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Parent's Right to Counsel in Dependency and Neglect Proceedings

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PARENTS' RIGHT TO COUNSEL IN DEPENDENCY AND NEGLECT PROCEEDINGS

While much attention has been focused on the constitutional rights of juveniles since the United States Supreme Court's decision in *In re Gault*,[1] constitutional rights of parents in juvenile court proceedings have not been widely recognized. In child-dependency and child-neglect proceedings, indigent parents threatened with the loss of custody[2] of

1. 387 U.S. 1 (1967). A 15 year old boy was committed to a state training school as a delinquent. He had been accused of making a lewd phone call and was adjudged a delinquent at a hearing at which he had no counsel, no one was sworn, and no official record was made. The Supreme Court held that the fourteenth amendment is not for adults alone and that a juvenile in delinquency proceedings has a right to counsel, notice of charges, confrontation and cross-examination of witnesses, and a privilege against self-incrimination. The Court cited the following authorities numerous times in support of its holding: Kent v. United States, 383 U.S. 541 (1966); REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 81-86 (1967); Lehman, *A Juvenile's Right to Counsel in a Delinquency Hearing*, 17 JUV. CT. JUDGES' J. 53 (1966). These authorities support extending *Gault's* logic to a right to counsel for parents.

2. Custody proceedings for purposes of this note do not refer to those between parents incident to divorce but to proceedings initiated by the state. State initiated custody proceedings fall into two broad categories, termination of parental rights and dependency or neglect proceedings. The difference between these two categories is primarily in the permanence and scope of the result.

Termination involves the formal and permanent deprivation of all the traditional rights and duties of a parent, including those involved with custody, control, inheritance and support. Termination usually arises in the context of adoption. For example, if a divorced mother remarries and her new husband wants to adopt her children, he cannot do so unless the natural father's rights are terminated. In Indiana, the natural father may consent, or termination may be decreed without his consent under certain conditions, such as failure to support the children. IND. ANN. STAT. §§ 31-3-1-6, -7 (Code ed. 1973).

Dependency and neglect, on the other hand, are both considered temporary and generally affect only rights to custody and control of children, not all underlying legal rights. Nevertheless, an adjudication of dependency or neglect can result in taking the child from the parents' custody and placing him in an institution for children or a foster home, a step which may have a lasting detrimental effect on the family. Furthermore, while such custody deprivations are theoretically temporary, as a practical matter they may be permanent. Brief for Plaintiff at 6, Cleaver v. Wilcox, 40 U.S.L.W. 2658 (N.D. Cal. Mar. 22, 1972). Another possible, less drastic result is allowing the child to remain with the parents under court supervision. *See*, Note, *Representation in Child-Neglect Cases: Are Parents Neglected?*, 4 COLUM. J. LAW & SOC. PROB. 230 (1968) [hereinafter cited as *Representation*].

Traditionally, dependency has implied nonsupport which may be innocent if it is the result of parental inability, while neglect has implied that the child is being mistreated. Neglect, therefore, conveys the idea of guilty parents while the parents of a dependent child might not be considered culpable. This distinction has been blurred in Indiana where the statutes defining dependency and neglect, IND. ANN. STAT. §§ 31-5-5-1, -2 (Code ed. 1973), overlap so that nonsupport, for example, might cause a child to be adjudicated either dependent or neglected, or both. In general, neglect is the broader term. It includes cruelty to a child as well as failure to properly care for and support

their children are often not afforded the aid of counsel.[3] Whether indigent parents are provided with court appointed counsel in such cases has generally turned on state statutory provisions.[4] However, two recent cases, *Cleaver v. Wilcox*[5] and *In re Ella B.*,[6] treat the question of court appointed counsel for indigent parents as one of constitutional dimension. The constitutional arguments in favor of finding a parental right to counsel are based on the due process and equal protection clauses of the fourteenth amendment. Recent Supreme Court cases interpreting those clauses lend support to the conclusion that parents have a right to be represented when threatened with loss of their children.[7] In addition, practical policy reasons support state provision of counsel for indigent parents.

This note will outline the constitutional arguments, describe the recent developments, and discuss the policy considerations relating to provision of court appointed counsel for indigent parents in child-neglect and dependency proceedings. The state of Indiana law on this issue is also examined.

