University of Baltimore Law Review

Volume 37
Issue 1 *Fall 2007*

Article 3

2007

Keynote Address: Seeking a Right to Appointed Counsel in Civil Cases in Maryland

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SEEKING A RIGHT TO APPOINTED COUNSEL IN CIVIL CASES IN MARYLAND

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Keynote Address given at
The University of Baltimore Law Review
Symposium on April 5, 2007

I. INTRODUCTION

My thanks to the *University of Baltimore Law Review* for inviting me to give the keynote address at this symposium on "Civil Gideon"—the right to appointed counsel in civil proceedings. I am particularly pleased to appear with distinguished panelists who continue to play central roles in the development of this vital issue.

On August 7, 2006, the House of Delegates of the American Bar Association (ABA) unanimously approved a groundbreaking resolution supporting the right to counsel for low income persons in civil cases impacting basic needs.[1]

My fellow panelists and I will undoubtedly be discussing the huge significance of the ABA resolution in the course of the afternoon. I want to provide a local context for the discussion by focusing on one case—*Frase v. Barnhart.*[2] I do so for several reasons.

First, it is the principal effort, so far, to secure the right here in Maryland. What better place to discuss it than at this outstanding school of law?

Second, we came damned close to winning.

Third, it is a chance to sketch our legal theories, some of which are unique to Maryland.

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1. *See* American Bar Association Task Force on Access to Civil Justice, *ABA Resolution on Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 507, *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.

2. 379 Md. 100, 840 A.2d 114 (2003).

And fourth, but most important, it is a chance to introduce you to Deborah Frase, to put a human face on a cause that is not mere theory . . . to try to convey what it is like—in the alien world of the law—to face the loss of your child—alone—without "the guiding hand of counsel."[3]

II. THE *FRASE* CASE

My co-counsel and I represented Deborah Frase, the appellant in *Frase v. Barnhart*,[4] a child custody case decided by the Court of Appeals of Maryland in December, 2003.[5] Deborah Frase won.[6] The Court of Appeals of Maryland held that because she was a fit parent, it was error for the lower court to condition her continued custody of her two-year-old son on bi-weekly visitation at the home of the custody-seeking Barnharts; *and* on her application to a transitional shelter; *and* on continued review hearings before a judicial master.[7]

The court's ruling was based on the Supreme Court's recent decision in *Troxel v. Granville*,[8] a grandparent visitation case, which established the constitutionally mandated presumption that a fit parent knows best what is in the child's best interest.[9] A four-judge majority of the Court of Appeals of Maryland did not reach our contention that Ms. Frase had been entitled to court-appointed counsel. They said that the issue had become moot.[10] Three judges concurred in the majority's disposition of the custody issue, but would have reached the right to counsel issue.[11] Moreover, they would have held that Ms. Frase was constitutionally entitled to appointed counsel.[12]

We were, of course, delighted that our client won her case and heartened by the concurring opinion. But I was left with the feeling that with respect to our cherished right to counsel issue, we had tossed up an appellate air ball.

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3. Gideon v. Wainwright, 372 U.S. 335, 345 (1963).
4. *Frase*, 379 Md. at 102, 840 A.2d at 115.
5. *Id.* at 100, 840 A.2d at 114.
6. *Id.* at 128–29, 840 A.2d at 131.
7. *Id.* at 121–22, 125, 840 A.2d at 126, 128–29.
8. 530 U.S. 57 (2000).
9. *See id.* at 63.
10. *See Frase*, 379 Md. at 103, 840 A.2d at 115.
11. *See id.* at 129, 840 A.2d at 131 (Cathell, J., concurring).
12. *Id.* at 141, 840 A.2d at 138.

