsel is required as a matter of fundamental fairness only when the litigant may lose his or her physical liberty as an outcome of the case.¹⁰

In *Lassiter v. Department of Social Services of Durham County*, a five-to-four decision, the Court rested the newly announced presumption on the remarkable observation that “it is the defendant’s interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel.”¹¹ This, the Court asserted, is demonstrated by the earlier ruling in *In re Gault*,¹² in which the Court declared that children faced with juvenile court delinquency proceedings are entitled to appointed counsel even though such proceedings are generally considered civil rather than criminal in nature. In *Lassiter*, the Court rested its decision on the statement in

Gault that “the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency *which may result in commitment to an institution in which the juvenile’s freedom is curtailed,*’ the juvenile has a right to appointed counsel even though the proceedings may be styled ‘civil’ and not ‘criminal.’”¹³

Lassiter was an abrupt shift away from the Court’s analysis of whether to appoint counsel for indigents as a matter of fundamental fairness in any case, criminal or civil,¹⁴ based on consideration of the totality of circumstances. Instead, *Lassiter* superimposed a presumption against the need for counsel if the litigant stands no risk of loss of personal freedom,¹⁵ based on the due process balancing test set out in *Matthews v. Eldridge*.¹⁶ After *Lassiter*, regardless of how grave the private interest at stake, how limited the governmental interest, and how significant the risk of erroneous deprivation is likely to be, in applying the Due Process Clause of the Fourteenth Amendment, the presumption against appointed counsel for an indigent in a proceeding not likely to result in loss of personal liberty will necessarily carry the day.

This article argues that, notwithstanding the *Lassiter* presumption against appointed counsel for indigent litigants in civil cases when there is no risk of incarceration under the federal due process standard, the Washington State Constitution compels a different, more flexible approach. That approach rests on the fundamental right of access to justice, which inheres in the Washington Constitution. The fundamental right of access to justice requires a court to consider, as a matter of fairness and justice, the litigant’s ability to negotiate the system of justice in which he or she is found. This approach borrows from the early right-to-counsel cases, including *Powell v. Alabama*, and the courts’ concern for fairness and justice in the particular proceedings. In contrast, the recent articulation of the due process standards under *Matthews v. Eldridge* and *Lassiter* look to the “interests” at stake to determine the level of “process” due, including whether counsel is required to protect those interests.

This article demonstrates that the Washington Constitution affords greater protection for the right to counsel in civil proceedings than the Fourteenth Amendment. This article also shows that in order to give full credence to the Washington Constitution, the Washington courts must abjure from applying the “interest-based” *Lassiter* presumption in favor of a more functional “access-based” analysis of when appointed counsel is required to ensure meaningful access to justice. While a court’s tendency might be to view such renunciation of *Lassiter* as either paving an untraveled road or straying into judicial activism, the ability of courts to exercise their authority to appoint counsel *whenever necessary* to ensure access to justice and fundamental fairness is in fact a return to the basic traditions of our system of justice.

The source of the right to counsel in civil proceedings under the Washington Constitution may be founded on the fundamentality of access to the courts as a central precept of access to justice. Unlike the decision in *Lassiter* and other federal right-to-counsel cases, the constitutional provisions available to the Washington courts are not limited to due process and equal protection. Rather, the structure and text of the Washington Constitution speaks more to the principles of fairness and justice and the government’s obligation to secure individual rights contained within the state constitution. A close reading of the Washington Constitution reveals that a Washington court has the inherent power to appoint counsel for civil litigants whenever, as stated in *Powell v. Alabama*, “it deems proper to appoint counsel where that course seems to be required in the interest of fairness.”¹⁷

This article further demonstrates that application of the federal due process standards, without consideration of the access-to-justice based principles embedded in the Washington Constitution, is both fundamentally unfair and inconsistent with Washington’s constitutional framework. Indeed, the Washington Constitution compels the appointment of counsel at public expense whenever a court deems it necessary to secure an indigent

litigant's effective access to the state court system through which the administration of justice is entrusted.

II. NEED FOR APPOINTED COUNSEL IN CIVIL CASES

In October 2003, the Washington Supreme Court's Task Force on Civil Equal Justice Funding issued a report on the results of a ground-breaking study that assessed the civil legal needs of Washington's poor (the Civil Legal Needs Study).¹⁸ The Civil Legal Needs Study concluded that approximately 75 percent of all low-income households in Washington State experience at least one civil legal problem per year.¹⁹ The study further concluded that low-income people face 88 percent of their problems without attorney assistance.²⁰ Moreover, the study found that most legal problems experienced by low-income people affect basic human needs such as housing, family safety and security, and public safety.²¹ Finally, while no surprise, the study confirms that low-income people who get legal assistance experience better outcomes and have greater respect and confidence in the justice system than those who do not.²² The findings of the legal needs study lead to the inescapable conclusion that a significant number of poor persons in Washington unnecessarily suffer the adverse social consequences of homelessness, family violence, family instability, and inadequate public safety solely because they lack access to competent legal counsel.

In order to partially address many of the legal needs documented in the Civil Legal Needs Study, Washington has taken a number of remedial measures. For example, non-lawyer facilitators, based in county courthouses, are authorized by statute²³ and court rule²⁴ to provide assistance to unrepresented domestic relations case litigants. This includes, among other activities, assistance in completion of mandatory court forms; assistance in calculating proposed child support; selection, and distribution of court forms; explanation of legal terms; information on basic court procedures and logistics such as requirements for service and filing of

pleadings, scheduling hearings, and complying with local procedures; previewing documents to be presented to a judge prior to presentation; attendance at hearings to assist the court with *pro se* matters; and assistance with preparation of court orders under the court's direction. However, many low-income persons are unable to access these resources because of insufficient education and literacy, limited English skills, or other factors such as mental and physical disabilities. Also, facilitator resources are unavailable for unrepresented litigants in cases outside the scope of domestic relations.

Washington also provides limited funding to staffed civil legal services programs that take high-priority needs cases for eligible clients within certain substantive law areas, subject to several restrictions.²⁵ In addition, virtually every county operates an organized volunteer lawyer program that provides free legal services to indigent people. Even with these resources, however, the Civil Legal Needs Study demonstrates that fewer than one in five low-income persons are able to obtain the legal services they need to secure or protect significant rights.

Thus, the question to be addressed here is whether in order to advance the cause of justice, reduce the social and financial costs of adverse conditions such as homelessness and family violence, and instill confidence and trust in the justice system, a right to counsel exists in any civil case not likely to result in incarceration. The jurisprudential question is twofold: (1) whether there is any basis in the history of federal constitutional jurisprudence for the U.S. Supreme Court to reconsider the holding of *Lassiter*, and (2) whether there is any rationale for states applying their own constitutional frameworks to deviate from the approach required by *Lassiter*.

Certainly, in answer to the first question, there is always the possibility of the U.S. Supreme Court changing course and overruling precedent, as it has done many times,²⁶ such as in *Gideon v. Wainwright*.²⁷ However, the balancing test of *Mathews v. Eldridge* has taken hold in other contexts, including lower court determinations of what process is due in non-criminal

cases.²⁸ Since the way due process is articulated in *Matthews* and its progeny is neither particularly nefarious nor a source of judicial angst,²⁹ there seems little momentum at this point either within the courts or among the advocate community to challenge the *Lassiter* presumption.

