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RIGHT TO COUNSEL IN CIVIL CASES: PROTECTOR (AND SOURCE?) OF SUBSTANTIVE DUE PROCESS RIGHTS

*John Pollock**

I do not want to put back the wall between substantive and procedural due process that Judith Resnik correctly explained we should not be thinking about today.¹ But just for the purpose of the way these things are classically understood, substantive due process (SDP) is generally considered to be a freedom from policy enactments that restrict rights. And procedural due process is considered to be ensuring that procedures are fair. So basically, SDP does not care whether the procedures are fair. It is, “can the government do this at all?” And procedural due process is, “is the way in which they’re doing it fair?”

The question that I would ask you is: can you really have substantive due process without procedural due process? And this really goes to Judith’s comments that this term substantive due process includes the words due process. And so, from the right to counsel movement’s perspective, when we work on right to counsel, the idea is providing procedural due process for everything that we hold dear. That is the whole reason that the right to counsel movement exists in the first place.

And when we focus on “basic human needs”—the term that we use in the movement—we are talking about many of the things that have been coming up today, all the interests, and I am going to show you exactly how. These are areas that we do a lot of work in. For physical liberty, which we deal with in child support, which we deal with when people are being incarcerated for fees in fines—you can be incarcerated physically without counsel, just to put that out there—the Sixth Amendment does not reach certain cases that involve incarceration. You can have your physical liberty

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1. This Article is based on John Pollock’s oral remarks at the National Civil Justice Institute 2023 Symposium, The Future of Substantive Due Process: What Are the Stakes?, delivered on March 31, 2023.

restrained through mental health commitment or through a guardianship. These are all things that have been considered fundamental and that there are procedural due process attempts to protect. Child custody—you heard all about parenting as a fundamental right. Also, I’ve been doing a little digging. The right to control a child’s education was recognized 100 years ago as a substantive due process right.² So, when we do work around these things—whether its truancy or special education IEPs—or whatever else we work on in terms of ensuring people have access to counsel, we are getting at all those fundamental, substantive due process rights. And bodily integrity and privacy, whether it is involuntary treatment, whether its abortion, whether its domestic violence, these rights are constantly coming up in the work that we are doing—it is embracing all of those things.

And the reason why we do this work is because we know that when people have a lawyer it dramatically changes the results.³ Now, I do not really need to convince you that if we did not think lawyers made a difference, we would not be in this field. But, in some of these matters, there tends to be a belief that, really, access to counsel is not that important because civil cases are less important; they are less complicated. Evictions are probably one of the best examples where people think, “this is a really simple matter.” Why would a person need a lawyer if they didn’t pay rent? Answer: In New York City, 84% of tenants that were represented are staying in their homes; plus, after the right to counsel went into effect, the filing rate went down by 30% because landlords were reacting to the fact that the doors of the courthouse were no longer only wide open for them.⁴ It was so easy for them to go to court before and get whatever they wanted because judges did whatever they wanted. There was no argument on the other side. Our statistics show that about 3% of tenants have access to counsel nationwide, compared to 81% of landlords.⁵ So you are talking about a system that really only exists for one side. That is very problematic for due process. So, we have these statistics that drive the idea of procedural due process: this evidence shows that it will not exist if there is not a lawyer on the other side.

So, where has the Supreme Court been on the right to counsel? Interestingly, on criminal right to counsel under the Sixth Amendment, the Court has been pretty protective of the concept over the years. Like *Powell v. Alabama*, the first case to recognize the right to counsel for capital cases.⁶ And then over the years, the Court continued to extend that doctrine to

2. *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925).

3. See, e.g., Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER, SOC. POL’Y & L. 499, 511–12 (2003).

4. *All About the Right to Counsel for Evictions in NYC*, NAT’L COAL. FOR A CIV. RIGHT TO COUNS. (Mar. 7, 2023), http://civilrighttocounsel.org/major_developments/894 [https://perma.cc/DHD5-J5HY].

5. John Pollock, *14-1 Advancing Tenant Protections: The Right to Counsel for Tenants Facing Eviction*, NAT’L LOW INCOME HOUS. COAL. (Feb. 7, 2023), <https://nlihc.org/resource/14-1-advancing-tenant-protections-right-counsel-tenants-facing-eviction> [https://perma.cc/UQ6N-VGNU].

6. *Powell v. Alabama*, 287 U.S. 45, 72–73 (1932).

find the right to counsel for more and more criminal cases.⁷ I am going to get to why some of the Justices are not too happy about that in a moment, because that will tie everything back together. But you can see that the Supreme Court has been really good on that issue.