DUE PROCESS: THE RIGHT TO COUNSEL AS ESSENTIAL TO A FAIR HEARING

Both the due process and equal protection clauses of the fourteenth amendment have been interpreted by the Supreme Court to require the appointment of counsel in many criminal prosecutions,[8] and to require

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the child. For a detailed discussion of definitions see Note, *Dependency and Neglect: Indiana's Definitional Confusion,* 45 IND. L.J. 606 (1970) [hereinafter cited as *Dependency & Neglect*].

3. *See, e.g., In re* George S., 18 Cal. App. 3d 788, 96 Cal. Rptr. 203 (1971); *In re* Robinson, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970), *cert. denied,* 402 U.S. 954, 964 (1971); *In re* Cager, 251 Md. 473, 248 A.2d 384 (Md. Ct. App. 1968). The right to appointed counsel has also been denied in a termination case. Casper v. Huber, 85 Nev. 474, 456 P.2d 436 (1969), *cert. denied,* 397 U.S. 1012 (1970). *But see* Chambers v. Dist. Ct., 261 Ia. 31, 152 N.W.2d 818 (1967); Munkelwitz v. Hennepin County Welfare Dep't, 280 Minn. 377, 159 N.W.2d 402 (1968).

4. *E.g.,* ARIZ. REV. STAT. ANN. § 8-225A (Supp. 1972); CONN. GEN. STAT. ANN. § 17-66b (Supp. 1973); IDAHO CODE § 16-1631 (Supp. 1973) (provides for counsel for parents if requested); ILL. ANN. STAT. ch. 37, § 701.20 (Smith-Hurd 1972); KAN. STAT. ANN. § 38.820 (1963) (appears that counsel is appointed only if parents will be permanently deprived of their rights); MINN. STAT. ANN. § 260.155 (1971); N.D. CENT. CODE § 27-20-26 (Supp. 1973) (North Dakota adopted the UNIFORM JUVENILE COURT ACT); OHIO REV. CODE ANN. § 2151.351 (Page Supp. 1972); OKLA. STAT. ANN. tit. 10, § 1109(b) (Supp. 1972) (apparently limited to termination of parental rights).

5. 40 U.S.L.W. 2658 (N.D. Cal. Mar. 22, 1972).

6. 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972).

7. *Cf.* Argersinger v. Hamlin, 407 U.S. 25 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971); *In re* Gault, 387 U.S. 1 (1967).

8. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932).

provision by the state of other trial-related services in certain coercive situations.[9] Due to the uncertain future of the Supreme Court's interpretion of the equal protection clause,[10] the due process argument is probably more likely to be successful in providing indigent parents with counsel in dependency and neglect proceedings.

Whenever the state seeks to deprive a person of liberty or property due process requires a fair hearing.[11] The Supreme Court has repeatedly recognized a right to counsel for criminal defendants whose liberty is at stake.[12] In *Powell v. Alabama*[13] the Court established the principle that availability of counsel is one prerequisite to a fair hearing. Although *Powell* was a capital case, the Court has relied on its reasoning in extending the right to court appointed counsel to indigent defendants in noncapital and nonfelony cases.[14] *Powell* and the line of cases which followed were based on the premise that the right to be heard is fundamental to our system of justice, and that this right may be futile without the assistance of counsel.[15]

The right to counsel is not limited to criminal prosecutions, but has been extended to some civil cases. Courts are rejecting civil-criminal distinctions and looking to the substantive effect of the proceedings. In *In re Gault*[16] the Supreme Court rejected the civil label for juvenile court hearings as misleading.[17] The Court pointed out that juveniles accused of delinquency are subjected to processes and sanctions essentially like those of the criminal law.[18] The juvenile accused could be adjudicated a delinquent and confined to a school or other institution. Recognizing the possible consequences of a finding of delinquency, and noting the potential for abuse in the informal procedure of the juvenile court system, the Court held that an accused in juvenile court needs the assistance of counsel to understand what is happening and to safeguard rights

9. Boddie v. Connecticut, 401 U.S. 371 (1971) (waiver of filing fees for indigent seeking divorce); Douglas v. California, 372 U.S. 353 (1963) (counsel for indigent at appellate level); Griffin v. Illinois, 351 U.S. 12 (1956) (free transcript for appellate review).

10. *See* notes 52-57 *infra* & text accompanying.

11. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972); Bell v. Burson, 402 U.S. 535 (1971) (state could not deprive a person of his driver's license without a hearing); Powell v. Alabama, 287 U.S. 45 (1932).