I admire Deborah Frase. She is in a class with some of my other heroines—like the real Karen Silkwood[13] and the fictional Norma Rae.[14]

When Deb Frase, then 29 and a resident of Caroline County, Maryland, was arrested on a year-old bench warrant for possession and intent to distribute three ounces of marijuana, her mother, Diane Keys, who was a traveling nurse—and with whom Deb had an *extraordinarily* contentious relationship—ignored Deb's instructions. She placed Deb's youngest son, two-year-old Brett Michael, with Cynthia and Curtis Barnhart, whose only relationship with the Frase family was that Curtis was the leader of the Boy Scout troop of which Deb's oldest child was a member.[15]

Deb Frase pled guilty to the marijuana charge and was sentenced by Talbot County circuit court judge William Horne to time served—eight weeks.[16] Upon release, she retrieved Brett Michael, but the Barnharts—who had known Brett Michael for all of six weeks—immediately filed a complaint for custody. They were represented by retained counsel. Deb Frase could not afford counsel. Although financially eligible, she was turned down by various legal services programs because they were understaffed and overworked.[17] She requested appointment of counsel at least four times, in vain, during the proceedings below.[18]

In two days of hearings before the judicial master in Caroline County, Deb Frase hung tough. She called witnesses from social service agencies, all of whom testified that she was a loving and fit mother, and that the trailer in which she was living, while crowded, was clean and safe.[19] The Barnharts, aided immeasurably by the hostile testimony of Deb's mother, focused on Deb's troubled past,

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13. Karen Silkwood, played by Meryl Streep in the biographical film *Silkwood*, was a union activist and whistle blower known for her efforts in investigating and exposing the appalling health and safety standards at her place of employment, the Kerr-McGee Nuclear Corporation, in the Kerr-McGee Plutonium Case. *See generally* RICHARD RASHKE, THE KILLING OF KAREN SILKWOOD: THE STORY BEHIND THE KERR-MCGEE PLUTONIUM CASE (1981); *see also* SILKWOOD (Twentieth Century Fox 1983).
14. Norma Rae is a movie heroine, played by Sally Field, who leads the effort to unionize the textile mill where she works. Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089, 1105 n.82 (1999).
15. Joint Record Extract at E0050–51, E0069–72, E0136, E0190–91, Frase v. Barnhart, 379 Md. 100, 840 A.2d 114 (2003) (No. 6).
16. *Id.* at E050–51.
17. *See Frase*, 379 Md. at 105, 840 A.2d at 116–17.
18. Joint Record Extract, *supra* note 15, at E0400, E0419, E0423, E0436.
19. *Id.* at E0094, E0097, E0100–01, E0103, E0224–25, E0230, E0245, E0247.

her earlier bouts with drugs and alcohol, some minor scrapes with the law, and her lousy parenting of her oldest son during her teenage years.[20]

I must point out here that nine years earlier, Deb Frase consented to relinquish legal custody of that oldest son, then her only child, to her mother.[21] The court file in that proceeding reveals that Ms. Keys, the mother, made the same allegations then that she was now making before the master—drugs, alcohol, and bad parenting.[22] The court file also reveals that Ms. Keys's attorney in the earlier matter was the same master now adjudicating Deb's case![23] But, neither the master nor Ms. Keys, or even the counsel for the Barnharts disclosed that fact. Deb Frase was ignorant of this and didn't discover it until she examined the earlier court file for the first time *after* the hearing before the master and the circuit court hearing on her exceptions.

Deb Frase testified that she had made, as she put it, some "bad choices" earlier in her life, but asserted she was recovering and responsible now.[24]

The hearing before the master was a parody of the adversary process.

She conducted no pretrial discovery and didn't know she could.

Her attempts at research in the Denton's courthouse library didn't lead her to the dispositive *Troxel* case until *after* all the hearings were over. She cited it for the first time in a final, desperate pleading—an emergency motion occasioned by her belated discovery of the master's previous representation of her mother.[25]

She had no understanding of how to introduce evidence or what an expert witness was.

She frequently expressed bewilderment and apologized for it.

Her cross examination of her mother—the central witness against her—was in shambles and amounted to little more than an exchange of accusations.[26]

She was never able to challenge the posture of the Barnharts as Good Samaritans who, in a mere six weeks, had purportedly established a loving and warm relationship with Brett Michael. She was also unable to question their motives; the reason for the plethora

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20. Brief of Appellant at 31, *Frase*, 379 Md. 100, 840 A.2d 114 (No. 6).
21. *Id.* at 3.
22. *Id.* at 15.
23. *See, e.g.*, Joint Record Extract, *supra* note 15, at E0435.
24. *Id.* at E0268. It is worthy of note that Deb had been abused by her father over a six-month period when she was a teenager; he committed suicide shortly thereafter.
25. *Id.* at E0434–35.
26. *Id.* at E0146–59.

of biological, foster, and adopted children who choked their home; or the living conditions in their home, all of which begged for testing.