How are they on the civil side? Terrible. Basically, we had a high point in 1967 with the ruling that children in delinquency cases, which are not criminal, have a right to counsel. And then almost every decision since then, the Court said no right to counsel, culminating in *Turner v. Rogers*, which held that a parent who went to jail for over a year was not entitled to counsel because he was unable to pay child support, and that was the reason he was jailed.⁸ The Court did send the matter back to the trial court for more process—they said there was more process due—but that process did not include a lawyer for him.⁹ So, many people that thought, “oh you know, physical liberty, that is when procedural due process attaches,” *Turner* showed them that was not the case.

The good news—and I am actually here to deliver good news to you—is that the state courts and state legislatures have done much to remedy the Supreme Court’s complete deficiency on this issue. As you can see from this chart, we actually do quite well on some of the areas that implicate some of the most serious rights. Rights that involve parents and children, rights that involve mental or physical health, and incarceration—these are the ones where the states have actually done fairly well in providing a right to counsel one way or another. Sometimes it is through a legislature, and sometimes it is through the courts. And I am going to get back to state court litigation to tie back what Jonathan Marshfield started us with, because it is really important in this sphere. Then there are some areas where we do not do so well. Again, it is a lot of the family areas, where there are sometimes these distinctions that are drawn where the courts do not necessarily find a right to counsel. And then there are some really big ones where we are basically at square one. Housing would have been on this list until recently. So, the answer is that we are not as bad off as some people think and we aren’t as good off as other people think.

What is interesting is for the right to counsel for tenants, the movement has taken place entirely outside of the courts for one very good reason, which is that courts have no understanding of how important housing is. Over and over, they have shown they think of housing as a property right, even when you are talking about a tenant losing their home. They do not understand all the ramifications of the proceedings. So, we dare not bring this matter as a procedural due process right. It has been done entirely through the city and state legislatures. I should say, though, that now there

7. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (incorporating the Sixth Amendment’s right to counsel against states under the Fourteenth Amendment); *Argersinger v. Hamelin*, 407 U.S. 25, 40 (1972) (extending the right to counsel to some state misdemeanor cases).

8. *Turner v. Rogers*, 564 U.S. 431, 435 (2011) (holding that defendant in child support civil contempt proceeding is not automatically entitled to counsel, as long as the state provides adequate procedures and safeguards).

9. See *id.* at 449.

is an attempt to either pass legislation preempting local control—which actually I should mention, in Texas there is a bill that would preempt all local eviction law from being passed by any city or county.¹⁰ That is very problematic. Florida has the same bill pending this year.¹¹ And it is because the people have spoken—at the local level, they want this—that the state is trying to exercise control over its city and county governments. And then, in some cases, like for instance in this map, San Francisco and Boulder accomplished their right to counsel through a ballot initiative,¹² and now some states are trying to restrict the ballot initiative process because they do not want that either. Very anti-federalism in a lot of ways. But basically, it shows that in a way, no matter what approach you take, we are going to be dealing with pushback. So, it is just a little bit of a cautionary tale. But despite that there's still been really good success.

In terms of the courts, one of the things I love about termination of parental rights is that, in twelve states, their state courts have said 'we do not agree with *Lassiter*.'¹³ *Lassiter* was wrongfully decided. We believe that not only is parenting a fundamental right, but that parents cannot possibly have a fair process through which their rights are terminated if they lose without counsel. I also should say that *Lassiter* is also really interesting because the *Lassiter* decision said—at that moment in 1981—there are thirty-three states that provide a right to counsel; thirty-three for parents facing termination, and we cannot find one decision—one—except for the case that was before us, where a court has ever ruled against the right to counsel in termination.¹⁴ And the Court basically said, we do not care about any of that. That does not matter. We are just going to rule against you anyway. They did say in some cases a parent might have counsel, but I wrote an entire paper about why the judge trying to determine if a particular litigant needs process does not work.¹⁵ That is a process that is inherently flawed. The judges do not have the necessary information in front of them. But basically, termination has been a great success story about how state constitutions can be leveraged to go further or to do things that the U.S. Supreme Court has been unwilling to do. And as you can see, there have been other areas: child support, contempt, paternity, civil commitment—these are all

10. Texas House Bill 2127 has since been signed into law by Texas Governor Greg Abbott. See H.B. 2127, 88th Leg., Reg. Sess. (Tex. 2023); Francisco Uranga & Erin Douglas, *As Texas Swelters, Local Rules Requiring Water Breaks for Construction Workers Will Soon Be Nullified*, TEX. TRIB. (June 16, 2023, 1:00 PM), <https://www.texastribune.org/2023/06/16/texas-heat-wave-water-break-construction-workers> [<https://perma.cc/2FLQ-MZRU>].

