

NO MONEY, NO LAWYER—NO CHILDREN: THE RIGHT TO COUNSEL FOR INDIGENT DEFENDANTS IN NEVADA TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

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INTRODUCTION

Christina Voight was pregnant with her son Lance while being prosecuted for arson.¹ Though she bitterly contested the charges, she was convicted and sentenced to prison for four to eight years.² Christina gave birth to Lance shortly after beginning to serve her sentence.³ Authorities immediately took him away from her and sent him to a foster home.⁴ Shortly thereafter, the state filed a petition to terminate Christina's parental rights.⁵

It was no easy task to fight the state from prison. After some legal maneuvering, however, the state withdrew their petition and moved Lance into a home dedicated to helping incarcerated women maintain a relationship with their children.⁶ During the remaining three years of Christina's sentence, Lance visited her frequently.⁷ She left prison and began working for the Open Society Institute, an organization dedicated to criminal justice reform.⁸ She has since

¹ David Crary, *Prison Moms Fight Termination of Parental Rights*, L.A. TIMES, Jan. 12, 2003, at A16.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

become a prominent advocate for social justice, focusing on incarcerated women and reproductive rights.⁹

Christina was fortunate in that she had an attorney.¹⁰ Many of her fellow inmates were not so fortunate.¹¹ Recognizing the plight of other incarcerated women, Christina ran workshops in the prison to educate them on the legal process and the importance of staying in contact with their children.¹² For many of these women, Christina's help was the closest they came to receiving legal advice.¹³

The U.S. Constitution does not recognize a right to counsel in termination of parental rights (TPR) proceedings. While the Constitution explicitly safeguards the right to counsel in criminal proceedings,¹⁴ as well as protection of individual due process rights,¹⁵ it makes no mention of a right to counsel in TPR proceedings or any other form of civil proceeding.¹⁶ In the landmark *Lassiter v. Department of Social Services of Durham County* decision, the U.S. Supreme Court determined that this omission indicated "the Constitution [does not require] the appointment of counsel in every parental termination proceeding."¹⁷ The Supreme Court of Nevada emphatically agreed, when it declared, "[N]o absolute right to counsel in termination proceedings exists in Nevada."¹⁸ These holdings inevitably lead to defendants being denied counsel in proceedings seeking to terminate their parental rights—some of the most fundamental rights that exist. Only four other states deny indigent defendants the right to an attorney when the awesome power of the government moves to eliminate their

⁹ Michelle Chen, *Parents in Prison, Children in Foster Care*, GOTHAM GAZETTE (July 20, 2009), <http://www.gothamgazette.com/index.php/state/266-parents-in-prison-children-in-foster-care>.

¹⁰ Crary, *supra* note 1.

¹¹ *Id.*

¹² *Id.*

¹³ Though many TPR cases feature defendants that are not nearly as sympathetic as Christina Voight, all defendants should enjoy the same rights, regardless of the facts of their particular case. In fact, it is the more unsympathetic defendants that may be in *more* need of representation, as proving their case is likely to be more difficult.

¹⁴ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").

¹⁵ See U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . .").

¹⁶ See generally U.S. CONST. (containing no explicit language regarding a right to counsel in civil proceedings).

¹⁷ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 32 (1981).

¹⁸ *In re Parental Rights as to N.D.O.*, 115 P.3d 223, 225 (Nev. 2005).

parental rights.¹⁹ Nevada must join the forty-five other states²⁰ and declare an absolute right to counsel in TPR proceedings, both at trial and on appeal.

Since the *Lassiter* decision, legal scholars across the country have argued for the adoption of “Civil Gideon.”²¹ In *Gideon v. Wainwright*, the Court recognized that the Sixth Amendment right to counsel in criminal proceedings is a fundamental right, and it therefore applies to the states through the Due Process Clause of the Fourteenth Amendment.²² The support for a broader right to counsel can be traced back as far as the Magna Carta.²³ The modern movement, though, has certainly gained momentum in the aftermath of the *Gideon* and *Lassiter* decisions.²⁴

The term “Civil Gideon” is misleading, however, as it implies a push towards an absolute right to counsel in civil proceedings similar to the fundamental Sixth Amendment right to counsel as recognized in *Gideon v. Wainwright*.²⁵ Most scholars generally do not advocate the creation of such a broad right.²⁶ Instead, the proponents of Civil Gideon argue for the right to counsel in civil proceedings only where fundamental interests or basic human needs are at stake.²⁷

The right to be the parent to one’s child is so fundamental that defendants threatened with the termination of that right should have a categorical right to counsel in such proceedings. While many of these arguments could apply to every state and to the federal government, this Note will focus specifically on the status of Nevada law and the corresponding need for change.

Part I begins with a general discussion of the rights of the indigent defendant in TPR proceedings, including the distinctions between criminal and civil rights to counsel, a history of the relevant federal cases, and an examination of the approaches of the fifty states and of foreign nations. Part II introduces the history of the legislative and judicial law regarding Civil Gideon in Nevada. Part III identifies the failures of the case-by-case approach created in *Lassiter*. This section will include a general analysis of the implications of *Lassiter* and a

¹⁹ 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, 781 (2013) (noting that forty-four states provided a categorical right to counsel in 2013); see also *In re T.M.*, 319 P.3d 338, 355 (Haw. 2014) (making Hawaii the forty-fifth state to provide this right).

²⁰ See Pollock, *supra* note 19; see also *In re T.M.*, 319 P.3d at 355.

²¹ See, e.g., Sarah Dina Moore Alba, Note, *Searching for the “Civil Gideon”: Procedural Due Process and the Juvenile Right to Counsel in Termination Proceedings*, 13 U. PA. J. CONST. L. 1079, 1081 (2011) (discussing the “robust support for a Civil Gideon”).

²² *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963).

²³ See Ward B. Coe III & Debra Gardner, *A Right to Counsel in Critical Civil Cases and the Role of the Private Bar*, 47 MD. B.J., July–Aug. 2014, at 12, 14.

²⁴ See *id.*

²⁵ John Pollock & Michael S. Greco, *It’s Not Triage If the Patient Bleeds Out*, 161 U. PA. L. REV. PENNUMBRA 40, 40 n.1 (2012).

²⁶ Coe & Gardner, *supra* note 23, at 15.

²⁷ *Id.*

specific examination of the ramifications of Nevada's current approach. Finally, part IV proposes creating a categorical right to counsel in TPR proceedings.

I. THE INDIGENT DEFENDANT IN TERMINATION OF PARENTAL RIGHTS CASES, GENERALLY

The Supreme Court has recognized a right to counsel on a case-by-case basis in civil cases, including in TPR proceedings.²⁸ The overwhelming majority of the states have since recognized the importance of counsel in these proceedings and have created their own right through either legislative or judicial action.²⁹ To understand this disparity between state and federal law, it is important to recognize the different constitutional rights afforded to the criminal and civil defendants.

A. *The Divergent Rights of the Indigent Defendant in Criminal and Civil Proceedings*

There can be no doubt that our justice system treats the indigent civil defendant differently than the indigent criminal defendant. Criminal defendants are guaranteed the right to counsel;³⁰ civil defendants are not.³¹ The U.S. Constitution is the source of this disparity.

1. *The Sixth Amendment: Indigent Defendants in Criminal Proceedings*

While the Constitution provides no explicit right to counsel in civil proceedings,³² the Bill of Rights clearly enumerates a right to counsel in criminal proceedings. The Sixth Amendment's final clause states,

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defence.*³³

In *Gideon*, the Supreme Court held the right to counsel in criminal proceedings is a fundamental right and incorporated it to the states through the

²⁸ See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31 (1981).

²⁹ See Pollock, *supra* note 19 (noting that forty-four states provided a categorical right to counsel in 2013); see also *In re T.M.*, 319 P.3d 338, 355 (Haw. 2014) (making Hawaii the forty-fifth state to provide this right).

³⁰ U.S. CONST. amend. VI.

³¹ See generally U.S. CONST. (containing no explicit language regarding a right to counsel in civil proceedings).

³² *Id.*

³³ U.S. CONST. amend. VI (emphasis added).

