
THE CASE AGAINST CASE-BY-CASE: COURTS IDENTIFYING CATEGORICAL RIGHTS TO COUNSEL IN BASIC HUMAN NEEDS CIVIL CASES

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ABSTRACT

While the U.S. Supreme Court has been reluctant to recognize a right to counsel in civil proceedings, the state courts have led the way, utilizing a variety of jurisprudential approaches. The courts discussed in this Article had the option of requiring trial courts to determine on a case-by-case basis whether litigants should be appointed counsel, but they did not do so. Instead, these courts established a categorical right to counsel for either all litigants or an easily identifiable group of litigants.

This Article explores the opinions that established a constitutional right to counsel in such areas as domestic violence, termination of parental rights, paternity, civil contempt, civil commitment, civil forfeiture, and judicial bypass of parental consent to obtain an abortion. This Article lays out the jurisprudential grounding for each opinion (state or federal constitution, due process, equal protection, inherent power, etc.) and examines the rationale for the court's decision: the strength of the multiple interests at stake, the risk of error, the quasi-criminal nature of the proceedings, and so on. This Article also examines how the rationale for some of these decisions could be applied to other subject areas. For example, some of the reasoning for a right to counsel in domestic violence cases could translate to abuse and neglect proceedings. Lastly, this Article looks at the problems inherent in the case-by-case approach for justice and judicial efficiency. In sum, this Article demonstrates that while there is much to do before all of the basic human needs of indigent litigants are

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protected, many wise and courageous courts have begun the process.

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I. INTRODUCTION

In 2011, the Supreme Court held in *Turner v. Rogers* that an indigent father was not entitled to appointed counsel in his civil contempt case regarding his failure to pay child support, even when the outcome was a year in prison.¹ The Court relied on several factors: (1) its perception that the matter was “straightforward” (a curious statement, given the Court’s later holding that the trial court had managed to mishandle this allegedly “straightforward” matter); (2) the fact that the State was not a party to Mr. Turner’s contempt proceeding; and (3) the Court’s belief that “substitute procedural safeguards” could adequately protect the interests of indigent litigants in civil contempt proceedings.² It held that an “unusually complex” matter might require counsel, and expressly declined to rule on cases in which the opposing party is either the government or represented by counsel.³ The decision contradicted some federal and state court decisions that had read the Court’s decision in *Lassiter v. Department of Social Services*—which established a case-by-case approach to the right to counsel in termination of parental rights proceedings⁴—as suggesting that the Court *would* find a categorical right to counsel when physical liberty was threatened.⁵

Fortunately, as I wrote in an online symposium occurring the week the *Turner* decision was released, the state courts have been vigilant for

1. *Turner v. Rogers*, 131 S. Ct. 2507, 2512 (2011).

2. *Id.* at 2519–20.

3. *Id.* at 2520.

4. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 32–33 (1981).

5. For examples of courts believing *Lassiter* created a “positive presumption” in favor of appointing counsel when physical liberty is threatened, see *Leonard v. Hammond*, 804 F.2d 838, 841 (4th Cir. 1986) (“[T]he [Supreme] Court recognized that a presumption that an indigent has a right to appointed counsel arises when, if he loses, he may be deprived of his physical liberty.”); *Bradford v. Bradford*, No. 86-262-II, 1986 WL 2874, at *5 (Tenn. Ct. App. Mar.7, 1986) (“We are of the opinion that in light of *Lassiter*, due process mandates that an indigent defendant has the right to be represented by counsel at a contempt proceeding whether it be called civil or criminal if the indigent defendant faces the loss of his freedom.”).

decades in protecting the rights of indigent civil litigants through the use of state constitutions or by distinguishing *Lassiter*.⁶ Thus, *Turner* will not be the last word on the constitutional right to counsel in civil cases any more than *Lassiter* has been.

This Article explores some of the decisions in which courts have identified a categorical right to counsel in various types of civil proceedings involving basic human needs, rather than adopting a *Lassiter* case-by-case approach. The cases rely on a variety of different rationales available to courts: due process, equal protection, equitable/inherent/supervisory power, protecting the vulnerable, *parens patriae* power, risk of future criminal prosecution, fundamental fairness, avoiding consequences of magnitude, and so on. Many of these cases utilize state constitutions to bypass the shackles of Supreme Court jurisprudence, and all of the cases recognize the numerous important interests beyond incarceration at stake in civil proceedings. While all of the decisions provide a “categorical” right, some carve out a discrete set of cases within the larger set by relying on criteria that are objective and easily identifiable (such as cases in which the State is the plaintiff or the party seeking counsel is a minor). This incremental approach, while not protecting all litigants that need counsel in critically important cases, may be more achievable for some courts and does not foreclose the possibility of later protecting a larger class of litigants. Moreover, the rationale behind some of the cases is often translatable to other subject areas.

These cases demonstrate the possibilities that lie before the judiciary—the so-called “weakest branch”—to help close the justice gap that has put the United States so far behind the rest of its world counterparts with respect to access to civil justice.⁷

6. John Pollock, *Turner v. Rogers: Why the Supreme Court Is a Day Late and a Dollar Short*, CONCURRING OPINIONS (June 22, 2011), <http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-why-the-supreme-court-is-a-day-late-and-a-dollar-short.html>. The full symposium about *Turner* is available at <http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers>.

7. See MARK DAVID AGRAST ET AL., THE WORLD JUSTICE PROJECT RULE OF LAW INDEX 2012–2013, at 27, 150 (2012–2013), available at http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf (reporting that with respect to access to civil justice, the U.S. ranks nineteenth out of twenty-nine high-income countries and twelfth out of sixteen countries in the Western Europe and North America regions).

II. A PREFATORY NOTE ABOUT THE FAILURES OF THE CASE-BY-CASE APPROACH

A few scholars have claimed that the categorical approach to providing counsel is overbroad and that a case-by-case approach better allows a court to determine whether the circumstances truly necessitate counsel while at the same time preserve scarce resources.⁸ I addressed this argument in a prior article that discussed: (1) the fact that the Supreme Court abandoned the case-by-case approach in criminal cases because of its basic unworkability; (2) the difficulty judges face in accurately determining in advance whether a case is sufficiently complex to merit counsel; and (3) the unlikelihood of correcting an erroneous denial of counsel on appeal, given the flawed and incomplete record that the appellate court will have to consider and the preservation issues that inevitably arise.⁹ Some courts have acknowledged these issues in rejecting the case-by-case approach in favor of a categorical right,¹⁰ or have pointed out the irony of dismissing appeals of the denial of counsel due to preservation or record development issues that were caused by the absence of trial counsel.¹¹ And the amicus

8. See, e.g., Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 991 (2012) (“Some exceptional civil cases may merit counsel, either because they are particularly complex or because they are otherwise especially important or meritorious. But these determinations demand case-by-case judgments, not blanket constitutional rules.”).