11. Florida House Bill 1417 has since been signed into law by Florida Governor Ron DeSantis. See H.B. 1417, 2023 Leg., Reg. Sess. (Fla. 2023); *Florida Governor Signs Preemption Legislation Impacting Tenant Protections Across State*, NAT'L LOW INCOME HOUS. COAL. (July 31, 2023), <https://nlihc.org/resource/florida-governor-signs-preemption-legislation-impacting-tenant-protections-across-state> [<https://perma.cc/VZV9-KCCT>].

12. *Boulder Ballot Issue 2B: No Eviction Without Representation*, BOULDER BEAT (Jul. 25, 2020), <https://boulderbeat.news/2020/07/25/boulder-ballot-issue-no-eviction-without-representation> [<https://perma.cc/GE4W-3QVP>].

13. *Lassiter v. Dep't of Soc. Serv. of Durham Cnty.*, 452 U.S. 18 (1981).

14. See *id.* at 30–31.

15. See John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 DRAKE L. REV. 763 (2013).

areas where states have recognized a right to counsel under the state constitutions, generally the due process clause.

We actually have had some litigation on equal protection as well, about states that provide counsel in a termination case but deny it in an adoption case where the consequences are exactly the same. And state courts have said that violates equal protection for the state to distinguish on those grounds, when there is really no meaningful difference between the two. And in terms of recent litigation, child custody, child guardianship, child welfare, you can sense a theme here: children, family, and parents are things the courts get. They understand why they are fundamental. They do not really have a lot of questions about that. So, there is a lot more understanding about why those rights need special protection.

But one of the things that we also encourage people to do is to look at your state constitution. Is there anything in there that does not appear in other states that you might be able to hook onto? In New Jersey, the state has said that basically, a consequence of magnitude is something that entitles someone to counsel.¹⁶ What is a consequence of magnitude? I have no idea. I mean, it could be a million things, or nothing. But that provision, that interpretation, gave us a hook to get a court to rule that a suspension of a driver's license was a consequence of magnitude, because of the enormous consequences of losing your driver's license. I was mentioning during lunch that New York's constitution has an "aid to the needy" clause in it that has not really been heavily interpreted.¹⁷ There are other states that have other provisions in them that you can look at to ground your argument, which we use to make right to counsel arguments. But you could also use those clauses to make substantive arguments yourself. So, there is a lot of meat out there that you can really dig into and that we have successfully.

Now, when you talk about "what is fairness": 75% of all civil cases involve at least one unrepresented party.¹⁸ That is a scary statistic. And I love this one from the National Center for State Courts—that in Virginia, they did a look at the success rate for parties based on whether they had counsel.¹⁹ And in cases just across the spectrum, where only the plaintiff was represented, they won about 60% of the time.²⁰ And as soon as you add an attorney for the defendant, it drops to about 20%.²¹ Just like that. Nothing else changed. Just looking at just adding an attorney for the defendant.

16. See *NJ Supreme Court Recognizes Right to Counsel for Parents in Adoption Cases*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS. (July 26, 2016), http://civilrighttocounsel.org/major_developments/1016 [https://perma.cc/BT7Z-7LMB] (discussing how the Supreme Court of New Jersey has recognized a right to counsel under the "consequences of magnitude" doctrine).

17. N.Y. CONST. art. XVII, § 1.

18. *Nat'l Center for State Courts: 3/4 of Civil Cases Have One Unrepresented Party*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS. (Nov. 11, 2015), http://civilrighttocounsel.org/major_developments/1018 [https://perma.cc/QLD7-UKDT].

19. NAT'L CTR. FOR STATE CTS., *VIRGINIA SELF-REPRESENTED LITIGANT STUDY: DESCRIPTIVE ANALYSIS OF CIVIL DATA IN GENERAL DISTRICT COURT* (2017), <https://brls.org/wp-content/uploads/2018/03/GDCDescriptiveReport.pdf> [https://perma.cc/9RFC-W6VP].

20. *Id.* at 14.

21. *Id.* at 13.

That is incredibly transformative. And what it teaches you in a way, is that this is often not about the underlying law. It is basically about who is in the room and the arguments that they are making. There is a terrible problem with judges that do not—absent there being an attorney—do things that would gatekeep; that would say like “wait a minute, what you are saying is contrary to what I know the law is, or you’re making objections that are completely groundless.” They are waiting for the other side to say something. None of that process happens without a lawyer. The system is reliant on that. In fact, that is where my substantive due process argument is really going to come in at the end here.