Fourteenth Amendment's Due Process Clause.³⁴ In support of this holding, the Court made several observations: (1) governments allocate significant funds toward the prosecution of criminal defendants;³⁵ (2) that the government and the affluent do not hesitate to enlist the aid of an attorney shows the necessity of counsel;³⁶ (3) even the most intelligent layman is likely to have no skill in the law;³⁷ and (4) an unrepresented innocent person may still be found guilty if he does not know how to prove that he is innocent.³⁸

2. *No Constitutional Right to Counsel in Civil Proceedings*

Conversely, the Court has recognized no such corresponding right in civil proceedings.³⁹ Although most civil cases deal with issues that do not threaten a party's fundamental interests, some claims do rise to this level. For example, courts jail thousands of defendants daily in civil contempt for failing to pay child support.⁴⁰ In fact, although Nevada has a criminal statute for nonpayment of child support,⁴¹ family court judges may still hold a nonpaying defendant in civil contempt.⁴² Both proceedings carry the possible penalty of incarceration.⁴³ Despite the possible loss of liberty in the latter situation, the defendant has no right to an attorney.⁴⁴ This reality does not comport with the principles the Supreme Court addressed in *Gideon*.⁴⁵

Similarly, defendants in TPR proceedings face the loss of an interest possibly even more compelling than their own physical liberty—the right to be a parent to their own children. The Supreme Court noted:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children “come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.”⁴⁶

³⁴ *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963) (holding that the right to counsel in criminal proceedings is a “fundamental right”).

³⁵ *Id.* at 344.

³⁶ *Id.*

³⁷ *Id.* at 345 (citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

³⁸ *Id.* (citing *Powell*, 287 U.S. at 69).

³⁹ See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31–32 (1981).

⁴⁰ Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 95 (2008).

⁴¹ See NEV. REV. STAT. § 201.020 (2013).

⁴² See *Rodriguez v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 102 P.3d 41, 43 (Nev. 2004).

⁴³ See NEV. REV. STAT. § 201.020; *Rodriguez*, 102 P.3d at 43.

⁴⁴ See *Rodriguez*, 102 P.3d at 43.

⁴⁵ See *supra* text accompanying notes 34–38.

⁴⁶ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (alteration in original) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

Because the Constitution is silent on the right to counsel in civil proceedings, such a right can only be derived from the Fifth and Fourteenth Amendments. The Fifth Amendment provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”⁴⁷ This constitutional command applies only to the federal government.⁴⁸ The Fourteenth Amendment extends its application to state governments, providing that “nor shall any State deprive any person of life, liberty, or property, without due process of law.”⁴⁹ It is from these due process guarantees that a right to counsel in termination of parental rights proceedings originates.⁵⁰

B. Supreme Court Jurisprudence Regarding Right to Counsel in Civil Proceedings

The U.S. Supreme Court has delivered two key opinions relevant to the civil right to counsel. *Mathews* created the due process test and *Lassiter* applied that test to conclude that civil defendants are not constitutionally entitled to an attorney.⁵¹

1. The Mathews v. Eldridge Test

Any due process analysis must begin by applying the test the Supreme Court created in *Mathews v. Eldridge*.⁵² There, the Court considered a challenge to administrative procedures that resulted in the termination of the plaintiff’s Social Security disability payments.⁵³ The Court found that the existing administrative procedures adequately protected the plaintiff’s due process interests.⁵⁴ In doing so, the Court created a three-pronged balancing test for due process claims, by which a court must consider

- (1) the private interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and
- (3) the Government’s interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.⁵⁵

⁴⁷ U.S. CONST. amend. V.

⁴⁸ *Barron v. City of Baltimore*, 32 U.S. 243, 247 (1833) (holding “the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states”).

⁴⁹ U.S. CONST. amend. XIV; *see, e.g.*, *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment’s guarantee of freedom of speech to the states through the Fourteenth Amendment).

⁵⁰ *See infra* Part IV.

⁵¹ *See infra* Part I.B.

⁵² *See Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

⁵³ *Id.* at 319–20.

⁵⁴ *Id.* at 339–40.

⁵⁵ *Id.* at 321.

Unlike the absolute right to counsel provided to criminal defendants under the Sixth Amendment, this due process analysis must occur on a case-by-case basis. However, even the Sixth Amendment right to counsel for criminal defendants was determined on a case-by-case basis until the Court expressly overruled such analysis in *Gideon*.⁵⁶

2. *The Lassiter Setback*

The Court first applied the *Eldridge* factors to involuntary termination of parental rights proceedings in *Lassiter v. Department of Social Services of Durham County*.⁵⁷ There, after the petitioner, Abby Lassiter, was imprisoned pursuant to a second-degree murder conviction, the local Department of Social Services petitioned to terminate her parental rights.⁵⁸ The trial court declined to delay the hearing so that Ms. Lassiter could seek counsel, and it neglected to consider her indigence.⁵⁹ The court terminated Ms. Lassiter's parent rights, citing her failure to contact her infant son for more than two years or to plan for his future.⁶⁰ The Supreme Court granted certiorari.⁶¹

In a major setback to proponents of the Civil Gideon movement, the Court held that the Due Process Clause does not mandate the appointment of counsel in TPR proceedings.⁶² Instead, the Court declared that the trial court is to make such a determination on a case-by-case basis by applying the *Eldridge* factors.⁶³ The Court noted:

Here, as in *Scarpelli*, “[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements,” since here, as in that case, “[t]he facts and circumstances . . . are susceptible of almost infinite variation.”⁶⁴

The Court then applied the *Mathews v. Eldridge* factors to Ms. Lassiter's circumstances and noted that (1) no allegations implicated criminal acts; (2) the hearing required no expert witnesses; (3) the area of law was not troublesome; and (4) most importantly, the presence of counsel would not have made a difference.⁶⁵ Though the private interest at stake was high, the Court determined that the risk of erroneous deprivation of that interest was low,⁶⁶ and therefore, the failure of the trial court to appoint counsel for Ms. Lassiter did not deprive

⁵⁶ *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

⁵⁷ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27–32 (1981).

⁵⁸ *Id.* at 20–21.

⁵⁹ *Id.* at 22.

⁶⁰ *Id.* at 23–24.

⁶¹ *Id.* at 24.

⁶² *Id.* at 32.

⁶³ *See id.*

⁶⁴ *Id.* (alterations in original) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

⁶⁵ *Id.* at 32–33.

⁶⁶ *Id.* at 33.

her of her due process rights.⁶⁷ The implications of *Lassiter* are troubling. *Lassiter* “stands for the proposition that a drunken driver’s night in the cooler is a greater deprivation of liberty than a parent’s permanent loss of rights in a child.”⁶⁸

C. *An Overview of the States’ Approaches to Right to Counsel in TPR Proceedings*

The number of states providing an attorney, by law, in TPR proceedings has steadily increased—even in the wake of the *Lassiter* decision.⁶⁹ This suggests the states recognize the fundamental rights at risk in these proceedings. Whatever the reason, the progress in the states is encouraging.

1. *States’ Approaches Before Lassiter*

At the time of the *Lassiter* decision, thirty-three states and the District of Columbia had either a statute or binding precedent that provided for a categorical right to counsel in termination proceedings.⁷⁰ The *Lassiter* Court, in an apparent acknowledgment of the dangers of its holding, noted this fact, stating that its “opinion today [denying a Constitutional right to counsel in TPR cases] in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.”⁷¹

2. *States’ Approaches After Lassiter*

Any fears that the *Lassiter* decision would convince these thirty-three states to roll back their added protections were soon dispelled. Mississippi was the only state that retreated to a case-by-case approach after *Lassiter*.⁷² By 1997, forty-four states offered a categorical right to counsel in TPR cases.⁷³ The other six states—Delaware, Hawaii, South Carolina, Tennessee, Wyoming, and Mississippi—all employed a case-by-case determination using the *Eldridge* factors.⁷⁴

⁶⁷ *Id.*

⁶⁸ Douglas J. Besharov, *Terminating Parental Rights: The Indigent Parent’s Right to Counsel After Lassiter v. North Carolina*, 15 FAM. L.Q. 205, 221 (1981).

⁶⁹ See *infra* Part I.C.1–2.

⁷⁰ Pollock, *supra* note 19.

⁷¹ *Lassiter*, 452 U.S. at 34.

⁷² See Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States’ Response to Lassiter*, 14 TOURO L. REV. 247, 262 (1997). However, this is misleading. Mississippi is counted among the thirty-three states with categorical approaches in the *Lassiter* decision only because petitioner’s brief claimed it to be true. *Id.* Mississippi repealed that statute, though, two years prior to the *Lassiter* decision. *Id.*

⁷³ See *id.* at 276–77.