9. John Pollock & Michael S. Greco, Response, *It’s Not Triage if the Patient Bleeds Out*, 161 U. PA. L. REV. PENNUMBRA 40, 41–44 (2012), <http://pennumbra.com/responses/response.php?rid=109>.

10. See, e.g., *Lavertue v. Niman*, 493 A.2d 213, 219 (Conn. 1985) (“We decline to follow such [a case-by-case] approach, not only because of the unique evidentiary problems of our paternity proceedings, but because [i]t is often difficult to assess the complexities which might arise in a given paternity trial before that trial is held; thus, a case-by-case approach would necessarily require an after-the-fact evaluation of the record to determine whether appointed counsel could have affected the result reached in a paternity proceeding.” (alteration in original) (quoting *Corra v. Coll*, 451 A.2d 480, 488 n.11 (Pa. Super. Ct. 1982)) (internal quotation marks omitted)).

11. See, e.g., *J.C.N.F. v. Stone Cnty. Dep’t. of Human Servs.*, 996 So. 2d 762, 771 (Miss. 2008) (agreeing that the presence of counsel “may have greatly changed the hearing transcript now before this Court,” while at the same time finding that the result would have been the same nonetheless); *Gold v. State*, No. DA 09-0675, 2010 WL 1780873, at *3 (Mont. May 4, 2010) (“We acknowledge the irony of the situation—the Catch-22 in which [the plaintiff] finds himself—namely, that the fact his claims have not been adequately presented is itself reflective of the very claims he is attempting to present: that as an indigent citizen, he requires the assistance of counsel to vindicate his constitutional civil rights. Nevertheless, this Court simply cannot decide a question of

brief of twenty-two states in *Gideon v. Wainwright* opposed the case-by-case approach in criminal cases for many of these reasons.¹²

In instances when state legislatures or courts have adopted the case-by-case approach, it has often resulted in serious implementation problems.¹³ In the wake of *Lassiter's* adoption of a case-by-case approach for termination of parental rights cases, a number of commentators have observed the struggles of some courts to apply even the relatively simple tests outlined in that case correctly, with courts treating the *Lassiter* presumption as an outright bar¹⁴ or skipping the analysis entirely to find no right to counsel.¹⁵

The result of using a case-by-case approach has not been any better in federal courts.¹⁶ A federal statute, 28 U.S.C. § 1915, permits federal courts to appoint counsel in any civil case, but in the absence of further guidance from the statute, a number of federal appellate courts have said appointment of counsel under § 1915 should only happen in “exceptional circumstances”—a bar virtually no litigants have been able to meet.¹⁷ Many

such significant import on the basis of the current briefing. . . . [T]he record . . . is wholly inadequate for purposes of deciding such a claim.”); State *ex rel.* Adult & Family Servs. Div. v. Stoutt, 644 P.2d 1132, 1137 (Or. Ct. App. 1982) (conceding that “it is circular to look to the record to determine whether counsel could have affected the result, when one of the principal missions of counsel in any litigation is to develop the record,” but still applying a harmless error test, in part because *Lassiter* did so); Graves v. Adult & Family Servs. Div., 708 P.2d 1180, 1185–86 (Or. Ct. App. 1985) (“[E]x post facto determinations are necessarily difficult, and it is well nigh impossible to discern from the record what difference adequate representation would have made in a given case.”).

12. Brief of the State Government Amici Curiae, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155), *cert. granted sub nom.* *Gideon v. Cochran*, 370 U.S. 908 (1962), 1962 WL 75209 at *3.

13. See Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186, 186 (2006) (noting how difficult it is to determine whether trial courts are actually performing a *Lassiter* analysis).

14. See *id.* at 187.

15. See William Wesley Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 LOY. U. CHI. L.J. 195, 201–02 (1996) (noting that many trial courts skip *Lassiter* hearings, resulting in a lack of evidence that might prove a right to counsel).

16. See *infra* notes 17–19.

17. See, e.g., *Cleary v. Mukasey*, 307 F. App'x 963, 965–66 (6th Cir. 2009); *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990) (noting pro se litigant must show complexity beyond basic pro se difficulties). *But see* Kimberly A. Owens,

litigants have their requests for appointment of counsel dismissed because the court did not perceive sufficient merit or complexity, a perception no doubt caused in part by the litigants' lack of counsel to articulate such things.¹⁸ One court acknowledged the irony of that outcome:

We feel compelled to remark that we are troubled by what we perceive to be the incoherence of the two-pronged inquiry into exceptional circumstances by which we are bound. The present case aside, we question how a court reasonably can expect a strong showing by a § 1983 claimant on the first prong when it is manifestly unlikely that a *pro se* petitioner involved in a complex case which he cannot litigate effectively would be *capable* of demonstrating a likelihood of success on the merits.¹⁹

Some federal district courts have even reasoned that a litigant's failure to find an attorney to take the case is indicative of the case's lack of merit, justifying the denial of appointed counsel.²⁰

Conversely (and ironically), litigants' success in explaining the merits

Comment, *Right to Counsel—The Third Circuit Delivers Indigent Civil Litigants from “Exceptional Circumstances,”* 39 VILL. L. REV. 1163, 1185–88 (1994) (describing how a handful of circuits have rejected exceptional circumstances approach after finding that “the clear language of § 1915(d) does not impose a strict limitation of exceptional circumstances on the appointment of counsel for indigent civil litigants”).

18. See, e.g., *Cleary*, 307 F. App'x at 966 (“[Plaintiff] did not identify any exceptional circumstances that warranted the appointment of counsel. The facts and legal issues were not complex.”); *Wood*, 900 F.2d at 1335–36 (“The instances that [the plaintiff] claims indicate the presence of [exceptional] factors are difficulties which any litigant would have in proceeding *pro se*; they do not indicate exceptional factors.”); *Roles v. Armfield*, No. 1:12-cv-00363-CWD, 2012 WL 6019141, at *6 (D. Idaho Dec. 3, 2012) (“[T]he Court finds that Plaintiff’s Complaint, liberally construed, states a colorable claim that will not be dismissed at this screening stage. But without more than the bare allegations of the Complaint, it is presently impossible to determine the likelihood of Plaintiff’s success on the merits. The Court also finds that Plaintiff has articulated his claims sufficiently, and that the legal issues are not complex in this matter.”).

19. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 n.3 (9th Cir. 1986).