Hearsay was rampant and was admitted without objection.[27] Her direct testimony was little more than a response to cursory questions from the master.[28]

At root, Deb Frase was never able to overcome the shadow that her admittedly troubled past cast on her present parenting abilities. She was never able to achieve, as any trained advocate would have, a coherent presentation distinguishing fact from supposition and prejudice or demonstrating a change over the decade from then to now.

Although the master found, as the evidence compelled, that Deb Frase was, at present, a fit parent and denied the Barnharts' custody request, she nonetheless recommended the restrictive custodial conditions I have mentioned.[29] Her report, moreover, made explicit her deep distrust of Deb, her scornful prediction that Deb would fail as a parent, and her regret that the law did not allow her to award custody to the Barnharts.[30]

Deb Frase fared no better before the circuit court. The judge—who took no testimony, listened to no tapes, and read no transcript—essentially adopted the master's report.[31] She expressed gratitude that the Barnharts "were there as a safety net for [her] family."[32] And she turned the *Troxel* constitutional presumption on its head, saying "unless you can tell me something about the Barnharts that would suggest that they wouldn't be adequate supervisors, it's falling on deaf ears."[33]

On appeal, the Court of Appeals of Maryland majority reversed, as I have said, on *Troxel* grounds. It didn't reach the recusal issue, but

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27. *Id.* at E0032, E0040, E0042.
28. *See generally* Reporter's Official Transcript of Proceedings, Master's Hearing, Barnhart v. Frase, Civ. No. 7764 (Cir. Ct. for Caroline County, Md. May 20, 2002), *reprinted in* Joint Record Extract, *supra* note 15, at E0076–82.
29. Frase v. Barnhart, 379 Md. 100, 106, 840 A.2d 114, 117 (2003); *see also* Report and Recommendation of Master, Barnhart v. Frase, Civ. No. 7764 (Cir. Ct. for Caroline County, Md. June 4, 2002), *reprinted in* Joint Record Extract, *supra* note 15, at E0398–99.
30. Report and Recommendation of Master, *supra* note 29, at E0398.
31. *Frase*, 379 Md. at 106, 840 A.2d at 117; *see also* Reporter's Official Transcript of Proceedings, Hearing on Exceptions, Barnhart v. Frase, Civ. No. 7764 (Cir. Ct. for Caroline County, Md. Sept. 13, 2002), *reprinted in* Joint Record Extract, *supra* note 15, at E0321–23.
32. Reporter's Official Transcript of Proceedings, Hearing on Exceptions, *supra* note 31, at E0342.
33. *Id.*

sent a strong message to the master to review her ethical obligations. The right to counsel issue *was*, of course, entirely moot as to Deb Frase, and the court majority was unwilling to use this occasion to give right to counsel guidance to others similarly situated. It was this decision to not decide that Judge Cathell's concurrence, joined in by Chief Judge Bell and Judge Eldridge, protested.[34]

In any case, there is no Civil Gideon in Maryland. At least . . . not yet.

* * *

"Gideon," of course refers to *Gideon v. Wainwright*,[35] the 1963 case in which Clarence Earl Gideon, prisoner number 003826 in the Florida State Prison, whose handwritten petition to the Supreme Court saying he should have had appointed counsel in his trial for petty larceny, led to one of the defining moments in our constitutional history.