⁷⁴ See *id.*

Currently, state law shows little change since 1997.⁷⁵ In 2008, South Carolina yielded to the Civil Gideon movement when it passed legislation declaring, “[p]arents, guardians, or other persons subject to a termination of parental rights action are entitled to legal counsel. Those persons unable to afford legal representation *must* be appointed counsel by the family court”⁷⁶ In 2010, Tennessee followed suit when it enacted a statute that entitles parents to “representation by legal counsel at all stages of any proceeding . . . involving . . . [t]ermination of parental rights.”⁷⁷ Finally, in 2014, the Supreme Court of Hawaii declared that the due process clause of the Hawaii Constitution “guaranteed the right to court-appointed counsel in termination proceedings.”⁷⁸ Currently, forty-five states and the District of Columbia provide indigent defendants with a categorical right to counsel in termination of parental rights proceedings.⁷⁹

Unfortunately, two states that once provided a categorical right to counsel in TPR cases have since restricted the right.⁸⁰ Minnesota converted to the case-by-case approach when it modified its statute to require the appointment of counsel only when the court “*feels* that such an appointment is appropriate.”⁸¹ Nevada is the only other state to retreat from its previously afforded protections.⁸² Delaware, Mississippi, and Wyoming have all maintained their case-by-case approach.⁸³

Nevertheless, the right to counsel has continued to expand nationwide. Importantly, states that already provide the right have expanded its application.⁸⁴ These gains have occurred both legislatively and judicially,⁸⁵ and states have expanded both the legal issues⁸⁶ and the procedural stages⁸⁷ to which the right applies. This trend demonstrates that states continue to favor expanding the

⁷⁵ See Young, *supra* note 72, at 276–77; see also Pollock, *supra* note 19, at 781 n.76.

⁷⁶ S.C. CODE ANN. § 63-7-2560(A) (2010) (emphasis added).

⁷⁷ TENN. CODE ANN. § 37-1-126(a)(2)(B)(ii) (West 2013).

⁷⁸ *In re T.M.*, 319 P.3d 338, 355 (Haw. 2014).

⁷⁹ See Pollock, *supra* note 19 (noting that forty-four states provided a categorical right to counsel in 2013); see also *In re T.M.*, 319 P.3d at 355 (making Hawaii the forty-fifth state to provide this right).

⁸⁰ See Young, *supra* note 72, at 276–77; see also Pollock, *supra* note 19, at 781 n.76.

⁸¹ MINN. STAT. ANN. § 260C.163(3)(b) (West 2012) (emphasis added).

⁸² See Young, *supra* note 72, at 276–77; see also Pollock, *supra* note 19, at 781 n.76; *infra* Part II.

⁸³ See Pollock, *supra* note 19, at 781 n.76.

⁸⁴ See Alba, *supra* note 21, at 1091.

⁸⁵ *Id.*

⁸⁶ *Id.* (showing the establishment of the right to counsel for “cases involving child custody, involuntary commitment and guardianship, orders of protection, and civil contempt”).

⁸⁷ See Patricia C. Kussmann, Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 92 A.L.R.5th Art. 379 (2001) (showing the establishment of the right to counsel in pretermination investigations, in review proceedings following dependency hearings, and in appellate proceedings).

right to counsel in civil proceedings—particularly those that involve “critical issues affecting basic human needs.”⁸⁸

Those states that still use the case-by-case approach deny indigent defendants counsel for a wide variety of reasons.⁸⁹ For example, some states deny a request for counsel if it is not timely made.⁹⁰ Others may deny counsel when the defendant fails to appear.⁹¹ One court in Tennessee denied counsel to two indigent parents, because they “were active participants in the termination proceeding.”⁹² In doing so, the court distinguished the parents’ education from other, more “poorly educated” defendants.⁹³ This was a peculiar approach, considering that the mother had only a GED and the father had only completed the eighth grade.⁹⁴

D. *The Right Internationally*

In a nation that calls itself “the land of the free”⁹⁵ and that regularly castigates the human rights records of other countries,⁹⁶ the United States is far from the model nation when it comes to the civil right to counsel. English common law granted the right to counsel for indigent defendants in civil cases as far back as the thirteenth century.⁹⁷ Parliament codified the right in 1495.⁹⁸

Additionally, most other European countries have laws providing a civil right to counsel.⁹⁹ France recognized the right in 1852, Italy in 1865, and Germany in 1877, with the rest passing “Civil Gideon” laws in the late 1800s and

⁸⁸ Alba, *supra* note 21, at 1091 (quoting CAL. GOV’T CODE § 68651 (West 2011)).

⁸⁹ See Kussmann, *supra* note 87.

⁹⁰ See, e.g., K.D.G.L.B.P. v. Hinds Cty. Dep’t of Human Servs., 771 So. 2d 907, 911 (Miss. 2000) (finding no right to counsel for an indigent defendant because “she never asked for a continuance or for additional time to seek substitute counsel”).

⁹¹ See, e.g., *In re Angela R.*, 260 Cal. Rptr. 612, 624 (Ct. App. 1989) (finding no requirement to appoint counsel where a defendant fails to appear because the statute only required such appointment “for an indigent parent who *appears* without counsel”).

⁹² *In re Fillinger*, No. 02A01-9409-JV-00223, 1996 WL 271748, at *5 (Tenn. Ct. App. May 23, 1996).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See The Star-Spangled Banner Lyrics, SMITHSONIAN, <http://amhistory.si.edu/starspangledbanner/the-lyrics.aspx> (last visited Nov. 6, 2015).

⁹⁶ See Robin Wright, *Dictators Upbraid U.S. for Racial Unrest in Ferguson*, WALL ST. J.: WASH. WIRE (Aug. 19, 2014, 4:38 PM), <http://blogs.wsj.com/washwire/2014/08/19/dictators-upbraid-u-s-for-racial-unrest-in-ferguson>.

⁹⁷ AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 112A, at 6 (2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/l_s_sclaid_resolution_06a112a.authcheckdam.pdf.

⁹⁸ *Id.*

⁹⁹ *Id.* at 7.

early 1900s.¹⁰⁰ Additionally, much of Canada, New Zealand, and Australia provide indigent civil defendants with the right to counsel.¹⁰¹

Notably, most foreign jurisdictions that provide this right do so for *all* civil cases.¹⁰² This presumably would include cases that threaten no fundamental interest or basic human need. Of the forty-five American states that currently guarantee the right to counsel in TPR proceedings, *none* has protections as broad as most of the aforementioned countries.¹⁰³

II. THE HISTORY OF CIVIL GIDEON IN NEVADA

The history of Civil Gideon in Nevada is a confusing one. The Nevada Supreme Court has oscillated from finding no right to counsel in TPR cases, to holding that the right exists, to again finding no such right in Nevada—all in the absence of underlying substantive statutory changes by the Nevada Legislature.¹⁰⁴ Ultimately, *In re Parental Rights as to N.D.O.* stands as binding law in Nevada, stripping the right to counsel from TPR defendants.¹⁰⁵

A. Pre-Lassiter

The Nevada Supreme Court recognized the serious implications of a termination of parental rights proceeding when it stated that the “termination of a parent’s rights to her child is tantamount to imposition of a civil death penalty.”¹⁰⁶ While Nevada acknowledges the fundamental interests at stake, it remains one of only five states that do not guarantee indigent defendants a categorical right to counsel in termination of parental rights proceedings.¹⁰⁷ In terms of due process rights, the Nevada Constitution mirrors the U.S. Constitution. Both declare that no individual may “be deprived of life, liberty, or property, without due process of law.”¹⁰⁸

Nevada’s legislature first addressed the issue in 1953, when it passed the awkwardly titled “AN ACT relating to the termination of parental rights over minors; providing a procedure therefor; defining the jurisdiction of courts in relation thereto, and other matters relating thereto.”¹⁰⁹ The statute stated that “[i]n any [TPR] proceeding the judge may appoint an attorney to act on behalf

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See infra* Part II.A–C.

¹⁰⁵ *See In re Parental Rights as to N.D.O.*, 115 P.3d 223, 225–26 (Nev. 2005).

¹⁰⁶ *Drury v. Lang*, 776 P.2d 843, 845 (Nev. 1989).

¹⁰⁷ *See Pollock*, *supra* note 19 (noting that forty-four states provided a categorical right to counsel in 2013); *see also In re T.M.*, 319 P.3d 338, 355 (Haw. 2014) (making Hawaii the forty-fifth state to provide this right).

¹⁰⁸ U.S. CONST. amend. V; NEV. CONST. art. I, § 8.