On the other hand, the development of state constitutional jurisprudence provides some hope that state courts will, in the application of their own state constitutions and due process requirements, look to other principles found within their municipal jurisprudence. Thus, they may begin to construct a framework for analyzing when counsel should be appointed for indigent persons based on state constitutional principles separate and apart from those set out in *Lassiter*.³⁰ The development of state jurisprudence on the right to counsel under state constitutional provisions is a logical extension of the Washington state courts' recent reliance on state constitutional law to recognize the existence of broader individual rights and protections than those enjoyed under the federal Constitution.³¹

III. THE RIGHT TO COUNSEL IN WASHINGTON

In Washington, the right to counsel is a product of case law, not constitutional or statutory text. None of the cases in which the Washington Supreme Court has established a right to counsel have specifically rested upon any provision of the Washington Constitution expressly affording a right to counsel—because no such provision exists. Even in the criminal context, the Washington Supreme Court observed that either the U.S. Constitution's Sixth Amendment right to counsel “*inheres*” in Article 1, Sec. 22 of the Washington Constitution (a criminal defendant shall have the right to appear in person *or* by counsel³²), or the right has been adopted by court rule.³³

In the civil context, the Washington Supreme Court has predominantly relied on rulings of the U.S. Supreme Court in determining when due process requires an indigent to be appointed counsel.³⁴ But unlike the U.S. Supreme Court, the Washington Supreme Court had determined prior to

Lassiter that indigent parents in dependency actions brought by the state to permanently or temporarily deprive parental rights have a due process right to counsel at public expense.³⁵ Those cases rest on the Washington State Court's conclusion that the parent-child relationship is so rooted in the "traditions and conscience of our people as to be ranked as fundamental."³⁶ In reaching this conclusion, the court reached back to the common law recognition that a parent's interest in the custody and control of minor children was a "sacred" right.³⁷

Until 1975, the Washington Supreme Court was more concerned with the fundamental fairness of the proceedings than with whether the case was denominated "civil" or "criminal." Because the scope of its analysis in the right-to-counsel cases encompassed only principles of due process and equal protection (which focus on the interests at stake), these cases also rested upon an interest-based approach. But in the early right-to-counsel cases, the Washington Supreme Court did not strictly limit the scope of the right in civil proceedings, under either the federal or state due process standards, to cases involving a high risk of incarceration. Nor did the Washington Supreme Court draw the distinction between civil and criminal when fundamental rights of liberty and parental rights were involved.³⁸ Instead, the Washington Supreme Court had relied on the proposition that "where the individual's right to remain unconditionally at liberty is not at issue . . . the right to counsel turns on the particular nature of the proceedings and questions involved."³⁹

The Washington Supreme Court had also determined that a right to counsel exists in proceedings designated as "civil" as a matter of federal equal protection. In *Honore v. State Board of Prison Terms*,⁴⁰ the court held that under the Equal Protection Clause of the Fourteenth Amendment, an indigent state prisoner seeking "civil" *habeas corpus* relief is entitled to appointed counsel to assist in prosecuting his petition at the initial hearing stage and on appeal. This right is afforded when the petition is urged in good faith, raises significant issues, and the nature of the issues raised

“indicate the necessity for professional legal assistance if they are to be presented and considered in a fair and meaningful manner.”⁴¹ Again, the court was concerned with the fairness of the proceedings and did not rely on any categorical expression of when the right to counsel attaches.

This more expansive approach slowed in the 1980s with the Washington Supreme Court’s decision in *State v. Walker*,⁴² wherein the court for the first time affirmatively conditioned the right to counsel on an imminent threat of imprisonment. *State v. Walker* was somewhat short lived and not followed by later courts (because of the intervening decision in the U.S. Supreme Court case, *Mathews v. Eldridge*).⁴³ However, any tendency toward further expansion of the right to counsel under a due process analysis came to a screeching halt in 1995 with *In re Grove*.⁴⁴ This turn of events was the unfortunate result of the misapplication of federal due process and right-to-counsel jurisprudence (*Mathews v. Eldridge* and *Lassiter* in particular). In an analytical sidestep, *Grove* also presented an overly broad articulation of when a right to counsel exists, which was unnecessary to the court’s resolution of the case.⁴⁵ Thus, the growth and development of right-to-counsel jurisprudence in Washington has been seriously retarded on the basis of *dicta*.

In re Grove concerned a request by three separate litigants in three different cases to pursue their appeals from trial court decisions at the public’s expense, including the payment for counsel on appeal. In two of the three cases, a right to counsel was expressly granted by statute. The first case concerned an appeal from a juvenile court dependency determination in which right to counsel is afforded “at all stages of the proceeding.”⁴⁶ The second case concerned an appeal of an adverse trial court finding under the state’s violent sexual predator act, which similarly provides for the right to counsel “at all stages of the proceedings.”⁴⁷ The third case involved a claimant who sought public funding of his appeal from a denial of workers’ compensation benefits, when concededly he had no statutory or constitutional right to counsel.

The question in all three cases, as phrased by the court in the combined opinion, was not whether each claimant had a right to counsel, but whether he had the right to prosecute his appeal solely because he is indigent, notwithstanding the existence or absence of a right to counsel.⁴⁸ Despite the very narrow scope of the actual issue presented, the court departed into a lengthy discussion of the right-to-counsel cases and cases addressing the waiver of court fees for indigent persons. As a result, the court concluded that because there is no right to counsel in workers' compensation cases, there is no right to appeal at the public's expense.⁴⁹

Prior to *In re Grove*, indigent-fee-waiver cases had never turned on whether a right to counsel existed. Instead, they typically focused on procedural access to courts and disparate impacts of court fees and other litigation costs on indigent persons.⁵⁰ Because there was no need for the court in *Grove* to determine whether there is a constitutional right to counsel in workers' compensation cases, the apparent clear line drawn between "fundamental rights" and purely "financial interests" as the determinant of a right to counsel in civil matters is technically and appropriately dicta.

While the Washington Supreme Court effectively ceased extending the right to counsel in civil cases in 1975 with *Tetro v. Tetro*, none of the later cases⁵¹ examined the relationship between Washington's guaranties of due process and equal protection and of access to justice. Moreover, the Washington courts have never considered whether recurrence to fundamental principles in the interpretation of these provisions requires a right to counsel at the public's expense when it is necessary to insure that indigent civil litigants have access to the courts. In one recent case, *Miranda v. Sims*,⁵² Division I of the Washington Court of Appeals did consider whether the fundamental right of access to the courts for a civil litigant included a right to counsel at public expense. In finding that it did not, the court relied on *In re Grove*. However, the court did not foreclose

the possibility that in an appropriate case, the right of access to the courts may indeed require counsel.⁵³

The *Miranda* case involved a request of family members to participate through appointed counsel in a non-adversarial, investigative inquest to obtain “an objective, nonpartisan, and independent opinion” into the cause of the decedent’s death. Indeed, the facts did not present the sort of compelling circumstances that would necessarily result in ineffective access to justice. It was “for these reasons,” that the court rejected the family’s argument that their right of access to justice required appointed counsel.⁵⁴ However, in an opinion concurring in the result of the case, Judge Anne Ellington observed:

the right to access to the courts is fundamental to our system of justice. Indeed, it is the right “conservative of all other rights.” . . . Where rights and responsibilities are adjudicated in the absence of representation, the results are often unjust. If representation is absent because of a litigant’s poverty, then likely so is justice, and for the same reason.⁵⁵

IV. ACCESS TO JUSTICE IS A FUNDAMENTAL RIGHT IN WASHINGTON

Access to justice is a fundamental right in Washington. The right is founded on the text of Article I, Sec. 10 of the Washington Constitution and case law.⁵⁶ Article I, §10 of the Washington Constitution mandates that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.”⁵⁷ This provision has been repeatedly cited as the source of the established right of access to justice.⁵⁸

Moreover, the Washington Supreme Court has on many occasions relied on the fundamental role that access to justice plays in a democratic society as the basis for significant initiatives it has taken under its role as chief protector and promoter of the justice system. For example, in 1994, the Washington Supreme Court established the first statewide Access to Justice

(ATJ) Board as an entity of the Washington State Bar Association (WSBA).⁵⁹ The ATJ Board was created for an initial evaluation period of two years. The court order relied upon the fact that “the Washington judicial system is founded upon the fundamental principle that the judicial system is accessible to all persons, which advancement is of fundamental interest to the members of the Washington State Bar Association.”⁶⁰

In reauthorizing the ATJ Board as a permanent entity that is to operate within the WSBA, the court reiterated the fundamental principle stated above and specifically tasked the board to “promote jurisprudential understanding of the law relating to the fundamental right of individuals to secure meaningful access to the civil justice system.”⁶¹ Those who suffer disparate treatment or disproportionate access barriers are of particular concern to the court and singled out for special attention by the ATJ Board.⁶²

In November 2001, the Washington Supreme Court further acknowledged the fundamental right of access to justice by its unanimous order creating a task force on civil equal justice funding.⁶³ While the court has not to date defined all of the essential components of the fundamental right of access to justice, it has identified that a specific purpose of the task force will be to “develop an analysis of and rationale for long-term, sustained, and permanent state funding for essential legal services for poor and vulnerable people in Washington State.”⁶⁴ Washington’s chief justices have also variously used their positions as chief judicial officers of the state to speak about the importance of access to justice and the need for indigent persons to have representation in civil proceedings.⁶⁵ Extrajudicial comments of justices have been authoritatively cited in support of expanded judicial process.⁶⁶

Whether the Washington Supreme Court is willing to make the leap from expressions of policy and creation of boards and task forces to a binding declaration that the right to counsel is an essential component of access to justice for indigent civil litigants cannot be predicted with any degree of

certainty. However, if history is any guide at all, one can at least postulate that conditions are ripe for the Washington courts to consider the question and, in doing so, to reconsider the *Lassiter* approach, which led to the wholly dichotomous (and jurisprudentially insupportable) result in *In re Grove*.