12. *See* cases cited note 8 *supra.*

13. 287 U.S. 45 (1932).

14. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in noncapital felony cases); Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel in any prosecution which could result in imprisonment).

15. 287 U.S. at 68-69.

16. 387 U.S. 1 (1967).

17. *Id.* at 27-30.

18. *Id.* at 36.

which could be lost because a parent or child may not know of their existence.[19]

Relying on *Gault*, a federal appeals court in *Heryford v. Parker*[20] held that due process required provision of counsel for a juvenile subjected to involuntary civil commitment proceedings.[21] The court emphasized that whatever the label given the proceedings, since individual liberty was in jeopardy, the juvenile had a right to be represented at the hearing.[22]

The civil-criminal distinction has also been abrogated in an area even more closely analogous to dependency and neglect proceedings. In *State v. Jamison*,[23] the Oregon Supreme Court implicitly rejected the civil label in holding that counsel should have been appointed for an indigent mother whose parental rights were being terminated. Although Oregon has a statute which gives the judge discretion to appoint counsel in juvenile court cases,[24] the court's holding was based on the due process rights of a person faced with the threat of termination of parental rights.[25] The court observed:

> [t]he permanent termination of parental rights is one of the most drastic actions the state can take against its inhabitants. It would be unconscionable for the state forever to terminate the parental rights of the poor without allowing such parents to be assisted by counsel.[26]

In explaining its decision, the court analogized the situation to that involved in *Gault*. In both cases the state was seeking to interfere in the family relationship by removing the child from the custody and control of the parent. Further, the Oregon court said that an indigent parent must be advised of her right to court appointed counsel and that failure to request appointment of counsel is not a waiver unless the parent knows she has the right.[27]

While *Jamison* involved a termination proceeding, there is nothing

19. *Id.*
20. 396 F.2d 393 (10th Cir. 1968).
21. *Id.* at 396. The case arose in federal court on a habeas corpus petition after petitioner's son had been involuntarily committed to the Wyoming Training School for the Feeble-minded and Epileptic.
22. *Id.*
23. 251 Ore. 114, 444 P.2d 15 (1968).
24. *Id.* at 116, 444 P.2d at 17. The statute involved has since been amended to make the appointment of counsel mandatory for indigent parents or children requesting such assistance. ORE. REV. STAT. § 419.498(2) (1971).
25. 251 Ore. at 117, 444 P.2d at 17.
26. *Id.*
27. *Id.*

to suggest that its reasoning should be confined to that context. Parents in dependency or neglect proceedings are faced with penalties similar to those involved in termination. If a child is adjudicated dependent or neglected, the parents may be subjected to at least a temporary loss of custody and control of the child.[28] This is in itself a serious penalty, and parents subject to it must be afforded due process for the same reasons as in termination cases.

Probably the most striking case in which the civil-criminal distinction was broken down for purposes of due process was *Boddie v. Connecticut.*[29] In *Boddie,* the Supreme Court held it a denial of due process for a state to refuse indigents access to the courts for divorce solely because of their inability to pay filing fees.[30] The majority opinion limited the holding to divorce cases because (1) the state has a monopoly on the power to legally dissolve marriages,[31] and (2) there are important fundamental liberties associated with the right to marry and raise a family.[32] Justice Black, dissenting, expressed disapproval of the holding[33] and implied that the majority's attempt to limit it to divorce was neither logical nor practicable.[34] Although the majority persuasively argues that the divorce situation is an especially appropriate place for the recognition of due process rights, there is merit in Justice Black's criticism that the justifications applicable to divorce would be present in other nominally civil cases.

The argument that *Boddie* is not analogous because the filing fee resulted in deprivation of access to the courts while parents in dependency and neglect proceedings do not have that problem misses the point. Parents are in court in these proceedings because of action initiated by the state. Therefore, the denial of counsel in a dependency or neglect proceeding is as serious as a deprivation of access because without counsel the parents' position cannot be effectively communicated.[35]

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28. *See* note 2 *supra.* Parents may be deprived of custody theoretically only temporarily, but if custody is taken away for an indefinite period of time, the actual differences between this kind of temporary loss of custody and actual termination may be minimal. For a discussion of the difficulties of regaining custody see Comment, *The Custody Question and Child Neglect Rehearings,* 35 U. CHI. L. REV. 478 (1968).