¹⁰⁹ 1953 Nev. Stat. 184.

of such minor person, or on behalf of the petitioner.”¹¹⁰ It was silent concerning counsel for the defendant.¹¹¹

The Nevada Supreme Court first considered the TPR defendant’s right to counsel in the 1969 *Casper v. Huber* decision.¹¹² There, a Nevada trial court determined that Gerald Casper was an unfit father to his ten-year-old daughter Deborah and entered an order terminating his parental rights.¹¹³ Casper appealed and requested an appointed attorney to represent him on the appeal.¹¹⁴ The Court noted the relevant statute only permitted the appointment of counsel to represent the party petitioning for the termination of parental rights or for the affected minor.¹¹⁵ Therefore, defendants in TPR proceedings had no statutory right to counsel.¹¹⁶

The Court in *Casper* declined to consider the father’s due process claim under either Article 1, section 8 of the Nevada Constitution or the Due Process Clause of the Fourteenth Amendment, because “the appeal [was] clearly frivolous and appointed counsel would not [have been] of any use.”¹¹⁷ The Court denied his request for counsel, found that the termination was in the best interests of the child, and dismissed the appeal as frivolous.¹¹⁸ Casper petitioned the U.S. Supreme Court for a writ of certiorari.¹¹⁹ The Court denied his petition.¹²⁰

B. *Between Lassiter and In re N.D.O*

Only thirteen days after the *Lassiter* decision, Nevada amended the 1953 statute.¹²¹ It added the requirement that “[i]f the parent or parents of the child desire to be represented by counsel, but are indigent, the court *may* appoint an attorney for them.”¹²² This language has since remained unchanged and is currently codified as NRS 128.100(2).¹²³

In 1996, the Nevada Supreme Court decided *In re Parental Rights as to Weinper*, noting that *other states* have determined “as a matter of due process, parents are entitled to: (1) a clear and definite statement of the allegations of the petition; (2) notice of the hearing and the opportunity to be heard or defend;

¹¹⁰ *Id.* at 187.

¹¹¹ *See id.*

¹¹² *Casper v. Huber*, 456 P.2d 436, 436–37 (Nev. 1969).

¹¹³ *Id.*

¹¹⁴ *Id.* at 437.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 437–38.

¹¹⁹ *See Casper v. Huber*, 397 U.S. 1012 (1970).

¹²⁰ *Id.*

¹²¹ *See Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (decided on June 1, 1981); 1981 Nev. Stat. 1750 (approved on June 14, 1981).

¹²² 1981 Nev. Stat. at 1755 (emphasis added).

¹²³ *See NEV. REV. STAT.* § 128.100(2) (2013).

and (3) *the right to counsel*.”¹²⁴ The Court affirmed the trial court’s order terminating parental rights because the defendant had received all of the above considerations.¹²⁵ However, the Court did not state whether the right to counsel was a requirement in Nevada.¹²⁶

One year later, in *In re Parental Rights as to Bow*, the Nevada Supreme Court again considered the right to counsel in TPR cases.¹²⁷ There, the defendant appealed the termination of her parental rights on the basis that, although she was provided counsel at the final termination hearing, she was denied counsel at other critical stages of the proceedings.¹²⁸ The Court discussed the *Weinper* Court’s observation that other states guaranteed the right to counsel in TPR proceedings.¹²⁹ Curiously, though, the *Bow* Court implied that the right to counsel was a *holding* of the *Weinper* Court.¹³⁰ Nevertheless, the Court affirmed the trial court’s termination of parental rights because the defendant was provided counsel at the final hearing.¹³¹

In *In re Parental Rights as to Daniels*, the Court reaffirmed the absolute right to counsel in TPR proceedings.¹³² The issue before the Court concerned the right to counsel at an earlier stage of the proceedings, when the children were only *temporarily* removed from the father’s custody.¹³³ The Court determined that the temporary removal of children does not require the same level of procedural safeguards as permanent removal, because the interests at stake are not as vital.¹³⁴ Thus, the Court affirmed the decision to terminate Daniels’s parental rights.¹³⁵

In his dissent, however, Chief Justice Springer noted that once a child is temporarily removed from his parents, the probability that the removal will become permanent is greatly increased.¹³⁶ He noted that even the trial judge was troubled by the categorical lack of a due process right to counsel in such cases.¹³⁷ Justice Springer concluded that “because of the ‘inherent imbalance of

¹²⁴ *In re Parental Rights as to Weinper*, 918 P.2d 325, 328 (Nev. 1996) (emphasis added), *overruled by In re Termination of Parental Rights as to N.J.*, 8 P.3d 126 (2000) (overruled on an unrelated issue).

¹²⁵ *Id.* at 328, 330.

¹²⁶ *See id.* at 328.

¹²⁷ *In re Parental Rights as to Bow*, 930 P.2d 1128, 1129 (Nev. 1997), *overruled by In re Termination of Parental Rights as to N.J.*, 8 P.3d 126 (Nev. 2000) (overruled on an unrelated issue), *and abrogated by In re Parental Rights as to N.D.O.*, 115 P.3d 223 (Nev. 2005).

¹²⁸ *Id.* at 1129, 1134.

¹²⁹ *Id.* at 1134.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *In re Parental Rights as to Daniels*, 953 P.2d 1, 5 (Nev. 1998), *overruled by In re N.J.*, 8 P.3d 126 (overruled on an unrelated issue), *and abrogated by In re N.D.O.*, 115 P.3d 223.

¹³³ *Id.*

¹³⁴ *See id.* at 7.

¹³⁵ *Id.* at 10.

¹³⁶ *Id.* at 12 (Springer, C.J., dissenting).

¹³⁷ *Id.*

experience and expertise between the parent and the state,' [he] would adopt a *per se* rule that would provide counsel in all cases in which the state seeks removal of a child from its home."¹³⁸

C. *Post In re N.D.O.*

In 2005, the legal landscape regarding the right to counsel in TPR proceedings shifted dramatically. In *In re Parental Rights as to N.D.O.*, the Court abrogated *Weinper*, *Bow*, and *Daniels* when it held "that no absolute right to counsel in termination proceedings exists in Nevada."¹³⁹ It went on to declare, "[o]ur statute contemplates a case-by-case determination of whether due process demands the appointment of counsel."¹⁴⁰ In a major setback to Nevada's Civil Gideon movement, the Court retreated from the progress it had made.

The case involved a proceeding to terminate Letesheia O.'s parental rights to her three children, referred to only as N.D.O., T.L.O. and T.O.¹⁴¹ The case was originally heard in the Eighth Judicial District Court, Family Court Division of Clark County, Nevada.¹⁴² The district court assigned counsel to Letesheia O., as state precedent required.¹⁴³ Nevertheless, the court found in favor of the state and terminated her parental rights.¹⁴⁴

The court based its decision on Letesheia's poor record as a parent.¹⁴⁵ She had been in and out of jail several times for theft convictions.¹⁴⁶ The state asserted that much of this theft was to support her cocaine habit.¹⁴⁷ Additionally, the state had previously removed her children on multiple occasions stemming from allegations of abuse and neglect.¹⁴⁸ Twice, the court mandated a case plan in which Letesheia would take classes on substance abuse, domestic violence, and parenting and would undergo counseling.¹⁴⁹ Both times Letesheia only minimally complied with the mandates.¹⁵⁰ During this time, the children lived primarily with their maternal grandmother.¹⁵¹ In fact, at the time of the TPR proceedings, Letesheia had been in jail for nearly twelve out of the previous eighteen months.¹⁵²

¹³⁸ *Id.* at 13 (quoting *Brown v. Guy*, 476 F. Supp. 771, 773 (D. Nev. 1979)).

¹³⁹ *In re Parental Rights as to N.D.O.*, 115 P.3d 223, 225 (Nev. 2005).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 223–24.

¹⁴² *Id.* at 223.

¹⁴³ *See id.* at 226.

¹⁴⁴ *Id.* at 224, 228.

¹⁴⁵ *See id.* at 224.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

Letesheia appealed to the Nevada Supreme Court on the basis that she had received ineffective assistance of counsel.¹⁵³ She claimed that her attorney had repeatedly failed to object to the admittance of hearsay evidence, that he failed to object to evidence regarding her prior felony convictions, and that these errors prejudiced her proceeding.¹⁵⁴

The Court first considered whether Nevada requires the provision of counsel in TPR proceedings.¹⁵⁵ It noted, “[r]ecent precedent may have generated confusion as to whether, and when, a right to counsel exists.”¹⁵⁶ According to the Court, the *Weinper* Court merely observed that other states provided the right to counsel in these proceedings, which subsequent opinions mischaracterized as a mandate for the provision of counsel in Nevada TPR proceedings.¹⁵⁷ Returning to the precise language of the Nevada statute, the Court held that “no absolute right to counsel in termination proceedings exists in Nevada” and that the statute required only a case-by-case approach.¹⁵⁸

The Court relied solely on the Fourteenth Amendment to the U.S. Constitution and on the relevant federal jurisprudence regarding the Due Process Clause.¹⁵⁹ The Court did not consider whether the Nevada Constitution’s Due Process Clause provided more protection for these indigent defendants.¹⁶⁰

Still, the Court applied the *Mathews v. Eldridge* test and determined that due process did not require the appointment of counsel for Letesheia.¹⁶¹ The Court quickly dispensed with the first and third prongs of the test, finding that the parent’s interests in avoiding the “civil death penalty” and the state’s interests in protecting children from neglect and abuse are both “invariably . . . strong in termination proceedings.”¹⁶²

The Court then considered the second prong of the *Eldridge* test—the risk of erroneous deprivation of the interest and the value of additional safeguards.¹⁶³ The record reflected that the trial court admitted a number of hearsay statements without objection from Letesheia’s attorney.¹⁶⁴ Both the case manager and the investigator for the Division of Child and Family Services (DCFS) testified that the children told them they were happy with their grandmother and that the grandmother wanted to keep them.¹⁶⁵ Neither the grandmother nor

¹⁵³ *Id.* at 225.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 225–26.