A re-examination of the right to counsel as an incident of the fundamental right of access to justice in Washington effectively must rest on a proper interpretation of the Washington Constitution. In Washington, there are multiple provisions of the state constitution that could form the basis of a claim that a trial court has the inherent authority to appoint counsel for an indigent person in order to ensure that person's access to justice and the fundamental fairness of the proceedings. In addition to Article I, Sec. 10, these provisions include Article I, Sec. 3 (state due process guaranty)⁶⁷ and Article I, Sec. 12 (state privileges and immunities prohibition and equal protection guaranty)⁶⁸ as informed by the mandate of Article I, Sec. 32 (recurrence to fundamental principles).⁶⁹

Even if no single constitutional provision would provide sufficient basis for the proposition that a right to counsel is an incident of access to justice in civil proceedings, a court would be hard pressed to determine that such a right does not exist at least in some instances of civil litigation. Article I, Sec. 32 of the Washington Constitution has no equivalent in the federal constitution; therefore, the recurrence to fundamental principles as a direct source of rights or an interpretive tool for analysis of other constitutional provisions need not be subjected to the stringent requirements for state constitutional interpretation imposed by the seminal case of *Gunwall v. State*.⁷⁰ But for determining whether the fundamental right of access to justice compels Washington courts to consider the need for counsel in civil cases beyond the scope allowed by *In re Grove*, *Gunwall* offers a useful analytical framework.⁷¹ On the basis of the *Gunwall* criteria, there is little doubt that the Washington Constitution provides support for the inherent judicial authority to appoint counsel to civil litigants.

V. WASHINGTON CONSTITUTION ARTICLE I, SECTION 32

Article I, Sec. 32 of the Washington Constitution provides, “[a] frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.”⁷² Article I, Sec. 32 has been addressed infrequently by the Washington Supreme Court and rarely in relation to specific claims of individual right.⁷³ It has been used as both an interpretive mechanism for other rights set out in the state constitution,⁷⁴ however, and as a source of substantive rights.⁷⁵ But, the full extent of its application and meaning has not been established. At minimum, based on the express text of the provision, it characterizes the fundamental relationship between individual rights and free government. This characterization lies at the heart of the Washington Constitution’s declaration of rights, finding expression as the first statement of principle.⁷⁶

This constitutional mandate further compels “recurrence to fundamental principles.” To “recur” has been defined variously as “to have recourse,” “resort,” “to go back in thought or discourse,” “to come up again for consideration.”⁷⁷ “Recurrent” means “running or turning back in a direction opposite to a former course.”⁷⁸ “Fundamental principles” can mean nothing less than those principles which, by nature, inhere in all humankind, regardless of their expression in documents and texts governing essentially political relationships. In *State v. Seely*,⁷⁹ while not unconditionally endorsing the view, the Washington Supreme Court acknowledged that Brian Snure has argued “persuasively” that the phrase “frequent recurrence to fundamental principles” “suggests that framers retained the notion that natural rights should be considered when protecting individual rights.”⁸⁰

Snure’s suggestion is further supported by the court’s recognition that when the Washington Constitution was first proposed it contained only thirty-one sections in Article I. As observed by the court, “[s]ection 32 was proposed by George Turner, whose later speeches as a U.S. Senator lead to the conclusion that Turner, like others of his day, believed that

constitutional interpretation often required a return to natural law principles beyond the four corners of the constitution.”⁸¹

It is on the supposition that the protections and requirements of the Washington Constitution are not limited by the expressed text of the document that the Washington Supreme Court found constitutional protection for the individual right to contract in 1898⁸² and the individual right to an insanity defense to a criminal charge in 1910.⁸³ The court’s recurrence to fundamental principles examined the common law treatment of property rights and persons of unsound mind.⁸⁴ However, as demonstrated below, the common law is not the extent of sources of law regarding fundamental rights and principles that may be recurred in defining the scope of access to justice under the Washington Constitution.

Finally, with the use of the term “frequent,” the constitution’s drafters have clearly implored the Washington courts to rely on fundamental principles and on sources outside the four corners of the document time and again, in order to protect and maintain individual rights and to ensure that justice and fairness are achieved.

VI. COMMON LAW SOURCES OF FUNDAMENTAL PRINCIPLES REGARDING THE RIGHT TO COUNSEL

Certainly on the basis of the Washington Supreme Court’s jurisprudence, one source of fundamental principles grounded in natural law is the common law. It is also a source of law to which the court may recur for the right to counsel for indigent civil litigants. California Court of Appeals Justice Earl Johnson, Jr., is a leading commentator on the right to counsel in civil proceedings at common law.⁸⁵ As Justice Johnson has written:

A rather primitive right to equal justice came to America from England along with the rest of our common law legal system. At the time the colonists were settling our nation, this right had existed under the common law of England for several hundred years. In 1495, during the reign of Henry VII, the English Parliament enacted a statute guaranteeing free counsel and waiving

all fees for indigent civil litigants. This “Statute of Henry VII” created a right to free counsel for indigent English litigants and empowered the courts to appoint lawyers to provide the representation without compensation.⁸⁶

English judicial decisions extended this statutory right to courts of equity.⁸⁷ Blackstone cited the statute of 11 Hen. 7, ch. 12 as the source of the right to counsel in civil proceedings: “[a]nd paupers...are, by statute...to have original writs and subpoenas gratis, and counsel and attorney assigned them without fee; and are excused from paying costs.”⁸⁸

The statute of Henry VII established a right to counsel for indigent civil litigants with meritorious claims before the court. The rationale for Parliament’s enactment of the statute was to ensure that indigent civil litigants had effective access to the King’s court and was part and parcel of the rights that attached to *in forma pauperis* status; the law itself was denominated *An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis*.⁸⁹ The purpose of the statute was to ensure that the poor, who had been effectively excluded from the King’s courts until then, could access the system of justice then in place.⁹⁰ That “access to justice” was the fundamental principle underlying the common law requirement of counsel—and not the desire to protect an underlying fundamental right or interest such as liberty or family relationship—is evident⁹¹ first, from the fact that the right initially applied only to civil plaintiffs⁹² and second, from the fact that it was the complexity of the legal system itself and the inability of the poor to hire expert legal assistance that the statute sought to redress.⁹³ Moreover, the only factor considered in appointing counsel was the litigant’s indigence; the nature of the action or the rights to be enforced was irrelevant.⁹⁴ Once a litigant was determined to be indigent, appointment of counsel was mandatory. The right to appointed counsel in civil actions was extended to indigent civil defendants by English courts as a matter of common law applying the same rationale underlying the statute.⁹⁵

The statute of Henry VII remained in effect in England until 1883. It was subsequently replaced by a system of legal aid for paupers administered under the Rules of Court.⁹⁶ The fundamental value of access to the courts and the importance of legal assistance for the poor as a core element of fair judicial proceedings was carried to the American colonies by the English⁹⁷ and continues to find expression in contemporary judicial decisions.⁹⁸

VII. INTERNATIONAL LAW AS A SOURCE OF FUNDAMENTAL PRINCIPLES

International Law or the Law of Nations and, in particular, international human rights law embody those principles that civilized nations have deemed fundamental. It is another source of applicable law “beyond the four corners” of the constitution to which Washington courts may recur under Article I, Sec. 32 to find a right to appointed counsel when required to ensure access to the courts.⁹⁹

Over 100 years ago, in a case called *The Paquete Habana*,¹⁰⁰ the United States Supreme Court declared the duty of a court to apply International Law “as often as questions of right depending upon it are duly presented for their determination.”¹⁰¹ Washington courts have not shied away from this admonition and have referenced international law and international human rights law when important questions of constitutional interpretation have been presented. For example, in *Eggert, et. al. v. City of Seattle*,¹⁰² the Washington Supreme Court relied in part on Article 13, Sec. 1 of the Universal Declaration of Human Rights¹⁰³ as a source for finding an unwritten constitutional right to travel, which the court determined was violated by a durational residency requirement for civil service employment.¹⁰⁴ The court further cited the Magna Carta’s proclamation “allowing every free man to leave England except during wars,” and the historical growth of this right having in part resulted from “efforts to evade restrictions imposed by feudal apprenticeship and paupership laws in 17th century England.”¹⁰⁵