20. See, e.g., *Gil v. Reed*, 381 F.3d 649, 657–58 (7th Cir. 2004) (“[T]he [district] court noted that it was reluctant to appoint counsel in a case where a number of lawyers had declined the case after assessing the risks of incurring the expense of the lawsuit against the probability of succeeding on the merits of the case. To the extent that this rationale influenced the court's ruling on the second motion, we agree with Gil that it was not an appropriate consideration. Gil is correct that a plaintiff's suit is not *per se* meritless simply because he was unable to obtain counsel.”).

of their claim to the court winds up counting against them in the court's assessment of whether they need counsel. For instance, in one federal district court case, the court held: "Here, [the plaintiff] has adequately presented his claims thus far. Indeed, his complaint survived § 1915A screening and he successfully obtained a preliminary injunction, an exceptionally rare feat for an incarcerated pro se litigant. Consequently, plaintiff's motion for appointment of counsel is [denied]."²¹

Some courts have set the bar similarly high for Title VII cases.²² The Ninth Circuit requires courts reviewing a Title VII appointment of counsel request to consider, among other things, the efforts made by the litigant to find counsel.²³ In one case, the Title VII plaintiff previously had his request dismissed because he provided insufficient information about his attempts to find an attorney; he re-filed with significantly more information, and the district court conceded that the plaintiff had "contacted six attorneys in the San Francisco Bay Area, all of whom were unable to represent [p]laintiff because they were either too busy, did not accept cases on a contingency basis, or required an expensive retainer fee."²⁴ The court held, however, that

Plaintiff still has not made a sufficient showing on [this] factor in both quality and quantity. Much like his prior application, [p]laintiff does not provide sufficient factual detail about his contacts with the six attorneys listed in the motion. For example, he does not indicate when he spoke to the attorneys or their staff, how long he spoke to them, or what he told them about this case. It therefore remains unknown whether he had extensive discussions or simply made a cursory inquiry. . . .

With regard to quantity of contacts, [p]laintiff's application indicates that five of the six attorneys indicated they were too busy to represent him. Although [p]laintiff is not required "to exhaust the legal directory" before presenting a motion such as this one, the court

21. Cassady v. Owens, No. CV408-250, 2009 WL 3233522, at *2 (S.D. Ga. Oct. 7, 2009) (citation omitted).

22. 42 U.S.C. § 2000e-5(f)(1) (2006) provides for discretionary appointment in Title VII cases.

23. Bradshaw v. Zoological Soc'y of San Diego, 662 F.2d 1301, 1318 (9th Cir. 1981).

24. Hosea v. Donley, No. 5:11-cv-02892 EJD, 2012 WL 5373406, at *1 (N.D. Cal. Oct. 30, 2012).

expects a more extensive effort to find attorneys who are not carrying a full caseload. Indeed, if all attorneys in the area are already too busy, then it is unlikely the court would have any more success than [p]laintiff in locating an attorney to represent him.²⁵

One state case demonstrates how implementation problems with a case-by-case approach can reach an absurd level. In Indiana, a statute provides trial judges with discretion to appoint counsel in any type of civil case provided there are “exceptional circumstances,” and requires the judge making this determination to predict the merits of the case.²⁶ In *Smith v. Indiana Department of Correction*, the trial court declined to appoint counsel for Smith, an indigent prisoner, in a case involving prisoner discipline and torts claims, and ruled for the Department of Correction on the merits.²⁷ On appeal, after first affirming the decision of the trial court on the merits, the Indiana Court of Appeals concluded that the plaintiff “was unlikely to, and indeed did not, prevail on his claims. Under these circumstances, the trial court was *required* to deny Smith’s request for appointment of counsel.”²⁸ By bootstrapping the right to counsel to the actual outcome of the case, the appellate court essentially negated any purpose behind appellate review, since a litigant denied counsel who nonetheless prevails in his case would never appeal, and a litigant who loses would automatically be presumed by the appellate court to not be entitled to counsel. Also, by relying on the outcome that occurred *without* counsel, the Indiana Court of Appeals failed to examine what evidence the litigant might have brought out or what trial errors might have been avoided if he *had* been given counsel.

It is true that a categorical right to counsel scheme means that a few cases might receive counsel despite not necessarily warranting it. However, as Justice Blackmun’s strong dissent in *Lassiter* noted, the Supreme Court in *Mathews v. Eldridge* held that “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.”²⁹ Indeed, Blackmun pointed

25. *Id.*

26. IND. CODE ANN. § 34-10-1-2(b)–(d) (LexisNexis 2008 & Supp. 2012).

27. *Smith v. Ind. Dep’t of Corr.*, No. 49A02-0705-CV-430, 2007 WL 4482636, at *1, *3 (Ind. Ct. App. Dec. 26, 2007).

28. *Id.* at *3.

29. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 50 (1981) (Blackmun, J., dissenting) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976)) (internal quotation marks omitted).

out how the *Lassiter* majority deviated from an otherwise consistent string of precedent by focusing on a handful of cases that might not warrant counsel instead of the majority of cases that would warrant it:

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." This conclusion is not only illogical, but it also marks a sharp departure from the due process analysis consistently applied heretofore. The flexibility of due process, the Court has held, requires case-by-case consideration of different decisionmaking *contexts*, not of different *litigants* within a given context. In analyzing the nature of the private and governmental interests at stake, along with the risk of error, the Court in the past has not limited itself to the particular case at hand. Instead, after addressing the three factors as generic elements in the context raised by the particular case, the Court then has formulated a rule that has general application to similarly situated cases.³⁰

Fortunately, *Turner* did not repeat the *Lassiter* mistake of focusing on the exceptions, even if it is wrongly decided for other reasons.³¹ Rather, the *Turner* majority rested its decision on its belief that civil contempt proceedings in *general* are simple enough to make the risk of error low, and that the "unusually complex" case was the outlier that might require counsel.³² It also left open the possibility that there might be a categorical right to counsel in civil contempt cases when the opponent is either the government or represented by counsel.³³

30. *Id.* at 48–49 (alteration in original) (quoting *id.* at 31 (majority opinion)).

31. *See, e.g.*, Peter Edelman, *Does the Supreme Court Get It In Turner?*, CONCURRING OPINIONS (June 27, 2011), <http://www.concurringopinions.com/archives/2011/06/does-the-supreme-court-get-it-in-turner.html>; Mary Schmid Mergler, *New Avenues for Right to Counsel Reform Necessary After Turner Decision*, CONCURRING OPINIONS (June 22, 2011), <http://www.concurringopinions.com/archives/2011/06/new-avenues-for-right-to-counsel-reform-necessary-after-turner-decision.html>.

32. *See* *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011).

33. *See id.*

III. DOMESTIC VIOLENCE: VULNERABLE POPULATIONS AND IMBALANCE OF POWER

While few reported decisions have addressed the right to counsel in proceedings involving safety, three recent opinions provide the first-ever judicial recognition of the need to protect the important interests at stake in protection order proceedings by providing counsel. As will be seen, two of these cases focused specifically on the inherent vulnerabilities of minors in such proceedings, allowing the courts in question to approach the right to counsel question more incrementally without resorting to a case-by-case approach.