¹⁵⁶ *Id.* at 225.

¹⁵⁷ *Id.*; see *supra* Part II.B.

¹⁵⁸ *In re N.D.O.*, 115 P.3d at 225.

¹⁵⁹ *Id.* at 226.

¹⁶⁰ See *id.* at 225–26.

¹⁶¹ *Id.* at 226–27.

¹⁶² *Id.* at 226.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

the children testified in court.¹⁶⁶ The Court determined that this was harmless error, because those same statements were included in the DCFS reports, which were already admitted in evidence.¹⁶⁷ Thus, with or without effective counsel, the statements would have been admitted.¹⁶⁸

It is important to note that this ruling appears to misapply Nevada's hearsay rules.¹⁶⁹ Thus, a competent attorney may have successfully excluded these statements. That the Nevada courts are confused on the application of the hearsay rules further supports the need for an attorney in all termination of parental rights proceedings.

Finally, the Court found that it was in the best interest of the children to terminate Letesheia's parental rights.¹⁷⁰ It partially based its finding on the fact that Letesheia failed to present evidence rebutting the presumption that termination was in the children's best interest.¹⁷¹ While the record is silent concerning Letesheia's educational background,¹⁷² it seems probable that she was unaware of this statutory presumption, of her requirement to rebut that presumption, or of how one could rebut the presumption. An effective attorney could have assisted her in this regard.

Ultimately, the Court affirmed the district court's decision. It found that because she was not entitled to counsel, Letesheia had no viable claim for ineffective assistance of counsel.¹⁷³ Unfortunately, the holding of *In re Parental Rights as to N.D.O.* remains valid law in the state of Nevada. Indigent defendants are no longer entitled to an attorney when the state seeks to terminate their parental rights.¹⁷⁴

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 226–27.

¹⁶⁹ The DCFS reports, themselves, were likely admissible under the Nevada hearsay exception for public records and reports. NEV. REV. STAT. § 51.155 (2013) (“Records, reports, statements or data compilations, in any form, of public officials or agencies are not inadmissible under the hearsay rule if they set forth: 1) The activities of the official or agency; 2) Matters observed pursuant to duty imposed by law; or 3) In civil cases and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or the method or circumstances of the investigation indicate lack of trustworthiness.”). The notes in the report regarding the statements of the children and the grandmother, on the other hand, were likely inadmissible hearsay. NRS 51.067 plainly states that “[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms to an exception to the hearsay rule provided in this chapter.” *Id.* § 51.067 (2013). In other words, each level of hearsay must fall within an exception to be admissible.

¹⁷⁰ *In re N.D.O.*, 115 P.3d at 227.

¹⁷¹ *Id.* at 227 n.19.

¹⁷² *See id.* at 224–28.

¹⁷³ *Id.* at 227.

¹⁷⁴ *Id.* at 225.

III. THE PROBLEM WITH THE CASE-BY-CASE APPROACH

The case-by-case approach, as used by only five states,¹⁷⁵ is wrought with problems.¹⁷⁶ Scholars have consistently noted the method's flaws,¹⁷⁷ yet it persists in Nevada. Unfortunately, data suggests that defendants are suffering as a result, especially in Nevada's appellate process.¹⁷⁸

A. *Case-by-Case Approaches, Generally*1. *Justice Blackmun's Dissent in Lassiter*

The *Lassiter* decision was not unanimous.¹⁷⁹ It was a 5-4 decision, with Justices Blackmun, Brennan, Marshall, and Stevens all dissenting.¹⁸⁰ Justice Blackmun's dissent in *Lassiter* is compelling. In it, he argued that the Fourteenth Amendment requires the appointment of counsel for defendants in *every* TPR proceeding.¹⁸¹ Justice Blackmun noted a strange irony in the majority's reasoning:

The Court's analysis is markedly similar to mine; it, too, analyzes the three factors listed in *Mathews v. Eldridge*, and it, too, finds the private interest weighty, the procedure devised by the State fraught with risks of error, and the countervailing governmental interest insubstantial. Yet, rather than follow this balancing process to its logical conclusion, the Court abruptly pulls back and announces that a defendant parent must await a case-by-case determination of his or her need for counsel. Because the three factors "will not *always* be so distributed," reasons the Court, the Constitution should not be read to "requir[e] the appointment of counsel in *every* parental termination proceeding."¹⁸²

Justice Blackmun went on to state that the *Eldridge* test called for a case-by-case consideration of various decision-making *contexts*, not of various defendants within those contexts.¹⁸³ He noted that the Court had previously distinguished welfare recipients as a class of litigants¹⁸⁴ and had ruled on Social Security pre-termination procedures in general.¹⁸⁵ The *Lassiter* decision appears to stand in stark opposition to the rationale of the *Eldridge* court, which stated, "To be sure, credibility and veracity may be a factor in the ultimate dis-

¹⁷⁵ See Pollock, *supra* note 19 (noting that forty-four states provided a categorical right to counsel in 2013); see also *In re T.M.*, 319 P.3d 338, 355 (Haw. 2014) (making Hawaii the forty-fifth state to provide this right).

¹⁷⁶ See *infra* Part III.A-B.

¹⁷⁷ See *infra* Part III.A.2-6.

¹⁷⁸ See *infra* Part III.B.

¹⁷⁹ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 34-35 (1981).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 35 (Blackmun, J., dissenting) (alterations in original).

¹⁸² *Id.* at 48-49.

¹⁸³ *Id.* at 49.

¹⁸⁴ *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970)).

¹⁸⁵ *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 339-45 (1976)).

ability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.”¹⁸⁶

Additionally, Justice Blackmun noted the inherent problems in the *post hoc* analysis the majority adopted.¹⁸⁷ A case-by-case approach would require a state appellate court to review the record in search of evidence that the trial court erroneously deprived the defendant of his parental rights.¹⁸⁸ While “obvious blunders” would be apparent to the reviewing court, the subtle benefits that legal representation could have provided would require “imagination, investigation, and legal research focused on the particular case.”¹⁸⁹ Even with such a thorough review, it could still be impossible to discern the effect trained representation would have had on the outcome.¹⁹⁰

Finally, Justice Blackmun reasoned that a case-by-case approach would have other ancillary drawbacks.¹⁹¹ For instance, the requirement of an *ad hoc* review would increase the strain on the nation’s appellate courts.¹⁹² It would also carry with it additional monetary costs.¹⁹³

Justice Stevens authored a separate dissenting opinion, going one step further than Justice Blackmun:

In my opinion the reasons supporting the conclusion that the Due Process Clause of the Fourteenth Amendment entitles the defendant in a criminal case to representation by counsel apply with equal force to a case of this kind. The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless.¹⁹⁴

Justice Stevens hinged his dissent on fundamental fairness.¹⁹⁵ Considering the issue from this perspective—rather than balancing the costs—suggests a valuable realization: a parent’s right to her child is fundamental and demands a great level of legal protection.

¹⁸⁶ *Id.* at 50 (quoting *Mathews*, 424 U.S. at 344).

¹⁸⁷ *Id.* at 50–51.

¹⁸⁸ *See id.*

¹⁸⁹ *Id.* at 51.

¹⁹⁰ *Id.*

¹⁹¹ *See id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 59–60 (Stevens, J., dissenting).

¹⁹⁵ *See id.*

2. *Procedural Problems with the Case-by-Case Approach*

The case-by-case approach to the appointment of counsel in termination of parental rights proceedings presents a number of problems not inherent to a categorical approach. First, the case-by-case approach requires trial judges to evaluate, *in advance*, the difference that an attorney might make in the case.¹⁹⁶ This necessarily requires the judge to predict the testimonial, physical, and documentary evidence¹⁹⁷ and to determine the potential legal complexities and other demands the case may lay on the indigent defendant. Because it is impossible for judges to accurately make these predictions, let alone determine the potential disputed issues at trial, the defendant suffers the serious risk of being denied counsel to which he otherwise may have been entitled.¹⁹⁸

Second, the *Mathews v. Eldridge* balancing approach is more suited to application in an appellate proceeding—not at trial. This approach routinely requires trial judges to evaluate complex and nebulous concepts to determine whether due process considerations require the appointment of counsel.¹⁹⁹ Where one judge may interpret “the risk of erroneous deprivation” liberally, another may set the bar higher. Thus, the same set of facts may lead one judge to appoint counsel and another one to deny counsel. Surely, the use of the state’s tremendous power to separate a child permanently from its parents demands a less ambiguous standard than the case-by-case approach provides.