Gideon held that the Due Process Clause of the Fourteenth Amendment, through its incorporation of the Sixth Amendment, required the appointment of counsel for indigent criminal defendants in state courts.[36] Justice Black's "moving words," drawn largely from the language of the old Scottsboro case, remain the hymn—the old time religion—for those of us who would apply the logic of *Gideon* to civil litigation:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. . . . He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him . . . .[37]

"This seems to us to be an obvious truth," Justice Black wrote, that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[38] In such circumstances, "lawyers," he wrote, "are necessities, not luxuries."[39]

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34. *Frase*, 379 Md. at 129–30, 840 A.2d at 131 (Cathell, J., concurring).
35. 372 U.S. 335 (1963).
36. *Id.* at 343.
37. *Id.* at 344–45 (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).
38. *Id.* at 344.
39. *Id.*

Alas, eighteen years later, the Supreme Court decided *Lassiter v. Department of Social Services*,[40] which held that a North Carolina mother fighting the State of North Carolina's effort to terminate her parental rights was *not* entitled to an appointed counsel.[41] A five-to-four majority of the Court tied *Gideon* to its Sixth Amendment moorings and erected a presumption that an indigent civil litigant has a right to appointed counsel only when, if she loses, she may be deprived of her physical liberty.[42] The presumption is rebuttable only after applying a restrictive balancing test on a case-by-case basis.

What to do? To repair to state constitutions, that's what. In particular to the Constitution of Maryland, which is older and better than the one those Framers wrote in Philadelphia in 1787.

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III. A FEW OBVIOUS PROPOSITIONS

Before I get to the doctrine, I want to set out a few unremarkable—and I think incontestable—propositions that give *practical* significance and importance to the state constitutional doctrines on which I rely.

First, a lawyer is a pretty important thing to have in litigation.

That's why people who can afford them usually hire them.

Lawyers make a difference. It is worth recalling that the second time around, after Clarence Earl Gideon got his court appointed lawyer, he was acquitted.[43]

That's why the presence of counsel in Maryland's administrative proceedings, for example, doubles claimants' success rates in overturning agency decisions.

That's why battered women who had an attorney were successful in getting a protective order 83% of the time, while only 32% of battered women without an attorney obtained an order.[44]

That's why judges are required to be scrupulous in making sure that waivers of lawyers in criminal cases are voluntary.

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40. 452 U.S. 18 (1981).

41. *Id.* at 31. This was not an ideal test case. Ms. Lassiter was in prison for double murder at the time and had no significant track record for motherly love. *Id.* at 18.

42. *Id.* at 26–27.

43. ANTHONY LEWIS, GIDEON'S TRUMPET 249 (1964).

44. Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 250–51 (2003).

And that's why, on the forms published by the Court of Appeals of Maryland's Administrative Office of the Courts, pro se litigants in contested custody cases like Deb Frase's are warned that they need a lawyer if the other side has one and are "urged to consider carefully the importance of getting an attorney to help you. Custody, if contested, is one of the most difficult types of cases and you should consider seriously using an attorney."[45]

IV. THE DOCTRINE

We Civil Gideon advocates argue that the Constitution of Maryland mandates appointment of counsel for indigent civil litigants, at least in cases, like Deborah Frase's, that touch fundamental rights and basic human needs.

Over a hundred years ago, a Yale Law Journal article about Maryland constitutional law observed that one of the axioms of our constitutional history is "[t]hat the colonists carried with them the rights of Englishmen, when they crossed the Atlantic . . . ."[46] Indeed, some of the provisions we rely on reach back to Tudor England and, earlier still, to Magna Carta. In short, the right of an indigent civil litigant to appointed counsel is a right that has deep roots in Maryland's constitutional soil.

A. Article XIX

I want to begin by discussing Article XIX of our Declaration of Rights. Article XIX provides:

> That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land.[47]

It flows directly, with some cadenzas by Lord Coke and Blackstone, from Magna Carta's chapter 40: "To no one will we sell, to no one will we refuse or delay, right or justice,"[48] which was written to reform the sale of writs, documents that opened access to the courts,

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45. INSTRUCTIONS ON COMPLETING A COMPLAINT FOR CUSTODY 1 (rev. ed. 2005), http://www.courts.state.md.us/family/forms/drin04.pdf (this is a commonly used civil domestic case information report).