In addition to Great Britain, from which the common law right to counsel in civil cases originates, other western democratic countries have recognized a constitutional right to counsel in civil cases either as an incident of “equal protection before the law” or as an affirmative obligation to provide equal access to justice for low-income citizens.¹⁰⁶ For example, “France and Germany have provided counsel for the indigent since the 1870s.”¹⁰⁷ As reported by Justice Johnson,

Germany has a comprehensive statutory right to counsel in civil cases heard in the regular courts. Nonetheless, the German Constitutional Court has also made it clear the nation’s constitutional guarantee of a fair hearing in civil cases requires appointment of free counsel for poor people where the legal aid statute does not.¹⁰⁸

In 1937, the Federal Court of Switzerland, that country’s highest court, held that the Swiss Constitution guarantees that its citizens are “equal before the law” and requires the governments of the Swiss Cantons to provide free lawyers to indigent litigants in all civil cases which require knowledge of the law.¹⁰⁹ In that case, the Swiss court observed that “poor people could not be ‘equal before the law’ in the regular courts unless they had lawyers just like the rest of the citizenry.”¹¹⁰

Justice Johnson cites numerous other examples of jurisdictions that have recognized the fundamentality of the right to legal representation for the poor in civil proceedings as an incident of equal access to the courts.¹¹¹ However, the broadest and most significant recognition of the fundamental obligation of government to provide free legal assistance to indigent civil litigants occurred in 1979, when the right was extended throughout the European Community by the European Court of Human Rights’ interpretation of Article 6 of the European Convention on Human Rights in the case of *Airey v. Ireland*.¹¹² Importantly, *Airey* does not rest on the guaranty of non-discrimination or equal protection under the law, but rather on the fundamental notion of access to justice.

Similar to the Washington Constitution's Article I, Sec. 10 guaranty of the fair administration of justice, Article 6 of the European Convention reads, "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time."¹¹³ On the basis of this provision, the European Court held in *Airey* that a low-income Irish woman had a protected human right to counsel as a matter of "fair" access to justice when she sought a judicial separation from her husband.¹¹⁴

The Irish Government argued in the case that because Ms. Airey's personal circumstances created the barrier to her ability to access justice, rather than any impediment posed by the state, the government had no duty to remove the barrier.¹¹⁵ Importantly, the European Court rejected that argument and ruled that "fulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive. . . . The obligation to secure an effective right of access to the courts falls into this category of duty."¹¹⁶ The court emphasized, however, that free counsel for poor persons is not necessarily required in all forums, but that governments can satisfy the duty by establishing forums which are simple enough in both procedure and substantive law to allow citizens to have a fair hearing without the assistance of a lawyer.¹¹⁷

Significantly, while *Airey* was pending before the European Court of Human Rights, the Committee of Ministers of the Council of Europe adopted a resolution declaring that the right of access to justice and a fair hearing includes the right to free legal aid and proceedings when necessary to ensure that no one is "prevented by economic obstacles from pursuing or defending his right before any court determining civil, commercial, administrative, social, or fiscal matters."¹¹⁸

Hence, in the international arena, not only does the right of access to justice include effective access, but government also has an affirmative duty to secure the right to individuals. The government can do so either by

appointing legal counsel for indigent litigants or by simplifying the forums in which justice is administered to allow lay citizens a fair hearing without the assistance of counsel.¹¹⁹ In many cases, however, such as for individuals who may have difficulties communicating with the justice system due to mental health problems or lack of English language proficiency, direct legal assistance is essential to secure access to the courts. Again, as was the case with the common law requirement, it is the complexity of the law and procedure that provokes the right to counsel and not the quality or “fundamentalness” of the rights or interests at issue in the proceeding.

VIII. APPLYING THESE SOURCES OF FUNDAMENTAL PRINCIPLES TO WASHINGTON’S ARTICLE I, SECTION 10

In applying both the common law and international law sources of fundamental principles to interpreting the scope of Article I, Sec. 10 of the Washington Constitution, it is apparent that this clause contemplates a right to counsel for civil litigants as part and parcel of access to justice. It is equally apparent that, when viewed with reference to access to justice, the rationale of the Washington Supreme Court’s most recent examination of the question in *In re Grove* is not sustainable.

Using the *Gunwall* criteria (the text and structure of the state constitution, state constitutional law history, pre-existing state law, and matters of particular state interest)¹²⁰ to examine the text of the Washington Constitution, there is no rationale for distinguishing liberty from property or financial interests in evaluating a litigant’s need to access the courts for a determination of his or her important personal interests. For example, the text of Article I, Sec. 3 (due process guaranty) does not distinguish between the level of process that is due to protect life, liberty, and property—each is placed on equal footing. Indeed, in recurring to fundamental principles in *Dennis v. Moses*, the Washington Supreme Court drew no distinction and found that the challenged restriction on the free use of property to secure a

loan was the equivalent of a deprivation of liberty.¹²¹ One might argue that the Washington Constitution affords certain property interests, such as the home, greater recognition and, therefore, greater procedural protection than other property or financial interests.¹²² But *In re Grove* cuts a wider swath and includes all property interests in the presumption against a right to counsel in civil matters.

The cases interpreting Article I, Sec. 10 correspondingly underscore the importance of due process protections in this state—not just to protect interests in life, liberty, and property, but also to secure the fair administration of justice. Indeed, the Washington courts have deemed the assistance of counsel to be an essential component of the fair administration of justice. For example, in *Honore v. State Bd. of Prisons*, the Washington State Supreme Court ruled that the requirement of appointed counsel expressly did *not* rest on the civil nature of the proceedings (post conviction *habeas corpus*), but on the lack of fairness in the proceedings in the absence of counsel as a matter of equal protection.¹²³ And also, in *In re Myricks*, the need for counsel to protect the fundamental familial rights at stake was to ensure the fair administration of justice. The court explicitly stated:

In dependency and child neglect proceedings—even if only preliminary to later and more final pronouncements—the indigent parent has to face the superior power of the State resources. The panoply of the traditional weapons of the State are trained on the defendant-parent, who often lacks formal education and with difficulty must present his or her version of disputed facts; match wits with social workers, counselors, psychologists, physicians, and often an adverse attorney; cross-examine (often expert witnesses) under rules of evidence and procedure of which he or she usually knows nothing; deal with documentary evidence he or she may not understand, and all to be done in the strange and awesome setting of the juvenile court.¹²⁴

The Washington right-to-counsel cases¹²⁵ provide the guidance as to some of the essential factors for determining when counsel is needed to

ensure access to the justice system. These include: first, the imbalance of power between the parties, for example, a state party litigant represented by counsel and an unsophisticated litigant unschooled in the procedural rules of litigation; second, the actual unfairness and the appearance of unfairness for poor and uneducated litigants to “match wits” with expert witnesses; third, the need for cross-examination or documentary evidence and the corresponding complexity of evidentiary requirements related to their admissibility; and fourth, the nature and formality of the court setting and the relative comfort level of the litigant appearing in court. On the basis of *In re Myricks*, *Honore*, *In re Luscier*, and the other pre-*In re Grove* right to counsel cases, the Washington State constitutional law history criterion of *Gunwall* supports a different, more functional approach to the determination of when counsel is required in state civil cases than what the federal constitution dictates.

Washington also has a demonstrated history of particular interest in access to justice and the need for legal services for the poor. For example, as early as 1939 the Washington Legislature recognized the importance of civil legal aid for the poor in the Legal Aid Act,¹²⁶ which authorized counties to organize and fund civil legal aid programs. In so doing, the Legislature declared “[t]he promotion of legal aid . . . to be in the public interest.”¹²⁷ The Washington Legislature has further declared as a matter of legislative policy that “effective legal representation should be provided for indigent persons and persons who are indigent and able to contribute, consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches.”¹²⁸

Washington has been at the forefront of more recent national efforts to promote access to justice for the poor. In addition to the various Washington Supreme Court initiatives cited above,¹²⁹ the Washington State Bar Association (WSBA) has also made access to the civil justice system for poor persons a high priority for its attention. One example is a WSBA resolution of June 28, 2000, finding that “there exists a crisis in the

availability of civil equal justice services for vulnerable low-income people in Washington State.”¹³⁰

In addition, unlike the U.S. Constitution, the Washington Constitution reflects particular concern for protecting the interests of the poor. Not only does Article I, Sec. 17¹³¹ forbid imprisonment for debt, but Article VIII, Sec. 7 prohibits any governmental extension of credit, “except for the necessary support of the poor and infirm.”¹³² Thus, Washington’s particular interest in access to justice for the poor finds expression in both law and policy at many levels of the justice system.