Finally, appellate review is insufficient, in many cases, to remedy the harm caused by the lack of counsel. As Justice Blackman noted in his dissent in *Lassiter*:

Determining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case. Even if the reviewing court can embark on such an enterprise in each case, it might be hard pressed to discern the significance of failures to challenge the State’s evidence or to develop a satisfactory defense. Such failures, however, often cut to the essence of the fairness of the trial, and a court’s inability to compensate for them effectively eviscerates the presumption of innocence. Because a parent acting *pro se* is even more likely to be unaware of controlling legal standards and practices, and unskilled in garnering relevant facts, it is difficult, if not impossible, to conclude that the typical case has been adequately presented.²⁰⁰

Furthermore, many indigent defendants never seek appellate review because they may be unaware of the right to appeal or may believe they have no chance of a reversal without the help of counsel.²⁰¹ Some may even be unaware

¹⁹⁶ Pollock & Greco, *supra* note 25, at 42.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 42–43.

¹⁹⁹ *See id.* at 43.

²⁰⁰ *Lassiter*, 452 U.S. at 51 (Blackmun, J., dissenting).

²⁰¹ Pollock & Greco, *supra* note 25, at 43.

of the option to appeal. In this regard, the denial of counsel also serves to disempower defendants in the appellate process.

3. *Special Considerations of Abuse and Neglect Proceedings*

While abuse and neglect proceedings are not *per se* termination of parental rights proceedings, they share enough similarities to justify their inclusion in this discussion. For example, when a Nevada court finds that a parent has abused or neglected his child, it has the authority to place the children permanently with a guardian.²⁰² Though this proceeding does not terminate the parental rights, the permanent removal of the child from the parent creates a similar result.

Moreover, the need for an attorney in abuse and neglect proceedings may be even more compelling than in a TPR case. First, evidence obtained in an abuse and neglect civil proceeding may later be used against the defendant to support criminal charges for the same disputed issues.²⁰³ Second, the evidence may also be used later to support a petition to permanently terminate the defendant's parental rights.²⁰⁴

John Pollock, coordinator for the National Coalition for a Civil Right to Counsel, addressed the disturbing issues that arise out of the potential for future proceedings based upon abuse and neglect proceedings.²⁰⁵ He noted that parents have the potential to incriminate themselves in these proceedings.²⁰⁶ Evidence obtained in an abuse and neglect proceeding will frequently be used to support future TPR proceedings.²⁰⁷ Appointing an attorney at the later TPR stage will be of limited use, as much of the fact finding will have been accomplished and admitted into the record in the abuse and neglect proceeding.²⁰⁸ As the cliché states, it is not possible to “un-ring the bell.”

4. *Private Termination Proceedings*

One could argue that when private parties, rather than the state, initiate termination of parental rights proceedings, such proceedings do not justify the automatic appointment of counsel for the defendant. The presumed logic behind such a claim is that, because the state is not taking action, the quasi-criminal aspect of the proceeding is absent. This notion, however, ignores one key fact: a successful private TPR petition will still result in the defendant los-

²⁰² See NEV. REV. STAT. § 432B.020 (2013) (defining abuse and neglect); *id.* § 432B.466 (setting forth the conditions for appointing a guardian).

²⁰³ Pollock, *supra* note 19, at 780.

²⁰⁴ *Id.*

²⁰⁵ See *id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

ing her parental rights.²⁰⁹ Thus, regardless of the party seeking termination, the parent's fundamental rights remain at risk.

Furthermore, state action is abundant in a TPR proceeding initiated by a private party. Often, there is little to no difference in the proceeding when a private party initiates it. For example, Nevada law allows "[t]he agency which provides child welfare services, the probation officer, or any other person, including the mother of an unborn child, . . . [to] file with the clerk of the court a petition" for termination of parental rights.²¹⁰ The statutes do not substantially distinguish privately initiated proceedings from publicly initiated proceedings.²¹¹ In terms of process and potential outcomes, it is irrelevant who initiates the petition.²¹²

Additionally, some states have attempted to argue that fiscal considerations justify denying a right to counsel in private termination proceedings.²¹³ Courts that have addressed this issue have routinely held that the state's interest in saving money is not as compelling as the parents' interest in their children.²¹⁴ Regardless of the reason that defendants are not afforded a categorical right to counsel, the case-by-case *Eldridge* approach becomes the unfortunate alternative.

5. *Due Process Inadequacies*

Even if one accepts the shaky premise that proper application of the *Mathews v. Eldridge* factors results in the appointment of counsel for all appropriate indigent defendants, the due process approach is wrought with pitfalls. Professor Rosalie Young notes six barriers to due process in termination of parental rights proceedings.²¹⁵ First, the definitions of "indigence" and "financial hardship" vary from state to state and from courthouse to courthouse.²¹⁶ This may result in defendants being denied counsel despite the inability to retain an attorney on their own.

²⁰⁹ See *id.* at 784.

²¹⁰ NEV. REV. STAT. § 128.040 (2013).

²¹¹ See *id.* §§ 128.005–.190 (listing Nevada's statutes pertaining to termination of parental rights).

²¹² See *id.* § 128.120 ("Any order made and entered by the court under the provisions of NRS 128.110 is conclusive and binding upon the person declared to be free from the custody and control of his or her parent or parents, and upon all other persons who have been served with notice by publication or otherwise, as provided by this chapter.").

²¹³ See *In re Adoption of K.L.P.*, 763 N.E.2d 741, 753 (Ill. 2002) (noting that the state withdrew its TPR petition so that prospective adoptive parents could begin adoption proceedings, where the defendant had no right to counsel and the state would not have the associated expense).

²¹⁴ *E.g., id.*; *In re Adoption of K.A.S.*, 499 N.W.2d 558, 565 (N.D. 1993).

²¹⁵ Young, *supra* note 72, at 263–66.

²¹⁶ *Id.* at 263.

Second, some states require that parents request an attorney; however, parents are not automatically informed of the right.²¹⁷ Frequently, these defendants are unaware that they may request counsel, or even that they *need* counsel.²¹⁸ This problem compounds after a defendant loses his parental rights at trial. The defendant who was ignorant of his right to counsel at the original proceeding is likely to be equally uninformed of his right to appeal.²¹⁹

Third, trial courts vary in their application of the “clear and convincing evidence” standard.²²⁰ An attorney is crucial to ensure that the courts do not slip below the standard’s requirements and instead evaluate the case under a “preponderance of the evidence” standard.

Fourth, where counsel is appointed but is inadequate, a reversal is rare.²²¹ Because the Fifth Amendment’s Due Process Clause does not confer a right to counsel in termination of parental rights proceedings, there can be no corresponding appeal based on ineffective assistance of counsel.²²² Even in states that allow such appeals, defendants have a monumental hurdle to overcome. To succeed, the defendant must show that the attorney was incompetent, that his incompetence led to an unfair trial, and that the result was not harmless error.²²³ This burden may become insurmountable when the defendant has no attorney to argue the appeal.

Fifth, appointed attorneys are often inadequately compensated.²²⁴ Because appointment of counsel in termination of parental rights proceedings is not a constitutional mandate, states may not feel compelled to allocate significant funding to the issue. Consequently, many attorneys may choose not to participate in TPR appointments.²²⁵ Moreover, those that do participate may not apply their usual degree of zealous representation to the case.²²⁶

Finally, though preliminary proceedings (such as abuse and neglect proceedings)²²⁷ may place crucial facts on the record and may implicate substantial rights, counsel may not be appointed until the initiation of a TPR petition.²²⁸ By that time, however, it may be too late. Hence, the due process approach fails to consider the potential implications of lesser proceedings. The categorical provision of counsel in TPR and all associated proceedings would eliminate this problem.

²¹⁷ *Id.* at 264.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See id.*

²²¹ *See id.* at 265.

²²² *See, e.g., In re Parental Rights as to N.D.O.*, 115 P.3d 223, 227 (Nev. 2005).

²²³ Young, *supra* note 72, at 265.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *See supra* Part III.A.3.

²²⁸ Young, *supra* note 72 at 265–66.

Furthermore, indigent defendants may have a greater need for an attorney than non-indigent defendants. Indigent defendants tend to be less educated than their non-indigent counterparts.²²⁹ In fact, many of the qualities that brought them under TPR review militate in favor of counsel. Some may have poor mental functioning or low IQ, be involved in crime, or suffer from drug addiction.²³⁰ Nevertheless, termination hearings may require defendants to participate in discovery, cross-examine witnesses, make objections, preserve issues for appeal, and determine and prove the relevant facts.²³¹ These tasks are difficult for even a well-educated layperson. It is a daunting endeavor for the uneducated defendant, especially one with the aforementioned problems.