46. Bernard C. Steiner, *The Adoption of English Law in Maryland*, 8 YALE L.J. 353, 353 (1899).

47. MD. CONST. DECL. OF RTS. art. XIX.

48. MAGNA CARTA ch. 40, *reprinted in* WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 395 (2d ed. 1914).

during the reigns of Henry II and good King John, and has been interpreted "as a universal guarantee of impartial justice to high and low . . . ."[49] Blackstone wrote of Magna Carta's guarantee of access to the courts.[50] As Professor Howard has put it, Magna Carta mandated that "justice is not something to be sold to the highest bidder but should be available on impartial terms to men of all ranks."[51]

Magna Carta has become the template for the so-called "open courts," "access to courts," and "remedies" provisions like Article XIX, which has counterparts in about forty other states.[52] Significantly, it has no counterpart in the federal constitution. Most of the jurisprudence under these provisions concerns the reasonableness of legislation that limits access to the courts in some way—legislation, for example, requiring arbitration of medical malpractice claims, statutes of limitations, and repose.

True, no court has found, so far, that open courts provisions mandate appointment of counsel for the indigent civil litigant. Nor, to my knowledge, has any state court yet directly addressed the issue. But, we argue, the promise of access to the courts—in the most litigious society on the face of the earth—is meaningless unless it contemplates access with counsel.

This is not a startling proposition.

We remember that warning on the forms that were provided to pro se litigants by our own Administrative Office of the Courts.

We have been reminded by the Maryland Commission on Pro Bono (the Cardin Commission) that "[m]any of Maryland's poor lack meaningful access to the civil justice system because they cannot afford a lawyer."[53]

We agree with Justice Black, who observed that in the civil context, "there cannot be meaningful access to the judicial process until every serious litigant is represented by competent counsel."[54]

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49. MCKECHNIE, *supra* note 48, at 398.

50. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 137 (Oxford, Clarendon Press 1765–69) ("[c]ourts of justice must at all times be open to the subject . . . .") (alteration of original).

51. A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 15 (1964).

52. John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of State Courts*, 26 WAKE FOREST L. REV. 237, 237–38 (1991).

53. THE MARYLAND JUDICIAL COMMISSION ON PRO BONO: REPORT AND RECOMMENDATIONS vi (2000), http://www.courts.state.md.us/probono.pdf.

54. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 959 (1971) (Black, J., dissenting from denial of certiorari).

We agree with Judge Robert Sweet of the Southern District of New York: "[W]e need a civil *Gideon*—that is, an expanded constitutional right to counsel in civil matters."[55]

We can appreciate the caustic observation of California's Justice Earl Johnson who wrote that saying that mere physical presence in the courtroom is "access" is like saying that early Christians being thrown to the lions had "access" to the Colosseum.[56]

In short, the *logic that* supports the holding of *Gideon*—that the right to be heard means little without the right to be heard by counsel, and that lawyers are necessities, not luxuries—is often as applicable to civil cases as it is to criminal ones. Fairness is not a function of the label on the proceedings. A trial is either fair or not. *Gideon's doctrine* may not support the civil right, but its *logic* sure does.

Deborah Frase, like Clarence Gideon, had no skill "in the science of law,"[57] she, like Gideon, was unfamiliar with the rules of evidence; faced with the need to interview and examine witnesses, to assess relevance, to advocate controlling legal issues she, like Gideon, needed "the guiding hand of counsel."[58] It is of no practical consequence that an assistant state's attorney was not her opponent; she faced a trained practitioner who made his living in the very courts in which she was an alien. And the stakes? It seems to me incontestable that the threatened loss of a child is an incomparably greater life shattering event than thirty days for shoplifting.

To put this in historic context, perhaps we should say that Deb Frase's inability to get a lawyer, and the inability of thousands of the poor in Maryland's courtrooms every day, hurting as badly as she and frequently worse, is the twenty-first century equivalent of being unable to buy a writ.

In short, Article XIX's promise of access cannot be fulfilled and cannot be redeemed, in many civil cases, without the appointment of counsel for the indigent civil litigant.

There is a second aspect of Article XIX's provenance that should be underscored and supports our contention that appointed counsel for the poor is essential to give it meaning.

Article XIX, and the Magna Carta provision from which it grew, is not only about unobstructed access to courts by private citizens.