Assuming a right of access to the courts is fundamental, and assuming further that the Washington Constitution’s guaranty of access to justice requires appointment of counsel for indigent litigants in some civil cases, must the government satisfy that obligation? The text of the Washington Constitution answers this question in the affirmative.

Unlike the federal Bill of Rights, which imposes negative constraints on the federal and state governments,¹³³ the Washington Constitution contains an affirmative declaration of rights. The very first article of the Washington Constitution is the Declaration of Rights, and the express language of the very first provision declares that “[a]ll political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.”¹³⁴ This provision, along with Article I, Sec. 10 (access to justice) and Article I, Sec. 32 (recurrence to fundamental principles), are mandatory by the express terms of Article I, Sec. 29 of the Washington Constitution, which reads: “[t]he provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.”¹³⁵

The Washington Supreme Court has interpreted Article I, Sec. 29 as a directive to the state as a whole to secure the protections of the constitution,¹³⁶ but that in the realm of individual rights enumerated in the constitution, it was recognized that “*the courts have ample power, and will go to any length, within the limits of judicial procedure, to protect such*

constitutional guaranties” (emphasis added).¹³⁷ Article I, Sec. 10 has been expressly identified as one of those constitutional guaranties that the courts have *ample power* to judicially enforce, even in the absence of implementing legislation.¹³⁸ Thus, even in the absence of legislation that affirmatively requires appointment of counsel in civil cases when necessary to secure access to justice, Washington courts have the inherent constitutional power and authority to appoint counsel and as a constitutional mandate must do so. Therefore, applying the *Gunwall* criteria of significant differences in text and structure of the federal and state constitutions, it is apparent that there is a strong basis for finding a right to counsel in civil matters beyond the scope of the federal constitution as determined by the U.S. Supreme Court in *Lassiter*.¹³⁹

Thus, the question boils down to: when should a court exercise its inherent authority to appoint counsel for a civil litigant? Assuming that a categorical approach based either on the likelihood of incarceration or the presence of a fundamental liberty interest is not sufficient, what factors should a court consider in determining when counsel is necessary to secure access to justice in any given case? While the state’s jurisprudence to date has not fully examined these questions, one can glean from the jurisprudence certain considerations that must be part of an informed court’s assessment in an “access-based” as opposed to a categorical “interest-based” analysis of when meaningful or effective access to the court is lacking.

IX. ACCESS-BASED DETERMINATIONS FOR APPOINTMENT OF COUNSEL

Ideally, an access-based determination would enable a trial court to survey the totality of circumstances in any case. The trial court can ask itself whether the parties are sufficiently able to present their claims or defenses, whether they can coherently present the facts and address matters of evidence, and if the court has a sufficient command of the information

available to render a fair and just ruling in the case. Factors related to the nature of the case that may affect these considerations are, among others, the complexity of the applicable law, the presence of any procedural issues that need to be addressed, and the potential existence of cross or counter-claims that could be lost if not asserted. The court might also weigh the need for expert testimony; the presence of complex evidentiary issues; the availability of other forums to resolve the dispute; and the extent of or need for pre-trial proceedings, such as preliminary relief, complex discovery, or summary judgment motions.

An access-based analysis would also necessarily enable a court to make reasonable determinations about individual litigants' differing abilities to meaningfully participate in the proceedings—particularly in light of case-based determinations provoked by the above considerations. Such individualized assessments might include inquiries into the educational level of a litigant and the litigant's familiarity with the court system (e.g., lay landlords and debt collection agency owners often initiate eviction or debt collection actions and effectively appear in court without counsel). Also included within the ambit of an individualized inquiry is whether a litigant suffers from a mental disability or emotional impairment that affects his or her ability to understand the proceedings or to communicate coherently with the court. The presence of a communication barrier or disability that affects the litigant's ability to participate effectively or understand the proceedings is, like the absence of proficiency in the English language impairing a litigant's ability to understand the proceedings or to communicate effectively his or her interests to the court, likely to render the need for counsel more acute. Similarly, other vulnerabilities such as physical disabilities or frailty—either of which may make the need for a litigant to come to the court a barrier to accessing the justice system—must be considered along with the relative availability of resources to mitigate the absence of counsel. Such alternative resources include qualified

language interpreters, courthouse facilitators, domestic violence advocates, and technology.

In addition to the case-based factors and the individualized characteristics that a court should assess, there are also systemic issues that should be assessed to determine if the presence of counsel is needed to ensure access to the courts. These issues include factors such as the balance of power between the parties—e.g., a governmental plaintiff represented by publicly supplied counsel against an unrepresented person; a young minority litigant forced to defend his or her interest in a predominantly white justice system; a wealthy relative seeking custody or other impairment of family rights from a teenage parent reliant on public benefits programs; a highly abusive partner versus a domestic violence victim in a dissolution or custody action; a United States citizen suing an undocumented immigrant. The list can go on. These assessments, either independently or coupled with an assessment of the interests at stake, would no doubt demonstrate that at least in some civil matters that do not concern physical liberty or governmental impairment of fundamental familial rights, meaningful access to the justice system compels appointment of counsel.

A court in the exercise of its inherent authority to secure access to its processes must be empowered to make these assessments and to appoint counsel at public expense to represent a needy litigant.¹⁴⁰ This premise is what was contemplated by the U.S. Supreme Court in *Powell v. Alabama*. Even though the extreme circumstances of that case called out for the appointment of counsel, it was ultimately the interest of fairness, given the particularized circumstances of the Scottsboro Boys and the systemic and institutionalized obstructions to fairness that so offended the Court's sensitivities and compelled the outcome.¹⁴¹

Though admittedly the potential outcome in civil matters can never be considered as extreme as the execution of a defendant charged with a capital offense, federal cases *Gideon v. Wainwright* and *In re Gault* provide solid proof that the potential for less extreme personal consequences calls out for

equally fair treatment. Even if courts were to continue to rely in part on interest-based determinations of when the right to counsel exists in civil matters, it is unreasonable to draw the interests as narrowly as that drawn in Washington's *In re Grove*.

The stigmatizing public nature of proceedings impairs important personal interests not unlike the long-lasting effects of the delinquency finding that concerned the court in *In re Gault*.¹⁴² These proceedings can include evictions, debt collections, domestic violence, and custody disputes, among others. Evictions from government-assisted housing prevent the evicted tenants from again accessing the public housing programs and ultimately impair the tenant's ability to secure substitute housing. Debt collection actions color credit reports, often impairing the debtor's ability to obtain future loans. Other actions can have similar far-reaching, long-term ramifications. Hence, it is not that far of a leap from the spectrum of adverse consequences flowing from a criminal prosecution to the very serious and sometimes devastating consequences that can result from civil litigation. Regardless of the potential consequences, however, the extent of the likely deprivation should not be the sole determinant of fair access to the system—the system charged with the consequence-inducing decision-making process.

X. CONCLUSION

Proponents of a fair and just society should no longer need to ask whether a right to counsel for non-criminal litigants finds support in the fundamental precepts of a modern civilized society—such support exists within and among the historical documents and foundational principles on which they rest—at least in Washington.

Courts in Washington are mandated to look back to natural law and other sources “beyond the four corners” of the constitution to ensure that the fundamental individual right of access to the courts is guaranteed. Courts have the inherent constitutional authority to enforce this right and one

significant mechanism for enforcement is the appointment of counsel when the totality of the circumstances deems it to be necessary to secure access for a party litigant. The access-based approach to a review of when appointment of counsel is necessary takes into account both systemic and individualized conditions. In contrast to the access-based analysis, a categorical interest-based right to counsel at best renders the system of justice that is central to a democratic social order non-user friendly. At worst, it threatens the very legitimacy and relevance of the system that is essential to the preservation of the constitutional framework. It is time to recur again.

¹ Deborah Perluss, Director of Advocacy and General Counsel, Northwest Justice Project. J.D. 1975, University of California Hastings College of Law; LL.M. 1983, University of London, London School of Economics and Political Science. The views expressed here are solely the author's. This article is dedicated to Joan Fitzpatrick, who was a fervent and articulate advocate for human rights and equal justice for all, in all forums, and in all realms of social, political, and personal life; and to Leonard Schroeter, who never rests.