29. 401 U.S. 371 (1971). *Boddie* was a class action by welfare mothers who wanted to sue for divorce but were unable to pay the filing fees.

30. *Id.* at 374.

31. *Id.* at 376, 383.

32. *Id.* at 376.

33. *Id.* at 389 (Black, J., dissenting).

34. *See id.* at 391-92. *See also* Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 956 (1971) (Black, J., dissenting). In *Meltzer,* Black made explicit a point hinted at in his *Boddie* dissent, that once the *Boddie* majority breached the civil-criminal distinction, there is no logical way to limit the extension of due process requirements to divorce cases.

35. *See In re* Ella B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972);

If anything, the arguments for disregarding the civil-criminal distinction are stronger in cases in which parents may lose their children than in divorce cases. Adjudication of dependency or neglect of a child may be the first step toward actual termination of parental rights.[36] The adjudication of dependency or neglect itself may be used as evidence if the state seeks permanent termination.[37] Even temporary loss of parental custody may have a lasting detrimental effect on the family relationship. These considerations are important because in determining the requirements of due process the pivotal issue should be the degree to which the state is affecting individual rights, and not whether the proceeding is labelled civil or criminal.

In *Argersinger v. Hamlin*[38] the Supreme Court recognized the importance of the right of a criminal defendant not to be deprived of his liberty, even for a short time, without having been accorded all the procedural safeguards of due process, including the right to appointed counsel.[39] Deprivation of liberty by imprisonment is serious, but, as Justice Powell pointed out in his concurring opinion in *Argersinger,* there are other liberties as important and deprivations more severe than a few days in jail:

> [T]he Fifth and Fourteenth Amendments guarantee that property as well as liberty, may not be taken from a person without affording him due process of law. The majority opinion suggests no constitutional basis for distinguishing between deprivations of liberty and property. In fact, the majority suggests no reason at all for drawing this distinction. The logic it advances for extending the right to counsel to all cases in which

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Representation, supra note 2.

The Supreme Court's opinion in United States v. Kras, 93 S. Ct. 631 (1973) does not detract from *Boddie's* applicability to right to counsel in custody deprivation proceedings. *Kras* was distinguished from *Boddie* on the basis of exclusivity, holding that there are alternatives to bankruptcy available unlike divorce, so that a denial of access to the courts for failure to pay filing fees is not a denial of due process or equal protection. *Id.* at 636. In this regard it is significant that in a custody proceeding the parent is coerced by the state to make a court appearance; no alternatives are available. Second, the Court in *Kras* held that a discharge in bankruptcy is not a fundamental right for which access to courts is constitutionally guaranteed. *Id.* at 638. In *Boddie,* however, a fundamental right was at stake. Similarly, in a custody proceeding the parent's fundamental right of control over the child may be unconstitutionally deprived in the absence of counsel.

36. *See* notes 2 & 8 *supra.*

37. Brief for Plaintiff at 6-7, Cleaver v. Wilcox, 40 U.S.L.W. 2658 (N.D. Cal. Mar. 22, 1972). *See also* CAL. CIV. CODE §§ 232(b), (c) (West Supp. 1973); IND. ANN. STAT. § 31-3-1-7 (Code ed. 1973).

38. 407 U.S. 25 (1972).

39. *Id.* at 27, 28, 37, 40.

> the penalty of any imprisonment is imposed applies equally well to cases in which other penalties may be imposed. Nor does the majority deny that some "non-jail" penalities are more serious than brief jail sentences.[40]

Upon examination of the parent's position in dependency and neglect proceedings, it becomes clear that many of the elements considered important by the Supreme Court in requiring appointment of counsel for indigents are present. Parent respondents in dependency and neglect proceedings may be subjected to a serious deprivation of liberty in losing custody of their children. The logic of *Argersinger* suggests that indigent parents may not be deprived of their fundamental right to raise their children without being afforded the safeguards of due process of law, including the right to court appointed counsel.

The distinction between dependency and neglect proceedings and criminal prosecutions is further weakened by the fact that in both cases the state initiates the action against the individual. In this way dependency and neglect proceedings are distinguishable from other civil actions.

If the parents' due process right to counsel is recognized, it can be met only by providing separate counsel for parents and for the child. While juvenile courts have the power to gravely affect the rights of both parents and children, it is generally only the child's right to counsel that has been recognized.[41] It has been argued that the child's counsel can adequately represent the parents.[42] However, since the interests of the parents and the child may not be the same in dependency and neglect proceedings, the child's counsel cannot adequately protect the rights of the parents.[43] Separate counsel is the only way to avoid conflicts of interest for the lawyers involved.