6. *The Consequences of Pro Se Representation*

Notwithstanding the Supreme Court's finding that the presence of an attorney would not have affected Ms. Lassiter's case,²³² research suggests that adequate representation has a significant effect on trial outcomes.²³³ Because pro se defendants often lack knowledge of legal processes, they frequently lose due to a procedural error or default.²³⁴ Additionally, pro se defendants are unskilled in the practice of discovery and trial motions, which, when accomplished by skilled attorneys, often makes the difference between winning and losing a case.²³⁵

In fact, studies show a significant difference in the success rates of pro se defendants and represented defendants. For example, at contested proceedings in general, a party's odds of success are cut in half when she has no attorney.²³⁶ Even in relatively simple protective order proceedings, the numbers are strik-

²²⁹ See Kyung M. Lee, Comment, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 398 (2004) (noting a link between poverty and a lack of education of inmate populations).

²³⁰ See Richard C. Boldt, *Evaluating Histories of Substance Abuse in Cases Involving the Termination of Parental Rights*, 3 J. HEALTH CARE L. & POL'Y 135, 135 (1999) (discussing "the intersecting problems of parental substance abuse and child neglect and abuse" in TPR cases); Alexis C. Collentine, Note, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 HOFSTRA L. REV. 535, 542 (2005) (explaining that "parents with mental disabilities are more likely than the rest of the parental population to have their children removed and their parental rights terminated" (footnote omitted)).

²³¹ Young, *supra* note 72, at 257–58.

²³² Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 32–33 (1981).

²³³ See Alba, *supra* note 21, at 1095–98.

²³⁴ *Id.* at 1096–97.

²³⁵ *Id.* at 1097.

²³⁶ Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 72 (2007) (citing Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?*, in DIVORCE REFORM AT THE CROSSROADS 37, 64 (Stephen D. Sugarman & Herman Hill Kay eds., 1990)).

ing: the petitioning party with an attorney is successful 83 percent of the time.²³⁷ The pro se party wins only 32 percent of the same petitions.

Attorneys and judges frequently remark as to the disparity between represented and pro se defendants:

Lawyers acknowledge this problem and have released numerous resolutions, studies, and scholarly articles arguing the issue. Though their statements could arguably be colored by professional self interest, judges who preside over civil proceedings also acknowledge this reality. A judge who served on the California Court of Appeals observed that the countless cases he reviewed where a pro se party argued against a lawyer left him with serious doubts as to whether pro se litigants obtain fair hearings. This is true even despite the fact that courts hold pro se filings to less stringent standards than attorney filings. Many of these pro se litigants need the assistance of an attorney in order to obtain the fair hearing that is their constitutional right, but our current system leaves them to fend for themselves.²³⁸

As the *Gideon* Court astutely observed, “That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.”²³⁹

B. Analysis of the Current Nevada Statute and Its Applications

Section 128.100, the Nevada statute regarding the appointment of counsel for TPR proceedings, reads as follows:

1. In any proceeding for terminating parental rights, or any rehearing or appeal thereon, or any proceeding for restoring parental rights, the court may appoint an attorney to represent the child as his or her counsel and, if the child does not have a guardian ad litem appointed pursuant to NRS 432B.500, as his or her guardian ad litem. The child may be represented by an attorney at all stages of any proceedings for terminating parental rights. If the child is represented by an attorney, the attorney has the same authority and rights as an attorney representing a party to the proceedings.

2. If the parent or parents of the child desire to be represented by counsel, but are indigent, the court *may* appoint an attorney for them.

3. Each attorney appointed under the provisions of this section is entitled to the same compensation and expenses from the county as provided in NRS 7.125 and 7.135 for attorneys appointed to represent persons charged with crimes.²⁴⁰

1. Nevada Trial Statistics

NRS section 128.100 grants Nevada courts discretionary authority to appoint counsel. It is difficult to determine accurately how courts across the state

²³⁷ 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).

²³⁸ Alba, *supra* note 21, at 1097–98 (footnotes omitted).

²³⁹ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

²⁴⁰ NEV. REV. STAT. § 128.100 (2013) (emphasis added).

are exercising this discretion. In Clark County, however, the number of TPR cases is on the rise.²⁴¹ The Clark County Family Court averages about 300 open cases at any given time.²⁴² As of June 25, 2015, private attorneys (who are contracted for conflict cases from the Special Public Defender's Office) had 313 open TPR cases.²⁴³ Nearly all of these TPR defendants are indigent.²⁴⁴

Family Court Judge Frank Sullivan notes that the recent increase in TPR cases corresponds to an increase in the percentage of contested cases, a phenomenon he believes stems from a recent policy change.²⁴⁵ In 2010, Judge Sullivan instituted a policy requiring the Family Court to appoint counsel for TPR defendants.²⁴⁶ While this development is very encouraging, it says nothing about the status of TPR defendants outside of Clark County, nor does it guarantee the policy will remain after Judge Sullivan leaves the bench.

In Clark County, judges ask defendants about their financial status during their initial hearing.²⁴⁷ It appears that nearly every request for counsel is granted in TPR proceedings;²⁴⁸ however, the number is less for abuse and neglect proceedings.²⁴⁹ If the judge appoints counsel, the Special Public Defender's office assigns an attorney to the case. When there is a conflict of interest in the Special Public Defender's office, a private, contracted attorney is appointed.²⁵⁰

2. Nevada Appellate Statistics

Nevada's appellate numbers tell a more discouraging tale. From 2012 to 2014, sixty-four TPR defendants filed appeals to the Nevada Supreme Court after losing their parental rights at trial.²⁵¹ Of the twenty-three filed in 2012, fifteen appellants had the assistance of counsel and eight were pro se.²⁵² The mat-

²⁴¹ Yesenia Amaro, *Judges Face Rising Tide of Parental Rights Termination Cases*, L.V. REV.-J. (May 10, 2015, 1:38 PM), <http://www.reviewjournal.com/news/las-vegas/judges-face-rising-tide-parental-rights-termination-cases>.

²⁴² *Id.*

²⁴³ Telephone Interview with Drew Christensen, Dir., Clark Cty. Office of Appointed Counsel (June 25, 2015) [hereinafter Christensen Interview].

²⁴⁴ Memorandum from Courtney Ketter, Law Clerk to the Honorable Frank P. Sullivan, to author (Feb. 26, 2015) (on file with author) [hereinafter Ketter Memorandum] ("I can only recall one case in the past year where a parent was able to afford private counsel on his own.").

²⁴⁵ Amaro, *supra* note 241.

²⁴⁶ *Id.*

²⁴⁷ Ketter Memorandum, *supra* note 244.

²⁴⁸ *Id.* (stating that "99 [percent] of the request[s] are granted"); *see also* Christensen Interview, *supra* note 243 (stating that nearly 100 percent of TPR defendants receive appointed counsel at the trial level).

²⁴⁹ Christensen Interview, *supra* note 243. The lack of counsel in abuse and neglect proceedings can prejudice the defendants in later TPR proceedings. *See supra* Part III.A.3.

²⁵⁰ Christensen Interview, *supra* note 243.

²⁵¹ E-mail from Susan Wilson, Supervisory Staff Attorney, Nev. Supreme Court, to Justice Kristina Pickering, Nev. Supreme Court (Mar. 26, 2015) (on file with author).

²⁵² *Id.*

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ters of the fifteen represented appellants proceeded without complications.²⁵³ However, of the eight pro se appellants, only five successfully navigated the process.²⁵⁴ The other three had their appeals dismissed for various procedural problems.²⁵⁵ The numbers from 2013 are even more disturbing. Ten of the twenty-two appeals included pro se appellants.²⁵⁶ Of those ten, the Court dismissed eight appeals on procedural grounds without hearing the appeal's merit.²⁵⁷ None of the represented parents failed on procedural grounds.²⁵⁸ Again, in 2014, the Court dismissed five of nine pro se TPR appeals on procedural grounds.²⁵⁹ As before, all of the represented appellants successfully navigated the appellate process.²⁶⁰

The contrast between represented parents and unrepresented parents is striking. From 2012 to 2014, no represented parent's appeal was dismissed prior to reaching a decision on the merits.²⁶¹ Over the same period, the Court dismissed 59 percent of pro se filings for jurisdictional problems or for failure to prosecute.²⁶² This disparity suggests that the presence of counsel has a measurable effect on the outcome of TPR appeals and the absence of counsel is often dispositive.

The availability of an attorney for appeal often depends on what form of attorney represents the parents at trial: an attorney with the Special Public Defender's office or a private attorney appointed due to a conflict of interest with the SPD office. Private attorneys frequently do not handle appeals and therefore withdraw after the TPR trial.²⁶³ While attorneys for the Special Public Defender's office will handle the appeal for parents that the attorneys represented at trial, the office does not take on appeals for parents who had a private attorney at trial.²⁶⁴ In 2013 alone, 740 defendants received private representation in their TPR proceeding.²⁶⁵ Therefore, defendants often lack an attorney on appeal.