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55. Hon. Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 503 (1998).

56. Earl Johnson, Jr., *Thrown to the Lions: A Plea for a Constitutional Right to Counsel for Low-Income Civil Litigants*, BAR LEADER, Sept.–Oct. 1976, at 17.

57. Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

58. *Id.*

It is also a statement of judicial independence, judicial power and, uniquely, judicial responsibility. It is judiciary centered. As the highest court of another state has said of its counterpart to Maryland's Article XIX: it was "directed at the courts."[59] As many commentators and courts have pointed out, these "open courts," "access," or "remedy clauses," rooted in Magna Carta and especially those cadenzas of Coke and Blackstone, were precursors of the then infant idea of separation of powers, captured in Article VIII of our Declaration of Rights, and of an independent judiciary.[60]

The Court of Appeals of Maryland has "been there," so to speak, before, nearly thirty years ago, in its searching discussion of the judicial function and judicial independence in *Attorney General v. Waldron*.[61] It's a case that I believe bears directly on the power of Maryland's courts to appoint counsel, and their responsibility to do so, in order to fulfill the unfulfilled promise of access of Article XIX.[62]

In *Waldron*, the Court of Appeals of Maryland held that the General Assembly's effort to prevent retired judges from practicing law if they accepted judicial pensions was an unconstitutional attempt by the legislature to regulate the legal profession, which the court held was the province of the judiciary under Article VIII.[63] It is instructive to examine the court's reasoning.

It asserted that each branch of government possessed powers implied "from the right and obligation to perform its constitutional duties."[64]

It spoke of the courts' "constitutionally imposed responsibility with respect to the administration of justice."[65]

It asserted flatly that the judicial branch had an obligation "to monitor and manage its own house."[66] In a passage that inescapably speaks to the issues raised in a right to appointed counsel claim, Judge J. Dudley Digges explained the "unique relationship" between

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59. Meech v. Hillhaven W., Inc., 776 P.2d 488, 492 (Mont. 1989).
60. MD. CONST. DECL. OF RTS. art. VIII; 1 BLACKSTONE, *supra* note 50, at 69; Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1279, 1312 (1995).
61. 289 Md. 683, 688–89, 695, 426 A.2d 929, 933, 936 (1981).
62. *See* MD. CONST. DECL. OF RTS. art. XIX.
63. *Waldron*, 289 Md. at 690–92, 697–98, 728–29, 426 A.2d at 933–35, 937, 954.
64. *Id.* at 690, 426 A.2d at 933–34.
65. *Id.* at 692, 426 A.2d at 934.
66. *Id.* at 695, 426 A.2d at 936.

bar and bench[67] and the need for effective lawyering to make the adversary system work:

> In this country, it is a well known maxim that attorneys function as officers of the courts, and, as such, are a necessary and important adjunct to the administration of justice. This truism necessarily derives, in our view, from the very theory of the structure of our system of justice.
>
> *The adversary process integral to the design of our dispute-resolving scheme is perhaps one of the more remarkable accomplishments of western jurisprudence. It is this process, whereby truth is garnered from the articulation of opposing points of view, that is the preeminent tool through which fairness is achieved in the administration of justice in this country.*
>
> . . . .
>
> Without a vigorous, honorable and qualified bar, the judiciary of this State, to put it quite simply, would be greatly handicapped if not completely incapable of performing those duties assigned to it.[68]

True, there is nothing in the *Waldron* holding that directly addresses the issue of appointment of counsel for the indigent.[69]

And *Waldron* is not, strictly speaking, an Article XIX case.[70]

But *Waldron* focused on the key role of lawyers in making the adversary system effective and, above all, stressed the power and the responsibility of the judiciary to manage its own house.[71]

Waldron, thus, is very strong support for my contention that Maryland courts should interpret Article XIX to require appointment of counsel for indigent civil litigants, at least in basic needs cases, in order to discharge their responsibility to make the adversary system function properly.[72]

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67. *Id.*
68. *Id.* at 695–96, 426 A.2d at 936–37 (emphasis added).
69. *See id.* at 684, 426 A.2d at 931 (addressing specifically only the issues of whether a statute prohibiting a former judge from practicing law for compensation violates separation of powers and whether that same statute itself violates separation of powers).
70. *See id.*
71. *Id.* at 695, 426 A.2d at 936.
72. *See id.* at 695–96, 426 A.2d at 936–37.