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40. *Id.* at 51-52 (Powell, J., concurring).

41. *See* note 1 *supra* & text accompanying.

42. *See, e.g.*, Note, *Child Neglect: Due Process for the Parents*, 70 COLUM. L. REV. 465 (1970) [hereinafter cited as *Child Neglect*]; *Representation, supra* note 2.

43. The procedural status of these cases should illustrate the adversary nature of the proceedings. Even if the state's participation is characterized as protective of the child, it is the parent's behavior which is being scrutinized. Thus in effect, it is the state and the child against the parents.

The *parens patriae* doctrine can be easily rejected as a justification for denying counsel to parents in dependency and neglect proceedings. The Supreme Court noted in *In re* Gault, 387 U.S. 1 (1967), that the doctrine of *parens patriae* underlies the juvenile court system and that the doctrine has been used to justify procedural informality. *Id.* at 17. In theory, the state is acting to protect children from overreaching adults, so the state as protector is not obligated to afford children due process. *Gault*, of course, denied the applicability of the *parens patriae* rationale to juveniles accused of delinquency. It should also be clear that *parens patriae* cannot justify denying counsel to parents, who are adults and are not being protected by the state.

In summary, parents' due process rights to appointed counsel in dependency and neglect cases derive from Supreme Court recognition of a right to counsel in many criminal prosecutions. In light of the Supreme Court's abrogation of the civil-criminal distinction, the crucial issue has become the severity of the deprivation of liberty at stake. Deprivation of parental rights, even temporarily, is sufficiently serious for due process to require the appointment of counsel for indigents.

EQUAL PROTECTION: FUNDAMENTAL RIGHTS AND SUSPECT CLASSIFICATIONS

The equal protection clause of the fourteenth amendment gives special protection to fundamental rights.[44] Parents' rights to raise their own children in the manner they choose has been recognized by the Supreme Court as fundamental.[45] Unless there is a compelling state interest to justify a classification which is based on suspect criteria and affects fundamental rights, the classification will be held to be a denial of equal protection.[46] The more important the fundamental right involved, the less suspect the classification need be for a court to subject it to strict scrutiny and require the state to meet a higher burden than mere rationality to justify the classification.[47]

Wealth has been treated as a suspect classification by the Supreme Court in *Griffin v. Illinois*[48] and *Douglas v. California*.[49] In *Griffin*, the Court held a state's refusal to furnish a free trial transcript to an indigent criminal appellant to be a violation of the equal protection clause. The plurality opinion stated:

> [I]t is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.[50]

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44. Stanley v. Illinois, 405 U.S. 645 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

45. Stanley v. Illinois, 405 U.S. 645 (1971); Griswold v. Connecticut, 381 U.S. 479 (1965); Armstrong v. Manzo, 380 U.S. 545 (1964); May v. Anderson, 345 U.S. 528 (1953); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (dictum).

46. Cases cited note 44 *supra*; Cox, *Foreward—Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

47. *See* cases cited notes 44 & 45 *supra*; Michelman, *Foreward—On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 34 (1969).

48. 351 U.S. 12 (1956).

49. 372 U.S. 353 (1963).

50. 351 U.S. at 18.

In *Douglas* the Court reiterated the *Griffin* principle that "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.' "[51]

The holdings in *Griffin* and *Douglas* may support a right to free counsel for indigent parents in dependency and neglect proceedings. However, the Supreme Court's holding in *San Antonio Independent School District v. Rodriguez*,[52] refusing to find a denial of equal protection in a public school financing system that resulted in significantly different per pupil expenditures and its holding in *United States v. Kras*,[53] refusing to waive bankruptcy filing fees for the indigent, may indicate a reluctance to extend the treatment of wealth as a suspect classification to the civil area. *Boddie v. Connecticut*,[54] which waived filing fees in divorce proceedings, may turn out to be the limit of that extension. Yet, if the Court is ever again willing to find wealth suspect in any area, the recognition of a right to counsel in dependency and neglect proceedings would be the logical next step.[55] These proceedings involve the family relationship, long recognized by the Supreme Court as a fundamental interest.[56] Further, because the state in dependency and neglect proceedings threatens parents with the loss of custody of their children, the severity of the possible sanction makes these cases analogous to criminal prosecutions.[57]