² *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

³ *Id.* at 45.

⁴ *Id.* at 52.

⁵ *Id.* at 71.

⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁷ *Betts v. Brady*, 316 U.S. 455, 471 (1942).

⁸ *Id.* See also *Powell*, 287 U.S. at 72 (citing *Hendryx v. State*, 29 N.E. 1131 (1892)).

⁹ See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (citing *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972), the Court ruled that a probationer facing a probation revocation hearing does not have a *per se* right to appointed counsel as the risk of deprivation concerns a conditional liberty interest and not one that is enjoyed by non-convicted persons) and *Scott v. Illinois*, 440 U.S. 367 (1979) (the Court ruled that a right to appointed counsel is not required as a matter of due process in criminal prosecutions that do not result in incarceration). The Court held that “the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.” *Id.* at 373–74.

¹⁰ *Lassiter v. Dept. of Soc. Servs. of Durham County*, 452 U.S. 18, 25–26 (1981).

¹¹ *Id.* at 25.

¹² *In re Gault*, 387 U.S. 1 (1967).

¹³ *Lassiter*, 452 U.S. at 25 (quoting *Gault*, 387 U.S. at 41). The Court's reference to this language ignored the context in which the *Gault* case was decided, which traditionally denied counsel to juveniles on the basis of the *parens patriae* role of the state in juvenile

delinquency proceedings. In fact, the point of *Gault* (and the cited quote) was not to suggest that incarceration is a condition precedent to appointed counsel, but to demonstrate the punitive as opposed to the assumed rehabilitative or nurturing aspects of delinquency courts).

¹⁴ See *Lassiter*, 452 U.S. at 27–28; see also *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (setting out three elements for the Court to evaluate in deciding whether and what type of due process is required in a non-criminal setting, including the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions).

¹⁵ *Lassiter* did not rest on the distinction between liberty and financial interests *per se*, nor on the distinction between civil and criminal proceedings. *Lassiter* involved a state-initiated proceeding to terminate the indigent litigant’s parental rights, a concededly significant, if not fundamental interest, which under North Carolina law, as in most jurisdictions, is deemed civil in nature.

¹⁶ *Matthews*, 424 U.S. at 335.

¹⁷ See *Powell*, 287 U.S. at 72.

¹⁸ Task Force on Civil Equal Justice Funding, Washington Supreme Court, The Washington State Civil Legal Needs Study (2003), available at <http://www.courts.wa.gov>.

¹⁹ *Id.* at 23.

²⁰ *Id.* at 25.

²¹ *Id.* at 33.

²² *Id.* at 55–56

²³ WASH. REV. CODE § 26.12.240 (2003).

²⁴ WASH. ST. CT. G.R. 27, available at http://www.courts.wa.gov/court_rules.

²⁵ See WASH. REV. CODE § 43.08.260 (2004).

²⁶ Recent changes in direction are demonstrated by *Lawrence v. Texas*, 123 S. Ct. 2462, 2482 (2003) (right to privacy in consensual sexual relations between members of the same sex) *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²⁷ *Gideon*, 372 U.S. at 345, *overruling* *Betts v. Brady*, 316 U.S. 455 (1942).

²⁸ See, e.g., *State v. James*, 686 P.2d 1097 (1984) (applying the *Matthews* test and holding that trial courts should engage in a case-by-case assessment of whether due process requires appointed counsel in paternity cases).

²⁹ Justice O’Connor stated in her concurrence in *Lawrence*:

The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*. When our precedent has been thus weakened, criticism from other sources is of greater significance. In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment.

123 S. Ct. at 2482–83 (citations omitted).

³⁰ See *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003), in which the appellant, an indigent mother threatened with loss of custody of her child to unrelated third parties, argued that

the right to appointed counsel arises in cases involving deprivations of fundamental familial interests under Articles 5, 19, and 24 of the Maryland Declaration of Rights. Although the Maryland court did not address the right to counsel issue and reversed the decision of the trial court in the appellant's favor on other grounds, three judges eloquently opined that a right to appointed counsel exists under Maryland's constitutional law and history. *See id.* (Cathell, J., concurring); *see also* *City of Moses Lake v. Smith*, No. 21783-3-III, slip op. (Wash. Ct. App. May 21, 2003) (dismissed as moot by Order Denying Motion to Modify Commissioner's Ruling). Appointed counsel was denied to an indigent elderly mentally ill man whose home of fifty years was threatened with total destruction by city government seeking to enforce building code requirements that were arguably inapplicable at the time additions were made. The appellant died while the appeal was pending.

³¹ *E.g., inter alia*, in Washington, privacy is afforded greater protection under art. I, § 7 of the Washington Constitution than under the federal constitution (*Gunwall v. State*, 720 P.2d 808 (Wash. 1986)); education has been declared a fundamental right under art. 9, § 1 of the Washington Constitution (*Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978)); and religion is afforded greater protection under art. I, § 11 than under the First Amendment (*Witters v. State Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989)).

³² *See Tetro v. Tetro*, 544 P.2d 17, 19–20 (Wash. 1975) (right to appointed counsel in civil contempt proceedings due to risk of incarceration).

³³ *McInturf v. Horton*, 538 P.2d 499, 500 (Wash. 1975) (holding there is a right to counsel in misdemeanor cases established by Court Rule implementing ABA Standards for Criminal Justice).

³⁴ *See, e.g., In re Lewis*, 564 P.2d 328, 331 (Wash. 1977) (right to counsel in juvenile court declination hearing is of federal constitutional magnitude), *citing* *Kent v. United States*, 383 U.S. 541, 554 (1966), *overruled by In re Grove*, 897 P.2d 1252, 1260 (Wash. 1995) to the limited extent inconsistent with the holding that a litigant entitled to counsel at all stages of a proceeding is entitled by statute to counsel on appeal.

³⁵ *See also In re Luscier*, 524 P.2d 906, 909 (Wash. 1974) (permanent deprivation of parental rights by the state requires appointment of counsel for indigent parent); *In re Myricks*, 533 P.2d 841, 842 (Wash. 1975) (extending *Luscier* to temporary deprivation of parental rights proceedings).

³⁶ *In re Myricks*, 533 P.2d at 842 (citing *Snyder v. Massachusetts*, 291 U.S. 97 (1934)).

³⁷ *See Luscier*, 524 P.2d at 908 (citing *In re Hudson*, 126 P.2d 765 (Wash. 1942)).

³⁸ *Id.* *See also Tetro*, 544 P.2d 17.

³⁹ *Id.* *See also In re Adoption of Hernandez*, 607 P.2d 879 (Wash. Ct. App. 1980) (no right to counsel for birth parent who voluntarily relinquished her child in non-adversarial adoption proceeding); *James*, 686 P.2d at 1099 (decision to appoint counsel for indigent putative father in state-initiated paternity action is best made by the trial court).

⁴⁰ *Honore v. Wash. State Bd. of Prison Terms & Paroles*, 466 P.2d 485 (Wash. 1970).

⁴¹ *Id.* at 493.

⁴² *State v. Walker*, 553 P.2d 1093 (Wash. 1976) (finding no right to counsel in filiation (paternity) proceedings when there is no imminent direct threat of imprisonment).

⁴³ *See id.*; *Matthews*, 424 U.S. at 335.

⁴⁴ *Grove*, 897 P.2d 1252.

⁴⁵ *Id.* at 1256–59.

⁴⁶ *Id.* at 1255 (citing WASH. REV. CODE § 13.34.090 (2003)).

⁴⁷ *Id.* (citing WASH. REV. CODE § 71.09.050 (2003)).

⁴⁸ *See id.* at 1255.

⁴⁹ *Id.* at 1261 (“Where, as here, the interest at stake is only a financial one, the right which is threatened is not considered ‘fundamental’ in a constitutional sense.”).

⁵⁰ *See* O’Connor v. Matzdorff, 458 P.2d 154 (Wash. 1969); Ashley v. Super. Ct. of Pierce County, 509 P.2d 751 (Wash. 1973); Iverson v. Marine Bancorporation, 517 P.2d 197 (Wash. 1973); Bullock v. King County Super. Ct., 524 P.2d 385 (Wash. 1974); Housing Auth. of King County v. Saylor, 557 P.2d 321 (Wash. 1977); and cases cited therein.