And these are just some examples from the real world. The Legal Services Corporation did a study recently and found that people are not even getting an eviction in court because their landlords are just turning off the water, changing the locks, doing whatever. That happens because of the judicial climate that exists. Because the landlords know that tenant is not, in our current environment, going to find someone to enforce their rights in court. That will not happen. Those courts are effectively shut, and the behavior you see outside the courtroom is reflective of that reality. There are just so many sad stories. There was a story out of Connecticut where a woman had a young baby, she went to court to try to get a restraining order, she did not have counsel, the restraining order was denied, and the father threw the baby off a bridge. Which is just awful and finally got people saying, wait a minute, we might have a problem with these protective order proceedings by not providing counsel for victims. Maybe we have a problem. It has led to a big push in Connecticut to try to change that and move toward the right to counsel. But these kinds of things happen because there is no process.

And in guardianship, which is one of the big topics that is being discussed now, the guardianship process is rife with abuse. It is basically a process that, again, in many jurisdictions, there is no attorney on the side defending against the guardianship. In some of these states, there is no right to counsel, and the judges will in some cases decide the guardianship based on the petition alone. No hearing. Just stop and think about this for a minute: no hearing, no personal service to the person who is being subjected to the guardianship, and no lawyer. And the court is deciding something that takes away every single right that that person has. Every single right we have talked about today, every one of those is basically restricted in a guardianship, potentially, depending on what happens. So, we are talking about a really significant problem that the legal system is currently allowing to happen.

So, that is where I get to sort of my final part of my comments, which is: could the right to counsel be a substantive right? A decision, *Garza v. Idaho*, was issued a couple of years ago.²² And actually, this is a decision where Justice Thomas, who has been very “popular” today, said why he

22. *Garza v. Idaho*, 139 S. Ct. 738 (2019).

thought the Sixth Amendment cases were wrongly decided.²³ He basically said *Gideon*²⁴ was wrong, every case since *Gideon* was wrong, and there should not be a right to appointed counsel in criminal cases.²⁵ And in the process of dismantling all of that jurisprudence, he was railing against the fact that not only do you have a right to appointed counsel, but the counsel has to be effective.²⁶ If counsel is completely denied, that is considered structurally deficient without requiring proof of error, and he was asking, where does that come from? So he is railing against all of those things. And in the process, he said, “[t]he structural protections provided in the Sixth Amendment certainly seek to promote reliable criminal proceedings, but there is no substantive right to a particular level of reliability.”²⁷ And I thought, hmm, since you are in the dissent, that means there *is* a substantive right to a certain level of reliability. So that got me thinking that all these decisions about the Sixth Amendment were basically trying to expand the Sixth Amendment—and I think the Sixth Amendment is the perfect example of something that is not easily defined as either procedural or substantive—and have put meat on those bones, making it more of a substantive right. So, the question is, can we do that with the right to counsel in the civil context?

In answering this question, I like to find places that are not your usual suspects and Wyoming is definitely not your usual suspect. I think thirty-nine states have an open courts provision. Wyoming’s provision says, “All courts shall be open and every person for an injury done . . . shall have justice administered without sale, denial or delay.”²⁸ But what is interesting is that the Wyoming Supreme Court said, “[w]e now hold that the right to access to the courts is a fundamental right . . .”²⁹ *Fundamental right*. Like, if you get that, then there is so much you can do with that. And where I started to go with that, is to say: hmm, if a state creates a court that you have to use, that is where things have to be litigated, and then they make it impossible, through their procedures, for any person without a law degree to use, that is similar to where you cannot go to court without paying a fee. Substantive due process is always thought of as a barrier: the government has to have done something, not just failed to do something, that created a barrier. Does the data not show that that is exactly what they’ve done by creating procedures that no one could possibly use unless they have a lawyer? The data shows people fail unilaterally without a lawyer.

Too many cases are not about facts or the law. They are simply about who is represented and that is not the way the system is supposed to work. So, my thinking is, maybe we should start arguing that having systems like this, that basically are so complicated, but that only a lawyer can navigate,

23. *See id.* at 756–59 (Thomas, J., dissenting).

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

25. *See Garza*, 139 S. Ct. at 756–59 (Thomas, J., dissenting).

26. *See id.*

27. *Id.* at 759.

28. WYO. CONST. art. 1, § 8.

29. *Mills v. Reynolds*, 837 P.2d 48, 54 (Wyo. 1992).

is in fact the state creating a barrier that is fundamentally unconstitutional and can be remedied by the provision of counsel for those litigants. So, that is my theory. But regardless of whether that theory ever goes anywhere, I can just tell you that as a civil right to counsel movement, we have seen so much success in the state courts and there is reason to be hopeful. The state courts are willing to do this when they are provided the right ammunition and the right case, and I hope that our success and the movement's success can be some inspiration as you look to state constitutions in other arenas. Thank you.