In the first case, *J.L. v. G.D.*, a chancery court in New Jersey considered a domestic violence restraining order case in which the minor plaintiff was seventeen years old and had been dating the defendant, who was twenty years old.³⁴ The court first found that the minor plaintiff was entitled to a *guardian ad litem* (GAL) because she was a party to the proceedings and the court rules authorized a GAL.³⁵ The court also expressed its doubt that the parents could or should play such a role.³⁶ However, the court went further and held *sua sponte* that when a minor plaintiff is opposed by an adult defendant represented by privately retained counsel, it is “equitable and appropriate”—suggesting the court was relying solely on its equitable power—to require the GAL be a licensed attorney.³⁷ The court relied on the combination of the plaintiff’s status as a minor, the existence of opposing counsel, and the severity of the proceedings (all of which could form the basis of a limited categorical right to counsel), and spoke eloquently of why these factors so strongly necessitated counsel and not merely a GAL:

The importance of the issue is highlighted by the courtroom scene at the start of this case. At one table is an adult defendant, standing next to an experienced and privately retained defense attorney of his choice. At the other table is a minor plaintiff, standing next to an empty chair. There is no basis for this court to conclude that this minor plaintiff is in any way equipped to conduct this legal proceeding by herself, all alone against a represented adult. She has no legal experience with concepts such as direct and cross examination,

34. See *J.L. v. G.D.*, 29 A.3d 752, 753–54 (N.J. Super. Ct. Ch. Div. 2010).

35. *Id.* at 756–57.

36. *Id.* at 757.

37. *Id.* at 757–58.

introduction of evidence, or legal objections in a domestic violence case. She is a high school student and legally still a child, barely old enough to gain entry by herself into an R-rated movie fictionally depicting domestic violence.

This hearing, however, is not a movie. Domestic violence is as real and serious an issue as exists in family court. The court's verdict following trial can have long-reaching consequences on both parties—plaintiff as well as defendant. Defendant tacitly appreciates and recognizes this reality by appearing in court with defense counsel at his side. Whether the minor plaintiff is mature enough to have a similar appreciation and recognition of the importance of an adult voice and representation in the courtroom is unclear. . . .

....

... In the present matter, the minor plaintiff brings forth serious allegations, which if true constitute dating violence against a teenager. In this country, the widespread problem of teen dating violence is appearing on the radar of societal consciousness. Both our national and state governing bodies are developing public policies aimed at protecting teenagers from abuse by former dating partners.³⁸

The court concluded by stating that providing an attorney was “consistent with the stated intent of the New Jersey Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.”³⁹

In the second case, *In re D.L.*, an Ohio parent sought a civil protection order for his son against another juvenile.⁴⁰ Both juveniles were “represented” by their respective parents, and the protection order was granted by a court of common pleas.⁴¹ The Ohio Sixth District Court of Appeals reversed, finding a federal due process right to appointed counsel for respondent juveniles in civil protection order proceedings.⁴² It first noted that, while being subjected to a civil protection order is not a criminal offense, certain other civil proceedings such as civil contempt do

38. *Id.* at 756, 758.

39. *Id.* at 759 (quoting N.J. STAT. ANN. § 2C:25-18 (West 2010)) (internal quotation marks omitted).

40. *In re D.L.*, 937 N.E.2d 1042, 1043 (Ohio Ct. App. 2010).

41. *Id.* at 1043–44.

42. *Id.* at 1044–46.

create a right to counsel in Ohio.⁴³ Furthermore, the court recognized that “in all other cases dealing with children as parties, due process demands that a minor child receive appointed counsel or a guardian to represent him or her: delinquency actions, termination-of-parental-rights cases, and divorce actions where the child’s welfare demands protection.”⁴⁴ The court concluded that it was aberrant to deny juveniles appointed counsel in civil protection hearings that “may lead to criminal violations.”⁴⁵ The court also commented, “[the a]ppellant’s young age alone would indicate that he should have been appointed counsel.”⁴⁶ The fact that the plaintiff was also not represented by counsel did not play a role in the court’s reasoning,⁴⁷ perhaps because the issue of whether counsel helps correct a power imbalance between the parties is of less importance when the party seeking counsel possesses inherent limitations, as minors do. If that is the case, then an unrepresented minor petitioner in a protection order case should also be entitled to counsel, even if the respondent is without counsel.

In the third case, *Striedel v. Striedel*, the Texas Court of Appeals in Corpus Christi questioned *sua sponte* whether an adult respondent in a protection order proceeding initiated by the State should have a right to counsel, although it ultimately did not rule on the issue.⁴⁸ The court recognized the power imbalance faced by the defendant in the proceeding, as well as the significant interests at stake:

This action was instituted and prosecuted by the State and appellee has received the benefit of the State’s resources in that regard. As in all other situations in which appointed counsel is available, appellant faces the possible deprivation of his liberty inasmuch as he is unable to be in places he would otherwise be allowed and must enroll in a counseling program which may have otherwise been unnecessary.

43. *Id.* at 1045–46.

44. *Id.* at 1046.

45. *Id.* This was a reference either to the court’s earlier observation that the violation of a civil protection order is a criminal violation, or to the magistrate in the case telling the juvenile that the prosecutor might use evidence from the hearing to file criminal charges. *See id.* at 1043–45.

46. *Id.* at 1047. Curiously, the opinion did not mention *Lassiter* or the presumption against appointed counsel, or even *Mathews*. Nor did the court clarify whether its holding was based on the state or federal constitution, or both. *See id.* at 1045–47.

47. *See id.* at 1043, 1045–47.

48. *See Striedel v. Striedel*, 15 S.W.3d 163, 166–67 (Tex. App. 2000).

Additionally, he faces incarceration for his failure to abide by the terms of the order.⁴⁹

The court also pointed out that “unlike any other ‘civil’ proceeding in which injunctive relief is sought, a petitioner for a protection order is statutorily guaranteed counsel.”⁵⁰ Although the court did not rule on the question of the respondent’s right to counsel, it concluded, “[i]n the event of a retrial of this matter, we recommend that the trial court give additional consideration to appellant’s right to appointed counsel.”⁵¹ *Striedel* suggests a few factors, in addition to minority, that could form part of a categorical right to counsel: opposition by the State or a represented party (the same factor focused on in *Turner*), and cases with multiple critical rights at stake, such as housing, custody, and safety.⁵² Moreover, these factors are relevant not only for respondents, but also for petitioners in domestic violence cases, who may face a represented opponent and have a myriad of interests at stake besides physical safety (such as custody and safe access to the home).