Empirical data showing that the results in dependency and neglect proceedings are significantly affected by whether parents are represented by attorneys provides support for the argument that an indigent parent without counsel has been denied equal protection. A study done in New York family courts revealed that parents who were not represented by counsel were much more likely than parents who were represented to lose custody of their children as a result of child neglect hearings.[58] Even if one were to suppose that parents who cannot afford counsel are somewhat more neglectful than parents who can, the great disparity in re-

51. 372 U.S. at 355.
52. 411 U.S. 1 (1973).
53. 409 U.S. 434 (1973).
54. 401 U.S. 371 (1971).
55. The Supreme Court had an opportunity to take this step, but declined to do so in Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, *denying cert. to* 225 Ga. 91, 166 S.E.2d 88 (1971). Justice Black wrote a spirited dissent, arguing that a parent in danger of being deprived of her child had an interest more fundamental than that in *Boddie* and her interest should be protected by appointed counsel. *Id.* at 959.
56. Cases cited note 45 *supra.*
57. *See* Note, *Indigent Parents in Juvenile Proceedings: The Right to Appointed Counsel*, 1969 LAW & SOC. ORDER 467, 475; *Representation, supra* note 2, at 252-53; *Child Neglect, supra* note 42, at 477.
58. *Representation, supra* note 2, at 241.

sults suggests that the presence of counsel contributes significantly to the outcome of the proceedings.

The importance of the parents' rights require that wealth be treated as suspect so that indigent parents will be provided with appointed counsel. If wealth is considered suspect here, the state will have to show a more compelling reason for denying counsel to parents confronted with potential loss of their children than the parents' poverty. Probably the state's only arguments in support of the classification will be administrative convenience and economy, but these have been held not to be compelling.[59] Without a compelling state interest, the failure to provide counsel to indigents would be a denial of equal protection.

Two Cases Recognizing Parental Right to Counsel

While the availability of court appointed counsel for parents is determined by statute is most states,[60] two influential courts have recognized a constitutional right to counsel for indigent parents in dependency and neglect proceedings. The New York Court of Appeals in *In re Ella B.*[61] held unconstitutional a neglect proceeding in which a mother without counsel was deprived of custody of her child.[62] In *Cleaver v. Wilcox*[63] a federal court enjoined a California state court from hearing a dependency case without appointing counsel for the mother.

In *In re Ella B.*, after the judge had read the petition of charges, he and the mother engaged in the following dialogue:

> [The Court:] You may be represented by an attorney in this proceeding, in which case you must obtain one yourself, and pay for him out of your own funds, or you may waive an attorney and either admit or deny the facts in the petition if you want. Do you want an attorney?
>
> Mrs. B.: No.
>
> The Court: Do you admit the facts in the petition?
>
> Mrs. B.: Yes I do.[64]

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59. Stanley v. Illinois, 405 U.S. 645 (1972); Reed v. Reed, 404 U.S. 71 (1971); Boddie v. Connecticut, 401 U.S. 371 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1955).

60. For a list of state statutes which provide for counsel see note 4 *supra*.

61. 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972).

62. *Id.* at 357, 285 N.E.2d at 290, 334 N.Y.S.2d at 136.

63. 40 U.S.L.W. 2658 (N.D. Cal. Mar. 22, 1972). This case was appealed to the 9th circuit, but the appeal was dismissed on the appellant's motion.

64. 30 N.Y.2d at 355, 285 N.E.2d at 289, 334 N.Y.S.2d at 135.

Without further inquiry into the facts, the judge made a finding of neglect.[65] The child was then taken from the mother's care by the authorities. Afterwards the mother heard about the Legal Aid Society and obtained its aid in appealing the finding of neglect. The appellate division affirmed the finding and rejected her claim of error in the lower court's failure to advise her that if she could not afford to pay she was entitled to court appointed counsel.[66] The Court of Appeals, however, held that there was a constitutional right to counsel.[67] It further found that the right had not been waived since the judge's statement, quoted above, was misleading as to the availability of appointed counsel.[68] The court's holding was influenced by the importance of the parent's interest in the care and control of the child as well as the potential threat of criminal charges against the mother.[69] The Court of Appeals based its holding of a right to counsel on the due process and equal protection clauses of the fourteenth amendment.[70] The result was clearly not based on statute because the New York statute provides counsel only for the child, not for the parents.[71]