⁵¹ *See, e.g., In re Perkins*, 969 P.2d 1101, 1105 (Wash. Ct. App. 1999) (applying the interest based federal due process standards and finding that no fundamental liberty interest is at stake in an initial truancy proceeding, where the alleged truant is potentially subject to an order requiring him to attend school; change schools; or appear before a community truancy board, whose role is to help abate the truancy). *See also* cases cited in *Luscier*, 524 P.2d 906; *Myricks*, 533 P.2d 841.

⁵² *Miranda v. Sims*, 991 P.2d 681, 683–84 (Wash. Ct. App. 2000).

⁵³ *Id.*

⁵⁴ *Id.* at 684.

⁵⁵ *Id.* at 687 (quoting *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907)).

⁵⁶ *See, e.g., Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370, 375 (Wash. 1991) (reciting a history of the Court’s cases establishing a right of “access to justice,” relying variously on Article I, §§ 1, 10, and 32, relating to the jurisdiction and authority of superior courts); *King v. Olympic Pipeline*, 16 P.3d 45, 57 (Wash. 2000). *See also* 1519–1525 *Lakeview Blvd. Condo. Assn. v. Apartment Sales Corp.*, 6 P.3d 74, 80–81 (Wash. 2000).

⁵⁷ WASH. CONST. art. I, § 10.

⁵⁸ *Puget Sound Blood Ctr.*, 819 P.2d at 375.

⁵⁹ *In the Matter of the Appointments to the Access to Justice Bd.*, No. 25700-B-277 (Wash. Oct. 19, 1994).

⁶⁰ *Order Reauthorizing the Access to Justice Bd.*, No. 25700-B-390 (Wash. Nov. 2, 2000).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *In the Matter of the Appointments to the Access to Justice Bd.*, No. 25700-B-412, (Wash. Nov. 1, 2001).

⁶⁴ *Id.* Paragraph VI of the Supreme Court’s Order Creating the Task Force on Civil Equal Justice Funding specifies the purposes of the Task Force shall be to:

(A) Oversee a comprehensive study of the unmet civil legal needs of the poor and vulnerable people in Washington State, including the unmet needs of those who suffer from disparate access barriers;

(B) Develop an analysis of and rationale for long-term, sustained, and permanent state funding for essential legal services for poor and vulnerable people in Washington State;

(C) Establish an appropriate level of funding for state supported civil legal services needed to address identified unmet civil legal needs of poor and vulnerable people in Washington State;

(D) Identify and propose strategies to secure long-term, sustained, and permanent state funding needed to meet this need; and

(E) Develop recommendations for the proper administration and oversight of publicly funded civil equal justice services in Washington State.

⁶⁵ *E.g.* Washington Chief Justice Gerry Alexander, Address at the University of Washington's School of Law Commencement (June 10, 2001) (text on file with *Seattle Journal for Social Justice*). Chief Justice Alexander spoke of the importance of access to justice as the fundamental precept of democracy.

⁶⁶ *See, e.g., In re Gault*, 387 U.S. at 31.

⁶⁷ WASH. CONST. art. I, § 3, provides: "No person shall be deprived of life, liberty, or property, without due process of law."

⁶⁸ WASH. CONST. art. I, § 12, provides: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

⁶⁹ WASH. CONST. art. I, § 32, reads: "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."

⁷⁰ *Gunwall*, 720 P.2d at 812–13. The Washington Supreme Court looks to six non-exhaustive criteria when analyzing whether the Washington Constitution affords greater protection than do parallel provisions of the Federal Constitution, including: (1) the text of the state constitution; (2) significant differences in that text and the parallel federal constitutional provisions; (3) state constitutional and common law history; (4) pre-existing state law; (5) differences in the structure between the federal and state constitutions; and (6) matters of particular state interest.

⁷¹ *Id.*

⁷² For an excellent discussion of the historical context for the adoption of this provision, *see* Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 WASH. L. REV. 669 (1992).

⁷³ *Id.* at 677–78.

⁷⁴ *See, e.g., Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 42 P.3d 394 (Wash. 2002) (interpreting WASH. CONST. art. I, § 12); *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 780 P.2d 1282, 1295 (Wash. 1989) (Justice Utter concurring but criticizing the majority's use of the state action doctrine to deny free speech rights under the state constitution); *Puget Sound Blood Ctr.*, 819 P.2d at 375 (interpreting rights of discovery as an incident of right of access to the courts under art. I, § 10).

⁷⁵ *State v. Strasburg*, 110 P. 1020 (1910) (right to insanity defense); *Dennis v. Moses*, 52 P. 333 (1898) (liberty right to contract for debt). *See also* Snure, *supra* note 72, at 679 n.76 (citing cases that interpret art. I, § 32 as substantive). *Cf., Seely v. State*, 940 P.2d 604 (1997) (finding no right to use marijuana for medical treatment founded on a natural right in existence at time of constitution's adoption).

⁷⁶ “All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and *are established to protect and maintain individual rights.*” WASH. CONST. art. I, § 1 (emphasis added).

⁷⁷ Webster’s Ninth New Collegiate Dictionary 985 (9th ed. 1984).

⁷⁸ *Id.*

⁷⁹ 940 P.2d at 620.

⁸⁰ *Id.* at 621.

⁸¹ *Id.*

⁸² *Dennis*, 52 P. at 339.

⁸³ *Strasburg*, 110 P. at 1021.

⁸⁴ In *Dennis*, 52 P. at 339, the court looked to Blackstone’s definition of civil liberty as reflective of “natural liberty” and Cooley’s discussion of state constitutions as not a limiting source of rights, which is “boundless in extent and incapable of definition.”

⁸⁵ See MAURO CAPPELLETTI, ET AL., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (Vincenzo Varano ed., 1975); Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 Md. J. Contemp. Legal Issues 199, 204 (1994) [hereinafter *Toward Equal Justice*]; see also *Quail v. Mun. Court*, 171 Cal. App. 3d 572 (1985) (Johnson, J. concurring and dissenting). Justice Johnson has also written in the previous issue of this journal on right to counsel for civil litigants under foreign and international law. See Earl Johnson, Jr., *Will Gideon’s Trumpet Sound a New Melody?*, 2 SEATTLE J. SOC. JUST. 201 (2003).

⁸⁶ CAPPELLETTI ET AL., *supra* note 85 at 204.

⁸⁷ See, e.g., *id.*; *Oldfield v. Cobbett*, 41 Eng. Rep. 765 (1845).

⁸⁸ William Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765–1769, Vol. III Of Private Wrongs (1768) (1979)*.

⁸⁹ 11 Hen. 7, c. 12 (1495), *reprinted in* 2 Statutes of the Realm 578 (1969). The statute provided, in pertinent part:

[T]he Justices . . . shall assign to the same poor person or persons, Counsel learned by their discretions which shall give their Counsels nothing taking for the same, and in likewise the same Justices shall appoint attorney and attorneys for the same person and persons and all other officers requisite and necessary to be had for the speed of the said suits to be had and made which shall do their duties without any rewards for their Counsels, help and business in the same (spelling modernized).

⁹⁰ John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 366 (1923).

⁹¹ It was this “right of every Englishman . . . of applying to the courts of justice for redress of injuries” as inscribed in the Magna Carta that was held sacred at common law. BLACKSTONE, *supra* note 88, at 137.

⁹² See *Powell*, 287 U.S. at 60–61 (“Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time, parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel”).

⁹³ Maguire, *supra* note 90, at 373. As Maguire notes, the statute of 11 Hen. 7, ch. 12 “was meant to carry the poor man through the ins and outs of an action at common law.”

⁹⁴ BLACKSTONE, *supra* note 88, at 400.

⁹⁵ *See, e.g.,* *Wiat v. Farthing*, 84 Eng. Rep. 237 (K.B. 1668). Further, the common-law practice of assigning counsel when the defendants were indigent was limited to either civil or misdemeanor cases. It was only later that the right was extended to felony defendants. Felix Rackow, *The Right to Counsel: English and American Precedents*, 11 WM. & MARY Q. 1, 4 (1954).

⁹⁶ *See* SETON POLLOCK, LEGAL AID—THE FIRST 25 YEARS 10–13 (1975) (the statutory system has been modified over the years, but retains the mandate that indigent civil litigants are entitled to appointed counsel); *see generally*, Joan Mahoney, *Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States*, 17 ST. LOUIS U. PUB. L. REV. 223, 226–29 (1998) (thus, the guaranty of counsel to civil litigants has continued in English law and tradition for 600 years).