While these domestic violence right to counsel cases are few, they indicate a growing awareness of the important interests at stake in such proceedings. But also, some of the reasoning in these decisions has applicability outside of the domestic violence context. For instance, in many states there are other types of proceedings in which minors go unrepresented, such as truancy, abuse/neglect, and custody proceedings. Minors have very strong interests in such proceedings, and have no more ability to represent themselves in such cases than they do in the domestic violence context. Additionally, the power imbalance between represented and unrepresented parties is typically present in both eviction and immigration cases.

IV. ABUSE AND NEGLECT CASES: COUNSEL HELPS CLOSE THE BARN DOOR BEFORE THE HORSE HAS ESCAPED

While most states and the District of Columbia provide parents a

49. *Id.* at 167.

50. *Id.* at 167 n.2. *See* TEX. FAM. CODE ANN. § 81.007(a) (West 2012) (providing that the county attorney, or criminal district attorney, is responsible for filing applications for protection orders).

51. *Striedel*, 15 S.W.2d at 167.

52. *See id.*

statutory right to counsel in abuse and neglect proceedings,⁵³ this section

53. The following is a list of statutes and court rules providing for a right to counsel in abuse and neglect proceedings. Note that some of these simply implemented a right to counsel declared by a court and that in some states there may be a second statute, or a court rule, also providing for appointment of counsel. Thirty-nine states plus the District of Columbia provide a right to counsel in all abuse and neglect proceedings. ALA. CODE § 12-15-305(b) (LexisNexis 2012); ARIZ. REV. STAT. ANN. § 8-221(B) (2007 & Supp. 2012); ARK. CODE ANN. § 9-27-316(h) (Supp. 2011); COLO. REV. STAT. § 19-3-202 (2012); CONN. GEN. STAT. § 46b-135(b) (West 2009 & Supp. 2013); D.C. CODE § 16-2304(b)(1) (2001 & Supp. 2013); FLA. STAT. ANN. § 39.013(1) (West 2012 & Supp. 2013); GA. CODE ANN. § 15-11-6 (West 2007 & Supp. 2012); 705 ILL. COMP. STAT. ANN. 405/1-5(1) (West 2007 & Supp. 2012); IND. CODE ANN. § 31-34-4-6 (LexisNexis 2013); IOWA CODE § 232.89(1) (2013); KAN. STAT. ANN. § 38-2205(b) (2007); KY. REV. STAT. ANN. § 620.100(1)(b) (LexisNexis 2008 & Supp. 2012); LA. CHILD. CODE ANN. art. 608 (2004 & Supp. 2013); ME. REV. STAT. ANN. tit. 22, § 4005(2) (2004 & Supp. 2012); MD. CODE ANN. CTS. & JUD. PROC. § 3-813 (West 2013); MASS. GEN. LAWS ANN. 119, § 29 (West 2008 & Supp. 2013); MICH. COMP. LAWS ANN. 712A.17c(4) (West 2012); MONT. CODE ANN. § 41-3-425 (2011); NEB. REV. STAT. ANN. § 43-279.01 (LexisNexis 2011 & Supp. 2013); N.J. STAT. ANN. 9:6-8.43 (2008 & Supp. 2013); N.M. STAT. ANN. § 32A-4-10(B) (2012); N.Y. FAM. CT. ACT CODE § 262(a)(4) (2008 & Supp. 2013); N.C. GEN. STAT. § 7B-602 (2013); N.D. CENT. CODE § 27-20-26(1) (2006 & Supp. 2011); OHIO REV. CODE ANN. § 2151.352 (LexisNexis 2011 & Supp. 2012); OKLA. STAT. ANN. tit. 10A, § 1-4-306(A)(1)(a) (West 2009 & Supp. 2013); 42 PA. CONS. STAT. § 6337 (West 2000 & Supp. 2013); R.I. GEN. LAWS § 40-11-7.1(b)(4) (2006); S.C. CODE ANN. § 63-7-1620(3) (2010 & Supp. 2012); S.D. CODIFIED LAWS § 26-7A-31 (2004); TENN. CODE ANN. § 37-1-126(a)(2)(B) (2010 & Supp. 2012); UTAH CODE ANN. § 78A-6-1111(1)(a) (LexisNexis 2012); VT. STAT. ANN. tit. 13, § 5232(3) (petitions filed in juvenile court); VT. STAT. ANN. tit. 33, § 5306(d)(5) (2009) (emergency care order and temporary care hearing); WASH. REV. CODE § 13.32A.160(1)(b) (West 2004 & Supp. 2013) (out-of-home placement); WASH. REV. CODE § 13.34.090(2) (West 2004 & Supp. 2013); W. VA. CODE ANN. § 49-6-2(a) (LexisNexis 2009 & Supp. 2012); WYO. STAT. ANN. § 14-3-422 (2011); ALASKA CHILD IN NEED OF AID R. 12; DEL. FAM. CT. R. CIV. P. 206, 207; IDAHO JUV. R. 37(d); *In re Hilary*, 880 N.E.2d 343, 345–46 (Mass. 2008) (applying MASS. GEN. LAWS ANN. ch. 119, § 29 to dependency). An additional four states provide an absolute right to counsel for at least some of the proceedings. See CAL. WELF. & INST. CODE § 317(a)(1), (b) (West 2008 & Supp. 2013) (appointment required when out-of-home placement sought for child); MINN. STAT. ANN. § 260C.176(3)(7) (West 2007 & Supp. 2013) (noting if child taken into custody is to be placed in shelter care facility, then counsel will be appointed for any party “if it is a child in need of protection or services, neglected and in foster care, or termination of parental rights matter”); MINN. STAT. ANN. § 260C.163(3)(b) (West 2007 & Supp. 2013) (“[T]he court shall appoint counsel to represent the . . . parent, guardian, or custodian in any case in which it feels that such an appointment is appropriate”); TEX. FAM. CODE ANN. § 107.013(c) (West 2008 & Supp. 2013) (noting right is triggered when state seeks temporary managing conservatorship of a child); VA. CODE ANN. § 16.1-266(D) (2010 & Supp. 2012) (noting right attaches for

will look at two court decisions that found a state constitutional due process right to counsel in these proceedings (which is not duplicative, even if a statute exists),⁵⁴ based on factors that are generally true for all abuse and neglect proceedings.