B. ARTICLE V

The most explicit recognition of the indigent's right to appointed counsel stems from Article V of the Declaration of Rights, which provides in relevant part:

> That the Inhabitants of Maryland are entitled to the Common Law of England . . . and to the benefit of such of the English statutes as existed on the Fourth day of July, [1776]; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity . . . subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State.[73]

Among those "rights of Englishmen" was the Tudor statute 11 Hen. VII, ch. 12, which established a right to appointed counsel for indigent civil plaintiffs with meritorious causes of action.[74] Its purpose was to ensure that those indigent civil litigants, who would have been unable to navigate the baroque writ system without assistance, had access to the King's courts. The Hen. VII statute commands that:

> Indifferent Justice to be had . . . as well to the poor as to the rich . . . of it be afore the King in his Bench, the Justices there shall assign to the same poor person or persons Counsel learned by their discretions which shall give their Counselees *nothing taking for the same*, and in like wise . . . shall appoint attorney and attorneys for the same poor person and persons . . . which shall do their duties *without any rewards for their Counselees help and business in the same* . . . .[75]

Under 11 Hen. VII the chancellor merely determined whether a party was indigent; whether he would swear himself worth less than five pounds.[76] Once the chancellor determined that the party was indigent, the statute required the appointment of counsel.

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73. MD. CONST. DECL. OF RTS. art. V(a).

74. Michael Milleman, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 42–43 (1990).

75. 11 HEN. 7, ch. 12 (1495), *reprinted in* 2 STATUTES OF THE REALM 578 (1816), *microformed on* Microcard No. 55E53 (Matthew Bender & Co.) (alteration of original) (emphasis added).

76. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 400 (Oxford, Clarendon Press 1765–69).

The Hen. VII statute was incorporated as part of the common law of Maryland. This we know because Chancellor Kilty tells us so. In 1809 the General Assembly asked William Kilty, then chancellor of Maryland (and a brooding omnipresence who hovers over Maryland legal history) to inform it which English statutes were proper to be incorporated into Maryland law. Among those statutes that Kilty found had been introduced, used, and practiced in the Maryland colony, and applicable to Maryland's circumstances was the Hen. VII statute.[77]

Although the Court of Appeals of Maryland has frequently addressed Kilty's findings concerning the incorporation of English statutes pursuant to Article V, it has never rejected such a finding. And, the General Assembly has never revised, amended or repealed the Hen. VII statute.

Kilty was not called upon to opine on what aspects of the English *common law* were incorporated via Article V. But as the Court of Appeals of Maryland has held, "the mass of the common law as it existed in England" at the American Revolution, unless it was inconsistent with our institutions, was also incorporated by Article V.[78] And it is clear from at least a dozen old English cases that the right to appointed counsel was recognized by English common law even prior to the Tudor statute, and that the right extended to defendants who were paupers as well as plaintiffs.[79]

Legitimate questions arise about the applicability of the Hen. VII statute. Where has it been all these years? Can the legislature really repeal it? Does it apply to defendants as well as plaintiffs? How on earth can we apply the "five pounds and the clothes on your back" test to the twenty-first century? These important issues, and others, deserve consideration. We can expect that when the Court of Appeals of Maryland eventually addresses the applicability of the Hen. VII statute, they will be thoroughly explored.[80]

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77. A REPORT OF ALL SUCH ENGLISH STATUTES AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE OF MARYLAND, AND WHICH BY EXPERIENCE HAVE BEEN FOUND APPLICABLE TO THEIR LOCAL AND OTHER CIRCUMSTANCES; AND OF SUCH OTHERS AS HAVE SINCE BEEN MADE IN ENGLAND OR GREAT-BRITAIN, AND HAVE BEEN INTRODUCED, USED AND PRACTISED, BY THE COURTS OF LAW OR EQUITY; AND ALSO ALL SUCH PARTS OF THE SAME AS MAY BE PROPER TO BE INTRODUCED AND INCORPORATED INTO THE BODY OF THE STATUTE LAW OF THE STATE 229 (1811) [hereinafter A REPORT OF ALL SUCH ENGLISH STATUTES].