²⁵³ *See id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* (explaining that the appeals were dismissed for jurisdictional problems or for failure to prosecute).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *See id.*

²⁵⁹ *Id.*

²⁶⁰ *See id.*

²⁶¹ *See id.*

²⁶² *Id.* (sixteen of twenty-seven over the three year period).

²⁶³ Ketter Memorandum, *supra* note 244.

²⁶⁴ *See id.*

²⁶⁵ Christensen Interview, *supra* note 243.

IV. JUSTIFYING REFORM

Nevada must join the other forty-five states²⁶⁶ that provide a categorical right to counsel in termination of parental rights proceedings. This can be accomplished in one of two ways. First, the Nevada Supreme Court should interpret the *Nevada* Constitution's Due Process Clause more liberally than the U.S. Supreme Court's interpretation of the U.S. Constitution, and require the appointment of counsel for TPR defendants. This, presumably, would not require the Court to overrule *In re Parental Rights as to N.D.O.*, as that decision was based upon the *Lassiter* Court's review of the U.S. Constitution's Due Process Clause.²⁶⁷

Second, the Nevada legislature should amend NRS section 128.100(2) to state, "If the parent or parents of the child desire to be represented by counsel, but are indigent, the court *shall* appoint an attorney for them." The discretionary word "may" should be replaced with the compulsory word "shall." Either one of these options would circumvent the numerous pitfalls of the case-by-case approach currently in use in Nevada²⁶⁸ and would much more ably protect the rights of the state's indigent defendants.²⁶⁹

Furthermore, Nevada courts must inform defendants of the newly created right to counsel, of their right to appeal should they lose, and their right to an attorney on that appeal. A TPR defendant should proceed pro se only with an informed waiver of his right to counsel.

The Civil Gideon movement has widespread support in the legal community, as the American Bar Association demonstrated in 2006 when its House of Delegates unanimously endorsed a resolution supporting Civil Gideon.

[T]he American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.²⁷⁰

A. *Using a Mathews v. Eldridge Analysis to Support Reform*

The *Lassiter* Court hinged its decision upon the fact that "an indigent's right to appointed counsel . . . has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation."²⁷¹ That the Su-

²⁶⁶ See Pollock, *supra* note 19 (noting that forty-four states provided a categorical right to counsel in 2013); see also *In re T.M.*, 319 P.3d 338, 355 (Haw. 2014) (making Hawaii the forty-fifth state to provide this right).

²⁶⁷ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31 (1981).

²⁶⁸ See generally *supra* Part III.

²⁶⁹ Though the determination of indigence will remain subjective, removing the other variables created by the case-by-case approach will help to substantially reduce the unpredictability and subjectivity experienced by TPR defendants.

²⁷⁰ AM. BAR ASS'N, *supra* note 97, at 1.

²⁷¹ *Lassiter*, 452 U.S. at 25.

preme Court regards even minor deprivations of physical liberty to be more serious than the permanent loss of one's child is troubling.

A proper *Mathews v. Eldridge* analysis demonstrates that TPR defendants are entitled to the right to counsel. The first factor in the test is a consideration of the private interests at stake in the proceeding.²⁷² In *Lassiter*, the Supreme Court noted that its “decisions have by now made plain beyond the need for multiple citation that a parent’s desire for and right to ‘the companionship, care, custody and management of his or her children’ is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’”²⁷³

The Nevada Supreme Court also acknowledged the compelling private interests when it stated, “termination of a parent’s rights to her child is tantamount to imposition of a civil death penalty.”²⁷⁴ This may, in fact, be an understatement, as many parents value their own life less than they value the life of their child. Consider for example, a mother faced with the horrible choice between saving her unborn baby’s life and saving her own life. Some in this situation choose to save the baby²⁷⁵—and this is a child she has not even *met*. Thus, there can be little doubt that the private interest at stake in a TPR proceeding is *at least* as compelling as that in a minor criminal proceeding.

The second *Eldridge* factor regards the risk of an erroneous deprivation and the value of additional procedural safeguards.²⁷⁶ The Supreme Court noted that “numerous factors combine to magnify the risk of erroneous factfinding” in TPR proceedings.²⁷⁷ The Court observed that these proceedings employed nebulous substantive standards that subjected the review to the judge’s own subjective values.²⁷⁸ Indigent defendants, largely comprised of minorities and uneducated persons, are “vulnerable to judgments based on cultural or class bias.”²⁷⁹

In addition to the many other factors discussed above,²⁸⁰ these additional risks demonstrate the vital need for an attorney.²⁸¹ The presence of counsel can mitigate these problems.²⁸² A trained voice can help ensure that the judge’s biases do not affect his discretion.²⁸³ The benefit of representation in a TPR proceeding is likely significant. Defendants may need to write motions, ask for

²⁷² *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

²⁷³ *Lassiter*, 452 U.S. at 27 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

²⁷⁴ *Drury v. Lang*, 776 P.2d 843, 845 (Nev. 1989).

²⁷⁵ See, e.g., *Mom Chooses to Die During Childbirth to Save Son*, ABC7.COM (Nov. 24, 2014), <http://abc7.com/family/mom-chooses-to-die-during-childbirth-to-save-son/408747>.

²⁷⁶ *Mathews*, 424 U.S. at 321.

²⁷⁷ *Santosky v. Kramer*, 455 U.S. 745, 762 (1982).

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 763.

²⁸⁰ See *supra* Part III.A.2–6.

²⁸¹ See *Alba*, *supra* note 21, at 1108.

²⁸² *Id.*

²⁸³ *Id.*

discovery, unearth relevant facts, and argue complex issues. Trained attorneys are far more capable of accomplishing these vital steps.

Finally, the third *Eldridge* factor regards the government's interest in the proceeding, including the costs of providing additional safeguards.²⁸⁴ The government has two key interests in TPR proceedings.²⁸⁵ The first is its *parens patriae* interest in the welfare of the child.²⁸⁶ The second is its interest in reducing the cost of the relevant proceedings.²⁸⁷ The *parens patriae* interest is similar to the interests of the parents. If anything, this interest favors keeping a child with her parents.²⁸⁸ Additionally, a court is better equipped to provide for the welfare of the child when counsel is present to raise appropriate issues and bring relevant facts to the court's attention.²⁸⁹

Regarding the government's financial interests, Attorney Sarah Dina Moore Alba argues that providing a categorical right to counsel can actually *save* the government money.²⁹⁰ Alba cites several studies demonstrating that civil cases with attorneys are more cost effective than those that proceed with pro se parties.²⁹¹ She also notes that the use of attorneys results in fewer children being separated from their parents, which saves the government the expense of providing foster homes.²⁹² Even if the government were to incur more costs from the appointment of counsel, this interest cannot outweigh the parent's interest. As even the *Lassiter* majority conceded, "[T]hrough the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here"²⁹³

When one considers these three factors together, the balance tips considerably towards the categorical provision of counsel in termination of parental rights proceedings. The *Lassiter* majority may have erred in its consideration of the first two factors. First, it appears to have undervalued the interest of the parent in keeping their children. Second, it failed to recognize the benefit of counsel in even simple proceedings. It is difficult to conceive of circumstances in which the interest of the parent would be greater. An attorney is essential to protect this interest. Thus, the *Eldridge* factors demand the appointment of counsel in all TPR proceedings.

²⁸⁴ *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

²⁸⁵ *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 766–67.

²⁸⁹ Alba, *supra* note 21, at 1108.

²⁹⁰ *Id.* at 1110–11.

²⁹¹ *See id.* at 1111 (first citing Carol J. Williams, *California Gives the Poor a New Legal Right*, L.A. TIMES, Oct. 17, 2009, at A8; and then citing (*Penny*) *Wise Justice for California*, L.A. TIMES, Sept. 25, 2009, at A30).

²⁹² *Id.*

²⁹³ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 28 (1981).

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CONCLUSION

Termination of parental rights proceedings are a “civil death penalty.”²⁹⁴ Forty-five states and the District of Columbia have all recognized the shortcomings of the case-by-case approach. Nevada is one of only five states that directs the substantial mechanism of governmental power to remove a child permanently from her parents while denying those subject to that deprivation the right to an attorney. This must be corrected either by statutory reform or by judicial recognition of more substantial Nevada due process rights. Society should be confident that the system employs all possible measures to ensure the process is fair. It is past time for Civil Gideon to come to Nevada. Parents may not always deserve their children, but they always deserve adequate representation to ensure a fair adjudication of the matter. The recognition of individual due process rights demands nothing less.

²⁹⁴ *Drury v. Lang*, 776 P.2d 843, 845 (Nev. 1989).