In the first case, *In re Ella B.*, the New York Court of Appeals found that “an indigent parent, faced with the loss of a child’s society, as well as the possibility of criminal charges, is entitled to the assistance of counsel” in abuse or neglect proceedings as a matter of due process.⁵⁵ In reaching this conclusion, the court first reasoned that “[a] parent’s concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right to be relinquished to the [s]tate without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer.”⁵⁶ In addition to a violation of due process, the court added that denying counsel was, “in light of the express statutory provision for legal representation for those who can afford it, a denial of equal protection of the laws as well.”⁵⁷ The court then added:

Once the conclusion is reached that one has a right to be represented by assigned counsel . . . it follows that one is entitled to be so advised. If the rule were otherwise, if the party before the court was not apprised of his right to assigned counsel, there could be no assurance either that he knew he had such a right or that he had waived it.⁵⁸

Although this case was decided before *Lassiter* and the *Ella B.* court did

adjudicatory/transfer hearings but not for dispositional hearings). In six states, appointment is discretionary. HAW. REV. STAT. § 587A-17(a) (2013); MO. ANN. STAT. § 211.211(4) (West 2010 & Supp. 2013); NEV. REV. STAT. § 432B.420(1) (2011); OR. REV. STAT. ANN. § 419B.205(1) (West 2012); *In re C.M.*, 48 A.3d 942, 944 (N.H. 2012); *Joni B. v. State*, 549 N.W.2d 411, 414–15 (Wis. 1996). Only Mississippi has no provision whatsoever for appointment of counsel in abuse and neglect cases.

54. Some courts employ different standards of appellate review depending on whether the violation was of a constitutional or statutory right to counsel. *See, e.g.*, *People v. Carines*, 597 N.W.2d 130, 143–44 (Mich. 1999) (finding when error is constitutional, beneficiary of error must establish that error is harmless beyond a reasonable doubt, but when error is not constitutional, person alleging error has burden of establishing miscarriage of justice). Additionally, a constitutional right to counsel provides a kind of “backup” right in the event that a statute granting a right to counsel is repealed.

55. *In re Ella B.*, 285 N.E.2d 288, 290 (N.Y. 1972) (citations omitted).

56. *Id.* (citations omitted).

57. *Id.*

58. *Id.*

not specify which constitution it was interpreting, New York courts since *Lassiter* have relied upon *Ella B.* and suggested that it was a state constitutional decision.⁵⁹

In the second case, *Danforth v. State Department of Health & Welfare*, the Supreme Judicial Court of Maine held that “the minimal requirements of procedural due process” led to the conclusion that indigent parents have the right, under both the state and federal constitutions, to appointed counsel in State-initiated child neglect proceedings.⁶⁰ The court first determined that a parent’s right to raise children is a fundamental constitutional right.⁶¹ The court then relied on some basic characteristics of abuse or neglect proceedings to support its holding: the fact that the State can employ its full resources against the defendant parents—resources such as “knowledge and experience in legal proceedings, subpoena powers, familiarity with the law of evidence, and the ability to examine witnesses”;⁶² the complexity of neglect proceedings and the difficulty laypeople might have understanding them; the accusatory nature of the proceedings (including the possibility that “a parent appearing in a neglect hearing without the assistance of counsel might make self-incriminatory statements that could result in a criminal prosecution”);⁶³ and the fact that the parents view the removal of the children as punishment.⁶⁴ The court also recognized that “[s]tatistical studies conducted in other jurisdictions indicated markedly different results between neglect proceedings where the parent has assistance of counsel and those proceedings where the parent is without counsel.”⁶⁵ Although this case preceded *Lassiter* and was

59. See, e.g., *People v. Smith*, 465 N.E.2d 336, 339 (N.Y. 1984) (“Due process and equal protection require the assistance of counsel when rights and interests as fundamental as those involved in the parent-child relationship are at stake.” (citing *In re Ella B.*, 285 N.E.2d at 290)); *In re St. Luke’s-Roosevelt Hosp. Ctr.*, 607 N.Y.S.2d 574, 578 n.5 (Sup. Ct. 1993) (“In *Lassiter*, the Supreme Court held that counsel was not inevitably required even in termination proceedings. However, our Court of Appeals has held counsel mandated both in termination and neglect proceedings, thus demonstrating a greater commitment to the protection of liberty interests under the state constitution than is necessarily required under the Federal constitution.” (citing *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981))).

60. *Danforth v. State Dep’t of Health & Welfare*, 303 A.2d 794, 800 (Me. 1973).

61. *Id.*

62. *Id.* at 799.

63. *Id.* at 799–800.

64. *Id.* at 800.

65. *Id.* at 799.

based on both the state and federal constitutions, it has been cited by the state high court as an example of “decisions where we have found that rights guaranteed by Maine’s Declaration of Rights were more protective than those granted by the federal Bill of Rights.”⁶⁶

These two cases illustrate some points, generally true for all abuse and neglect cases, that support a categorical right to counsel: (1) parents may potentially subject themselves to later criminal charges based on the evidence that emerges in the civil abuse or neglect proceeding;⁶⁷ and (2) the State prosecutes all such cases, which creates a power imbalance.⁶⁸ But also, much of the evidence forming the basis of a termination of parental rights comes from the adjudicatory and dispositional phases of an abuse or neglect proceeding,⁶⁹ so providing counsel only at the termination phase is too little too late. In some states, *res judicata* may prevent counsel appointed for the termination proceeding from relitigating issues determined during the abuse and neglect proceeding.⁷⁰

As with the domestic violence cases, there are some elements of these abuse and neglect decisions that translate well to non-abuse/neglect contexts. For instance, the *Danforth* court relied on studies demonstrating the “markedly different results” when the parents had counsel,⁷¹ and there are numerous studies showing a dramatic impact of providing counsel in other types of civil cases.⁷² Additionally, the *Ella B.* court’s concern that parental rights are “too fundamental an interest and right to be

66. State v. Cadman, 476 A.2d 1148, 1152 n.6 (Me. 1984).

67. See, e.g., *Danforth*, 303 A.2d at 799–800; *In re Ella B.*, 285 N.E.2d at 290.

68. See, e.g., *Danforth*, 303 A.2d at 799 (“In a neglect proceeding the full panoply of the traditional weapons of the state are marshalled against the defendant parents.”).

69. See, e.g., *Custody of a Minor (No. 2)*, 491 N.E.2d 283, 285 (Mass. App. Ct. 1986) (stating that each set of findings “builds on preceding stages”).

70. See, e.g., *In re Heaven L.F.*, 311 S.W.3d 435, 439 (Tenn. Ct. App. 2010) (“Mother and the Department were parties in the dependency and neglect action and the issue of whether Mother committed severe child abuse was fully litigated in that action. Therefore, the issue of whether Mother committed severe child abuse is *res judicata* and the trial court properly found by clear and convincing evidence that Mother’s parental rights should be terminated . . .”).

71. *Danforth*, 303 A.2d at 799.

