

# Right to counsel

Law, Common Law



Right to Counsel David Trapani University of Phoenix CJA 364 October 17, 2011 Scott Horwath Right to Counsel The right to counsel is a fundamental right in the United States criminal justice system. As the country has matured, the concept has evolved and expanded significantly to promote due process and confidence in the entire system. The concept has evolved to the point that most successful attorneys elect to use private counsel when they themselves are the subject of criminal proceedings. To develop an appreciation of the right to counsel in the United States, individuals need to take the initiative to examine its historical roots and progress over time.

Historical Perspective Most people are aware that the United States criminal justice system is rooted in English common law. In 1695, the English courts first permitted an individual to be represented by private counsel in a treason trial (Zalman, 2008). During the period of 1695 through 1836, counsel in English courts was permitted on a case-by-case basis at the pleasure of the court (Pettys, 2011). In 1836, the English Parliament granted individuals charged with felonies the right to obtain legal counsel at their own expense (Pettys, 2011). During the American colonial period, colonial leaders enthusiastically embraced the concept of the right to counsel. Following the events on the evening of March 5, 1770 John Adams successfully represented a group of English soldiers charged in connection with an event that was later titled the Boston Massacre (Linder, 2001). The concept of the right became a permanent component in the United States criminal justice system in 1791 with the ratification of the Sixth Amendment within the Bill of Rights (Cornell University Law School, n. d.). Individual Right to Counsel The original intent of the Sixth Amendment to the United States

Constitution was to ensure individuals were afforded the right to be represented by counsel in criminal proceedings if they wished. However, the right at the time did not serve as a guarantee individuals would be represented in criminal proceedings (Zalman, 2008). In 1932, the case of *Powell v. Alabama*, 287 U. S. 45 (1932) set the precedent that all individuals charged with capital offenses would be provided counsel free of charge if they were found to be indigent (Cornell University Law School, n. d.). In 1963, the case of *Gideon v. Wainwright*, 372 U. S. 335 (1963) extended the right to counsel for individuals charged with felonies (Zalman, 2008). Later, the case of *Argersinger v. Hamlin*, 407 U. S. 25 (1972) set the precedent that individuals have the right to counsel in all criminal cases that may result in periods of incarceration (Zalman, 2008). Finally, in 1979, the case of *Scott v. Illinois*, 440 U. S. 367 (1979) strengthened the precedent that all indigent individuals charged with crimes that could lead to periods of incarceration would be provided counsel free of charge (Justia, n. d.).

Role of Attorneys  
Defense attorneys serve as the legal voices of their clients. They are charged with representing their clients in a manner that ensures due process and protects his or her right against self-incrimination. Defense attorneys are also tasked with challenging the merits of the jurisdiction's cases and when appropriate, brokering the best plea agreements possible (Zalman, 2008). Individuals are extended the right to counsel at nearly every step of the criminal justice process. Today, many individuals simply suspected of ill deeds or criminal violations seek legal counsel to protect their interests. A good example would be United States House of Representative Anthony Wiener. In May 2011, lewd photos of Wiener were posted on an Internet site.

Although Representative Wiener claimed the photos were acquired by a hacker, he still sought legal counsel to protect his interests. Later it was discovered that Wiener had lied, and he had sent the lewd photos to multiple women via the Internet (Sherman & Allen, 2011). In 1961, the case of *Hamilton v. Alabama*, 368 U. S. 52 (1961) established the right of counsel at arraignment hearings for capital offenses (Justia US Law, n. d.). In 1963, the case of *White v. Maryland*, 373 U. S. 59 (1963) reinforced the significance of permitting defense counsel in the plea bargain process (Justia U. S. Law, n. d.). The court ruled that an attorney's involvement during the plea bargain process was a critical stage in the criminal justice process (Zalman, 2008). In 1963, the case of *Douglas v. California*, 372 U. S. 353 (1963) provided individuals with the right to counsel at first or mandatory appeals (Zalman, 2008). One of the most significant points during the criminal justice process involves the custodial questioning of individuals. Pursuant to *Miranda v. Arizona*, 384 U. S. 486 (1966) subjects in custody must be advised of a litany of rights associated with his or her right to counsel. After an acknowledgement that an individual understands his or her rights, he or she may exercise the right to remain silent or waive the right (Cornell University Law School, n. d.). In 1967, the case of *Mempa v. Rhay*, 389 U. S. 128 (1967) granted individuals the right to counsel at sentencing and deferred sentencing proceedings. In 1970, the case of *Coleman v. Alabama*, 399 U. S. 1 (1970) established the right of individuals charged with crimes to have legal counsel present at preliminary hearings. The basic premise of the decision indicated that professional counsel could serve to cross-examine witnesses that would sufficiently weaken cases, subsequently leading to the

dismissal of cases (Zalman, 2008). During the period of 1972 to 1973 two important cases, *Morrissey v. Brewer*, 408 U. S. 71 (1972) and *Gagnon v. Scarpelli*, 411 U. S. 778 (1973) served to establish the precedent that individuals had the right to counsel at parole and probation revocation hearings (Zalman, 2008). Both court decisions guaranteed defendants due process hearings in which they had the opportunity to challenge evidence, present arguments, and offer a defense (Zalman, 2008). Occasionally defendants seek to represent themselves in criminal proceedings. In 1975, the case of *Ferretta v. California*, 422 U. S. 806 (1975) established the right to self-representation and established guidelines for pro se defenses (Zalman, 2008). The guidelines specifically require that “ the judge takes pains to ensure the waiver is voluntary, that it is unequivocal and expressed, that it is knowing and intelligent, and that the defendant is mentally able to make the waiver” Zalman, 2008, p. 347). In 1984, the case of *McKasle v. Wiggins*, 466 U. S. 168 (1984) permitted the practice of judges assigning stand-by counsel to assist those electing to represent themselves. The decision was intended to protect defendants from their lack of knowledge and familiarity with the formal criminal justice system (Zalman, 2008). Conclusion The right to legal counsel in the United States criminal justice system is an absolute right that is applicable in most criminal justice proceedings. Legal counsel serves to provide defendants with the opportunity to develop defense strategies, challenge evidence, present evidence, cross-examine witnesses, provide compelling arguments, and broker plea agreements. To develop an understanding of the value of legal representation within the United States criminal justice system, people need to take the initiative to study its

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