Cleaver v. Wilcox[72] reached a similar conclusion on similar reasoning. In *Cleaver,* a mother brought a class action in federal court to enjoin state dependency proceedings in which she had been denied court appointed counsel. The court granted the injunction, rejecting the state's contention that appointment of counsel was not required because the proceeding was civil in nature. The court refused to be bound by labels attached to the proceedings in determining the rights of persons threatened

65. *Id.* at 356, 285 N.E.2d at 289, 334 N.Y.S.2d at 135.
66. *Id.*
67. *Id.* at 357, 285 N.E.2d at 290, 334 N.Y.S.2d at 137.
68. *Id.* at 358, 285 N.E.2d at 290, 334 N.Y.S.2d at 137.
69. *Id.* at 356, 285 N.E.2d at 290, 334 N.Y.S.2d at 136.
70. In our view, an indigent parent, faced with the loss of a child's society as well as the possibility of criminal charges . . . is entitled to the assistance of counsel. A parent's concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right . . . to be relinquished to the State without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer. To deny legal assistance under such circumstances would—as the courts of other jurisdictions have already held . . . —constitute a violation of his due process rights and, in light of the express statutory provision for legal representation for those who can afford it, a denial of equal protection of the laws as well.

Id.

71. *See* N.Y. FAMILY CT. ACT §§ 241-49 (McKinney 1963).
72. 40 U.S.L.W. 2658 (N.D. Cal. Mar. 22, 1972). *See also* Danforth v. State Dep't of Health & Welfare, —— Me. ——, 303 A.2d 794 (1973). In a well reasoned opinion, the Maine Supreme Court held that indigent parents against whom a custody petition is instituted have a constitutional right to appointed counsel. The Supreme Court of Nebraska apparently reached the same result applying similar reasoning in State v. Caha, —— Neb. ——, 208 N.W.2d 259 (1973).

with deprivation of fundamental rights. Pointing out that the state was the moving party and was seeking to deprive the natural parent of her right to care for the child, the court stated that it would be unfair and a denial of due process to allow the state to interfere in the family relationship without affording the mother the assistance of counsel.[73] The court found that the parent's fundamental interest in the custody of her children could not be curtailed without a meaningful opportunity to be heard, including the assistance of counsel.[74] One of the factors which led to the court's finding was the gross imbalance in expertise and experience between the state and the accused parent. Moreover, because the interest at stake was considered fundamental, the court found the classification on the basis of wealth to be a denial of equal protection unless the state could show some compelling interest to justify denial of counsel to indigents.[75] The only interest the state had advanced was avoidance of the expense of court appointed attorneys. The court concluded that avoidance of expense is not a compelling state interest sufficient to justify denial of counsel to parents.[76]

These two cases may lead other courts to a greater judicial awareness of parental rights in dependency and neglect proceedings. The approach of the courts in *Cleaver* and *Ella B.* is worthy of emulation because it looks beyond form to substantive rights.

Policy Reasons for Appointed Counsel for Indigent Parents

The policies of elimination of arbitrariness and improvement of the quality of justice in dependency and neglect proceedings support the appointment of counsel for indigent parents. A positive by-product of providing counsel would be increased parental confidence in the integrity of the judicial process and diminished hostility toward the courts.[77]

Traditionally, the presence of lawyers in juvenile courts has been opposed on the basis of the countervailing policy of informality and the fear that lawyers would subvert those informal processes.[78] In order to evaluate this argument, two questions must be considered: (1) whether juvenile court informality is worth preserving; and (2) whether

73. 40 U.S.L.W. at 2658.
74. *Id.* at 2658, 2659.
75. *Id.*
76. *Id.*
77. *See In re* Gault, 387 U.S. 1, 26 (1967).
78. *See, e.g.,* Tamilia, *Neglect Proceedings and the Conflict Between Law and Social Work,* 9 Duquesne L. Rev. 579, 589 (1971) [hereinafter cited as *Neglect Proceedings*]; *Representation, supra* note 2, at 250.

lawyers representing parents in dependency and neglect proceedings hinder the decisionmaking process.