72. See Laura Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. FOR SOC. JUST. 139 (2010), available at <http://www.law.seattleu.edu/x9204.xml>.

relinquished to the [s]tate without the opportunity for a hearing”⁷³ is no less true when the parent is relinquishing the child to another parent or third party in an adoption proceeding. Finally, the point in *Danforth* that failing to provide counsel in the abuse/neglect proceeding could cause collateral consequences later on (such as possible criminal charges) has relevance in other contexts too, such as when defendants are provided counsel at a civil contempt proceeding for violating a child support or protection order but not at the earlier hearings imposing the order itself.⁷⁴

V. PRIVATE TERMINATION OF PARENTAL RIGHTS: CLOSING THE LOOPHOLE IN THE STATUTORY SCHEME

A. Public vs. Private Terminations: The History

In the context of State-initiated termination of parental rights cases, the reaction of the states to *Lassiter*'s adoption of a case-by-case approach has been nothing short of extraordinary. At the time of *Lassiter*, thirty-three states and the District of Columbia provided for a categorical right to counsel in such proceedings (either by legislative act or court decision);⁷⁵ now it is forty-four and D.C.⁷⁶ Notably, courts in at least ten jurisdictions

73. *Ella B.*, 285 N.E.2d at 290.

74. *See Danforth*, 303 A.2d at 799.

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

76. The following is a list of statutes and court rules providing for a right to counsel in state-initiated termination proceedings. Note that some of these simply implemented a constitutional right to counsel declared by a court, and that in some states there may be a second statute, or a court rule, also providing for appointment of counsel. ALA. CODE § 12-15-305(b) (LexisNexis 2012); ARIZ. REV. STAT. ANN. § 8-221(B) (2007 & Supp. 2012); ARK. CODE ANN. § 9-27-316(h)(1)(D) (Supp. 2011); CAL. FAM. CODE. § 7862 (West 2004 & Supp. 2013); COLO. REV. STAT. §§ 19-1-105, -3-602(2) (2012); CONN. GEN. STAT. ANN. § 45A-717(A)-(B) (West 2004 & Supp. 2013); D.C. CODE § 16-2304(b)(1) (2008 & Supp. 2012); FLA. STAT. ANN. § 39.807 (West 2012 & Supp. 2013); GA. CODE ANN. § 15-11-98(b) (West 2007 & Supp. 2012); IDAHO CODE ANN. § 16-2009 (2009 & Supp. 2012); 705 ILL. COMP. STAT. ANN. 405/1-5(1) (West 2007 & Supp. 2012); IND. CODE ANN. § 31-32-4-3 (LexisNexis Supp. 2012); IOWA CODE § 232.113(1) (2013); KAN. STAT. ANN. §§ 38-2205(b), -2267(d) (2007); KY. REV. STAT. ANN. § 625.080(3) (LexisNexis 2008 & Supp. 2012); LA. CHILD. CODE ANN. art. 1016 (2004 & Supp. 2013); ME. REV. STAT. ANN. tit. 22, § 4052(3)(H) (2004 & Supp. 2012); MD. CODE ANN., CRIM. PROC. § 16-204(b)(1)(vi) (LexisNexis 2008 & Supp. 2012); MASS. GEN. LAWS. ANN. ch. 119, § 29 (West 2008 & Supp. 2013); MICH. COMP. LAWS ANN. § 712A.17c(4)(c) (West 2012); MO. ANN. STAT. § 211.462(2) (West 2004 & Supp. 2013); MONT. CODE ANN. § 41-3-425(2)(a) (2011); NEB. REV. STAT. ANN. § 43-279.01(1)(b) (LexisNexis 2011 & Supp. 2012); N.H. REV. STAT. ANN. § 170-C:10

(LexisNexis 2010); N.J. STAT. ANN. § 2A:158A-14 (West 2002 & Supp. 2012); N.J. STAT. ANN. § 30:4C-15.4 (West 2008); N.M. STAT. ANN. § 32A-5-16(E) (2012); N.Y. FAM. CT. ACT § 262 (2008 & Supp. 2013); N.C. GEN. STAT. § 7A-451(A)(14)–(15) (2011); N.D. CENT. CODE § 27-20-26 (2006 & Supp. 2011); OHIO REV. CODE ANN. § 2151.352 (LexisNexis 2011 & Supp. 2012); OKLA. STAT. ANN. tit. 10A, § 1-4-306(A)(1)(a) (West 2009 & Supp. 2013); OR. REV. STAT. ANN. § 419B.518 (West 2012); 23 PA. CONS. STAT. § 2313(a.1) (West 2010 & Supp. 2012); S.C. CODE ANN. § 63-7-2560(A) (2012 & Supp. 2012); S.D. CODIFIED LAWS § 26-7A-31 (2004); TENN. CODE ANN. § 37-1-126 (2010 & Supp. 2012); TEX. FAM. CODE ANN. § 107.013 (West 2008 & Supp. 2012); UTAH CODE ANN. § 78A-6-1111 (LexisNexis 2012); VT. STAT. ANN. tit. 15A, § 3-201 (2010); VT. STAT. ANN. tit. 13, § 5232 (2009); VA. CODE ANN. § 16.1-266(D)(2) (2010 & Supp. 2012); WASH. REV. CODE § 13.34.090(2) (West 2004 & Supp. 2013); W. VA. CODE ANN. § 29-21-2(2) (LexisNexis 2008); WIS. STAT. ANN. § 48.23 (West 2011); ALASKA ADOPT. R. 8(B); R.I. JUV. P. R. 18(C). Only six states do not have any categorical right to counsel for parents in public termination of parental rights cases. See HAW. REV. STAT. § 587A-17 (2013) (noting in actions under Child Protective Act, which includes terminations, “[t]he court may appoint an attorney to represent a legal parent who is indigent based on court-established guidelines”); MINN. STAT. ANN. § 260C.163(3)(b) (West 2007 & Supp. 2013) (noting the court shall appoint counsel for parent “in any case in which it feels that such an appointment is appropriate”); MINN. STAT. ANN. § 260C.176(3)(g) (West 2007 & Supp. 2013) (noting appointment of counsel for parent required if child placed in secure detention facility or a shelter care facility); MISS. CODE ANN. § 93-15-101 (West 2007) (termination statute; makes no mention of appointment of counsel); NEV. REV. STAT. § 128.100(2) (2011) (“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.” (emphasis added)); WYO. STAT. ANN. § 14-2-318(a) (2011) (“The court *may* appoint counsel for any party who is indigent.” (emphasis added)); MINN. R. JUV. PROTECTION PROC. 25.02(2)(a) (noting the court shall appoint counsel for parents when “the court determines that such appointment is appropriate”); *Watson v. Div. of Family Servs.*, 813 A.2d 1101, 1108 (Del. 2002) (noting that while most states provide a right to counsel in termination proceedings, “Delaware remains one of the few states to continue to use the case-by-case approach”); *In re “A” Children*, 193 P.3d 1228, 1246 (Haw. App. 2008) (citing to predecessor version of Hawaii Revised Statutes section 587A-17 and commenting that “[d]espite the magnitude of the deprivation faced by an indigent parent in a child-protective proceeding, appointment of counsel for an indigent parent who is a party to a child-protective proceeding remains discretionary in Hawai’i”); *K.D.G.L.B.P. v. Hinds Cnty. Dep’t of Human Servs.*, 771 So. 2d 907, 911 (Miss. 2000) (“[T]here is no statute or case law in Mississippi on the question of whether an indigent parent is entitled to counsel at a termination of parental rights proceeding”); *In re Parental Rights as to N.D.O.*, 115 P.3d 223, 225 (Nev. 2005) (“Our statute contemplates a case-by-case determination of whether due process demands the appointment of counsel.”); *In re CC*, 102 P.3d 890, 895 (Wyo. 2004) (“Following the guidance of the United States Supreme Court in *Lassiter*, we must, therefore, consider the specific facts of the case at bar in light of the *Eldridge* factors to determine whether the district court denied BSC due process of law when it refused to appoint counsel to represent him at the termination hearing.”).