78. Gladden v. State, 273 Md. 383, 389, 330 A.2d 176, 180 (1974).

79. *See, e.g.*, Wiat v. Farthing, 84 Eng. Rep. 237 (K.B. 1668).

80. These issues are addressed and relevant authorities are collected in Brief of Appellant, *supra* note 20, at 33–42.

C. *Article XXIV*

Article XXIV provides in relevant part, "That no man ought to be . . . deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."[81]

Article XXIV is Maryland's guarantee of due process, which ensures a fair hearing. Many believe that, while the Supreme Court's *Lassiter* decision is our law of the land, Article XXIV is not as reliable as support for a Maryland Civil Gideon as are Articles XIX and V. But, several supportive features concerning Article XXIV are relevant.

First, while it is true that Article XXIV is to be construed *in pari materia* with its federal counterpart and is thus subject to the restrictive case-by-case balancing test of *Lassiter,* the Court of Appeals of Maryland has recently reminded us that *in pari materia* does not require Maryland to slavishly follow every interpretation of the federal provisions by the Supreme Court.[82]

Second, the interpretation of Article XXIV to include the right to appointed counsel for the poor in civil cases involving fundamental rights or human needs, draws additional support from those companion Declaration of Rights provisions, Articles XIX and V, which, as we have seen, have no counterpart in the federal constitution. The provenance of these three provisions is nearly identical. They were written by drafters schooled on the works of Coke and Blackstone, who also knew, as Kilty observed, that appointed counsel for the poor was "being [used and] practi[c]ed" in the Maryland colony.[83] The drafters of Article XXIV had plenty of reason to believe that the Law of the land, at least in Maryland, incorporated a right to appointed civil counsel for the poor.

* * *

V. CONCLUSION

So where do we Marylanders stand? We continue to search for the best test case, "*Frase II.*" Meanwhile, several judges of the Court of Appeals of Maryland, including Chief Judge Bell, have indicated judicial approval of some form of the right.[84] But it seems

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81. MD. CONST. DECL. OF RTS. art. XXIV.

82. *See, e.g.*, Dua v. Comcast Cable, 370 Md. 604, 621, 805 A.2d 1061, 1071 (2002).

83. A REPORT OF ALL SUCH ENGLISH STATUTES, *supra* note 77, at 229.

84. *See, e.g.*, Touzeau v. Deffinbaugh, 394 Md. 654, 687–89, 907 A.2d 807, 827–28 (2006) (Bell, C.J., dissenting) (supporting the right of low-income people to counsel at public expense in adversarial proceedings where basic human needs are at stake).

appropriate to give the last word today to Judge Cathell, author of an eloquent concurring opinion in *Frase:*

> [T]his issue will not go away . . . . This issue will keep coming back . . . until four judges of this Court vote to resolve it one way or the other. The bullet will have to be bitten. . . . The poor need a yes or a no.
>
> I am fully aware of the consequences of taking the first step onto the path of a civil *Gideon.* But the right we are asked to afford in the context of this case, addresses the most fundamental of rights. It is not in the nature of a speeding ticket, a civil violation of a zoning ordinance, a tortious interference with contract, or a breach of contract case. In my view, it is much more fundamental, much more important. It is in the nature of the protection of the family. What can be more important? We should all try to imagine how it must feel to be utterly poor and to receive a summons from the hands of a sheriff informing us that we are required to appear in court because either the State or some third party is attempting to terminate our paternal rights, or to interfere with them, and we don't have any money with which to hire a lawyer. The poor face fears without the security of the money that many others have. And it can be terrifying, to realize how helpless you are when others are attempting to take your children from you.[85]

85. Frase v. Barnhart, 379 Md. 100, 140–41, 840 A.2d 114, 138 (2003) (Cathell, J., concurring).