The Supreme Court in *Gault*[79] made it clear that informal procedures inadequately protect individual rights. The Court said: "[J]uvenile Court history has again demonstrated that unbridled discretion is frequently a poor substitute for principle and procedure."[80] Informality, with its obvious lack of procedural restraints on judicial discretion, may cause the person penalized by the court to feel he has not been treated impartially. Having the aid of counsel would not only protect parental rights, but also make parents feel less alienated and victimized by the process and its results.[81]

The question of whether lawyers would subvert the juvenile court processes cannot be answered definitively. A survey of judges in the New York juvenile court system indicates that the judges themselves feel representation of parents in dependency and neglect proceedings would improve the quality of the hearings and make the judge's job easier.[82] When parents are not represented by counsel, the burden of protecting their rights and trying to discover all of the relevant facts falls on the judge. It is unrealistic to expect the judge to be able to adequately perform both the role of judge and that of advocate for unrepresented parents. In *Gault,* the Supreme Court explicitly stated that the judge could not be a substitute for counsel for one of the parties.[83] Rather than hindering the juvenile court processes, counsel for parent respondents would ensure a more orderly presentation of information and lighten the burden on the presiding judge.

Admittedly, the role of an attorney in juvenile court may be different from the role of an advocate in regular criminal courts.[84] Since the hearing is supposed to protect the child, the lawyer may need to be more involved in fashioning remedies than is traditional. Nevertheless, uncertainties about the exact role attorneys will play in juvenile court are not a sufficient reason to deny appointed counsel to parents whose important fundamental rights are at stake.

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79. *In re* Gault, 387 U.S. 1 (1967).
80. *Id.* at 18.
81. *See* 387 U.S. at 26; *Neglect Proceedings, supra* note 78, at 585.
82. *Representation, supra* note 2, at 253.
83. 387 U.S. at 36.
84. Chapman, *The Lawyer in Juvenile Court: "A Gulliver among Lilliputians,"* 10 W. ONT. L. REV. 88 (1971); Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court,* 12 BUF. L. REV. 501 (1963).
85. IND. ANN. STAT. §§ 31-1-17-1, 31-5-5-2 to -4 (Code ed. 1973); IND. CODE §§ 35-14-3-1, 35-14-1-2, -4, -5 (1971), IND. ANN. STAT. §§ 10-807, -813, -815, -816 (Supp. 1973).

THE STATUS OF INDIANA LAW

Indiana, like many other states, does not provide counsel for parents in juvenile court actions either by statute or judicial decision. The failure to provide for the appointment of counsel is particularly unsatisfactory in this state because of the multitude of statutes dealing with parental responsibilities.[85] There is some confusion about the scope of some of these statutes which has not been remedied by case law.[86] For example, it is possible that an adjudication of dependency and neglect may lead to termination of parental rights. A provision in the adoption code permits a court to terminate parental rights either with consent or, in certain circumstances, without consent.[87] The statute does not specifically define the circumstances under which parental consent is not required. The statutory vagueness might permit the situation of a parent without custody because of a dependency or neglect proceeding to be treated as parental failure to communicate with or contribute to the support of the child. The statute lists these failures as grounds for nonconsensual termination.[88]

Both because loss of custody, even temporarily, is a serious penalty and because of the possibility of even more drastic consequences, Indiana must provide counsel to protect the rights of indigent parents in dependency and neglect proceedings.[89]

CONCLUSION

Although the states have not traditionally provided counsel for indigent parents in dependency and neglect proceedings, the law is changing. States are beginning to recognize the importance of protecting parental rights in these proceedings and several now provide for counsel either by statute or judicial decision. These reforms are responsive both to the constitutional arguments of due process and equal protection and to the strong practical policy reasons in favor of appointing counsel for indigent parents.

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86. *Dependency & Neglect, supra* note 2.

87. IND. ANN. STAT. §§ 31-3-1-6, -7 (Code ed. 1973).

88. IND. ANN. STAT. § 31-1-17-1 (Code ed. 1973).

89. In drafting a statute to provide for court appointed counsel, the legislature could consult the statutory provisions in states which already provide for appointment of counsel. *See* statutes cited note 4 *supra*. *See also* HEW, LEGISLATIVE GUIDE FOR DRAFTING FAMILY AND JUVENILE COURT ACTS § 25 (1969); HEW, STANDARDS FOR JUVENILE AND FAMILY COURTS 56-57 (1966); UNIFORM JUVENILE COURT ACT §§ 3, 13, 39; UNIFORM JUVENILE COURT LAW §§ 22(d), 26.