⁹⁷ *See* *Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1206–07 (Utah 1999). These common law principles are the precursor for the current *pro bono publico* obligation in every lawyer’s oath.

⁹⁸ *Honore*, 466 P.2d at 498–99 (the fundamental requirement of the right to counsel for indigent litigants remains the bedrock of a just system of adjudication). *See also* *Miranda*, 991 P.2d at 687 (Ellington, J. concurring).

⁹⁹ Justice Johnson fully explores international law and foreign domestic law sources for the right to counsel in non-criminal proceedings in his article: *Will Gideon’s Trumpet Sound a New Melody?*, *supra* note 85.

¹⁰⁰ *The Paquete Habana*, 175 U.S. 677 (1900).

¹⁰¹ *Id.* at 700.

¹⁰² *See* *Eggert v. City of Seattle*, 505 P.2d 801, 802 (Wash. 1973).

¹⁰³ Art. 13 § 1 of the Universal Declaration of Human Rights provides: “Everyone has the right to freedom of movement and residence within the borders of each state.” Universal Declaration of Human Rights, G.A. Res. 217(A)(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

¹⁰⁴ *Eggert*, 505 P.2d at 802.

¹⁰⁵ *Id.*

¹⁰⁶ CAPPELLETTI ET AL., *supra* note 85, at 206–08. *See also* Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL’Y REV. 503, 504 (1998); *supra* note 99; Johnson, *Will Gideon’s Trumpet Sound a New Melody?*, *supra* note 85.

¹⁰⁷ Sweet, *supra* note 106, at 504. *See also* Earl Johnson, Jr., *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341 (1985).

¹⁰⁸ CAPPELLETTI ET AL., *supra* note 85, at 206 (citing BGB sec. 114 (German Code of Civil Procedure) & Decision of June 17, 1953 (No. 26), 2 Entscheidungen des Bundesverfassungsgerichts 336 (1953)).

¹⁰⁹ *Id.* at 206.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 210–14.

¹¹² *Airey v. Ireland*, 2 Eur. Ct. H.R. Rep. (ser. A) 305 (1979).

¹¹³ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, para. 1, 213 U.N.T.S. 222, 228.

¹¹⁴ *Airey*, 2 Eur. Ct. H.R. Rep. at 316.

¹¹⁵ *Id.* at 314.

¹¹⁶ *Id.* at 316.

¹¹⁷ *Id.* at 317.

¹¹⁸ Legal Aid and Advice: Resolution 78 (8) Adopted by the Committee of Ministers of the Council of Europe on 2 March 1978 and Explanatory Memorandum (1978).

¹¹⁹ Commentators have suggested that traditional and systemic justice system rules and practices have erected insurmountable barriers to access by those unschooled in the procedural requirements of litigation and that many changes in the institutional roles of clerks, judges, and other court personnel could go far to facilitate meaningful access to the courts short of the need for counsel for civil litigants. See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987 (1999).

¹²⁰ *Gunwall*, 720 P.2d at 812–13.

¹²¹ *Dennis*, 52 P. at 339 (“The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.”).

¹²² The home receives special protection in the Washington Constitution against invasion of privacy under art. I, § 7 and against levy from debts in the homestead exemption under article 19. WASH. CONST. art. I, §§ 7, 19.

¹²³ *Honore*, 466 P.2d at 493.

¹²⁴ *In re Myricks*, 533 P.2d 841, 842 (1975).

¹²⁵ See cases *supra* at notes 32–36. While cases addressing waiver of fees such as trial court filing fees (*O’Connor v. Matzdorf*, 458 P.2d 154 (Wash. 1969)), costs of transcripts on appeal (*Iverson v. Marine Bancorp.*, 546 P.2d 454 (Wash. 1976)), service by publication costs (*Ashley v. Super. Ct.*, 521 P.2d 711 (Wash. 1974)), sheriff service fees (*Bullock v. Super. Ct.*, 524 P.2d 385 (Wash. 1974)), and waiver of appellate fees and costs (*Housing Auth. v. Saylor*, 557 P.2d 321, 325 (Wash. 1976) *overruling*, *Carter v. Univ. of Wash.*, 536 P.2d 618 (Wash. 1975)) have bearing on the Washington Supreme Court’s access-to-justice jurisprudence, none of these cases rested on art. I, § 10 and in none did the Court recur to fundamental principles under art. I, § 32. Thus, a full consideration of the application of these cases is beyond the scope of this article. Importantly, however, the cases support the conclusion that Washington courts have inherent power and authority to waive their own procedures and fashion remedies required to ensure effective access to the courts, and have implications for how a right to counsel for civil litigants might be effectively implemented through the exercise of that inherent authority.

¹²⁶ 1993 Wash. Laws ch. 93 § 1.

¹²⁷ 1993 Wash. Laws ch. 93 § 2.

¹²⁸ WASH. REV. CODE § 10.101.005 (2002).

¹²⁹ See *supra* notes 59–64 and related text.

¹³⁰ Washington State Bar Association Board of Governors Resolution, *available at* <http://www.wsba.org/atj/publications/bogresolution.htm> (last modified Mar. 10, 2004).

¹³¹ Art. I, § 17 provides: “There shall be no imprisonment for debt, except in cases of absconding debtors.” WASH. CONST. art. I, § 17.

¹³² Art. VIII, § 7 provides: “No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any

individual, association, company, or corporation, except for the necessary support of the poor and infirm.” WASH. CONST. art. VIII, § 7. See *Housing Auth. v. Saylor*, 557 P.2d 321, 333–34 (Wash. 1977) (Horowitz, A.J. concurring).

¹³³ See *Gunwall*, 720 P.2d at 815 (characterizing the federal Constitution as a “grant of limited power,” which is true for articles I–III, but not necessarily accurate with regard to the Amendments, which constrain the federal government from taking acts that violate individual rights declared and characterizing the state constitution as imposing “limitations on the otherwise plenary power of the state to do anything not expressly forbidden,” which does not reflect the mandatory obligations imposed on the state by the Constitution).

¹³⁴ WASH. CONST. art. I, § 1.

¹³⁵ WASH. CONST. art. I, § 29.

¹³⁶ See *Gottstein v. Lister*, 153 P. 595 (Wash. 1915).

¹³⁷ *Id.* at 606.

¹³⁸ *Seattle Sch. Dist. No. 1*, 585 P.2d at 86, citing IV Wash.Hist.Q. 281, 286 (1913), quoting Theodore L. Stiles, a member of the constitutional convention and one of the first justices of the state Supreme Court on principles of state constitutional interpretation and the self-executing mandatory nature of the state Declaration of Rights:

There have been some excellent provisions in the Constitution from which the people have had no benefit, because they depend for operation upon action by the legislature, and that body has neglected to do its duty in the premises. Considering that by section 29 of the first article every direction contained in the constitution is mandatory unless expressly declared to be otherwise, it is at least surprising that in some instances no attempt has been made whatsoever to set these provisions at their legitimate work.

¹³⁹ The other *Gunwall* criteria, which examine pre-existing state law and matters of particular state interest, also support a right to counsel in civil cases as an essential component of access to justice. Cases cited at notes 33–36, *supra*, pre-exist *In re Grove* and strongly suggest the importance of counsel in Washington jurisprudence.

¹⁴⁰ The decision of whether or not to appoint counsel for an indigent civil litigant may arguably be considered either a question of law or a question of discretion, and this is itself an important question which could affect the standard of review in appeals of such decisions. However, such a question lies beyond the scope of this article.

¹⁴¹ Specifically, with respect to whether the trial court’s failure to make an effective appointment of counsel was the denial of due process under the Fourteenth Amendment, the *Powell* Court stated:

Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; . . . Let us suppose the extreme case of a prisoner charged with a capital offense, who is deaf and dumb, illiterate, and feeble minded, unable to employ counsel, with the whole power of the state

arrayed against him, prosecuted by counsel for the state without the assignment of counsel for his defense, tried, convicted and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder . . .

287 U.S. 45, 71–72.

¹⁴² See *In re Gault* 387 U.S. at 24–25. The Court noted:

Police departments receive requests for information from the FBI and other law-enforcement agencies, the Armed Forces, and social service agencies, and most of them generally comply. Private employers word their application forms to produce information concerning juvenile arrests and court proceedings, and in some jurisdictions information concerning juvenile police contacts is furnished to private employers as well as government agencies.