that found a categorical due process right to counsel in termination cases prior to *Lassiter*, or never reached the issue, reaffirmed or established that right subsequent to *Lassiter* under their state constitutions.⁷⁷

In private termination of parental rights cases, the termination is often initiated by a prospective adoptive family or a stepparent,⁷⁸ and in many states, the governing statute is silent on whether the defendant biological parent has a right to counsel.⁷⁹ However, every state high court

77. *K.P.B. v. D.C.A.*, 685 So. 2d 750, 752 (Ala. Civ. App. 1996) (construing *Ex parte Shuttleworth* as requiring counsel in termination of parental rights cases under the state constitution); *In re E.H.*, 609 So. 2d 1289, 1290 (Fla. 1992) (citing approvingly to *In re D.B.*, 385 So. 2d 83 (Fla. 1980), which had found right to counsel in termination proceedings under both U.S. and Florida constitutions); *M.E.K. v. R.L.K.*, 921 So. 2d 787, 790 (Fla. Dist. Ct. App. 2006) (“[U]nder the state due process clause, *D.B.* requires appointment of counsel in proceedings involving the permanent termination of parental rights to a child.” (quoting *In re D.B.*, 385 So. 2d at 90) (internal quotation marks omitted)); *In re Catholic Charitable Bureau of Archdiocese of Bos., Inc.*, 490 N.E.2d 1207, 1212 n.6 (Mass. App. Ct. 1986) (“It is not open to dispute that the father had a right to court-appointed counsel.” (citing *Dep’t of Pub. Welfare v. J.K.B.*, 393 N.E.2d 406, 408 (Mass. 1979))); *In re A.S.A.*, 852 P.2d 127, 129–30 (Mont. 1993) (quoting approvingly from the *Lassiter* dissent); *N.J. Div. of Youth & Family Servs. v. R.B.*, No. A-3541-04T4, 2005 WL 2860832, at *5 (N.J. Super. Ct. App. Div. Nov. 2, 2005) (relying on *Crist v. Div. of Youth & Fam. Servs.*, 320 A.2d 203 (N.J. 1974)); *In re Evan F.*, 815 N.Y.S.2d 697, 699 (App. Div. 2006) (relying on *In re Ella B.*, 285 N.E.2d 288 (N.Y. 1972)); *In re Baby Girl Baxter*, 479 N.E.2d 257, 260 (Ohio 1985) (“[T]his court has held that the state must appoint counsel for indigent parents at parental termination proceedings.” (citing *State ex rel. Heller v. Miller*, 399 N.E.2d 66, 70 (Ohio 1980))); *In re D.D.F.*, 801 P.2d 703, 706 (Okla. 1990) (“We continue to adhere to the philosophy enunciated in *Chad S.* Although the federal constitution does not require that counsel be appointed in all termination proceedings, we believe that the rights at issue are those which are fundamental to the family unit and are protected by the due process clause of the Oklahoma Constitution.” (referring to *In re Chad S.*, 580 P.2d 983, 985 (Okla. 1978)); *King v. King*, 174 P.3d 659, 662–63 (Wash. 2007) (noting that federal underpinnings of court’s right to counsel decision in *In re Luscier*, 524 P.2d 906 (Wash. 1974), may have been eroded, but that *Luscier* had been cited to favorably by the court since *Lassiter*); *In re Lindsey C.*, 473 S.E.2d 110, 122 n.12 (W. Va. 1995) (noting that *Lassiter* did not relieve the state “of compliance with one or more of the[] protections which have been recognized in West Virginia as constitutionally mandated”).

78. See, e.g., *In re K.L.J.*, 813 P.2d 276, 277–78 (Alaska 1991) (involving a termination of parental rights petition by the child’s stepfather); *Adoption of Meaghan*, 961 N.E.2d 110, 111–12 (Mass. 2012) (involving a termination of parental rights petition by the child’s legal guardians).

79. See, e.g., *In re S.A.J.B.*, 679 N.W.2d 645, 647 (Iowa 2004) (noting that Iowa Code chapter 600A provides no authority to appoint counsel for indigent parents

presented with this situation has held it violates equal protection or due process, or both, to provide counsel to all parents in all State-initiated cases but deny counsel in privately initiated cases.⁸⁰ The result of these decisions has been a categorical right to counsel for all indigent litigants in private termination cases. This is not surprising: equal protection claims are not amenable to a case-by-case approach, since the analysis already involves comparing classes of individuals. Notably, nearly all of these decisions have been an expression of *state* constitutional law, even though, as the Iowa Supreme Court recognized, the issue “remains open under the federal constitution.”⁸¹

B. *Common Threads in the Private Terminations Cases*

There are a few commonalities running through these decisions that demonstrate why private terminations are not amenable to a case-by-case analysis. First, each case relied on the parent’s fundamental right at stake in all private terminations, and the fact that the right is equally imperiled in both the public and private contexts.⁸² Relying on a prior decision’s statement that “loss of a child may be as onerous a penalty as the deprivation of the parents’ freedom,”⁸³ the Massachusetts Supreme Court held that when “the petitioner is a private party, the same fundamental, constitutionally protected interests are at stake.”⁸⁴ The North Dakota

in termination proceedings); *Adoption of Meaghan*, 961 N.E.2d at 112 (“No statute or decision of this court, however, expressly provides for appointed counsel in a case commenced by the would-be adoptive parents.”).

80. Five of these courts have decided this question under equal protection. *In re Adoption of L.T.M.*, 824 N.E.2d 221, 229 (Ill. 2005); *In re S.A.J.B.*, 679 N.W.2d at 648; *Adoption of Meaghan*, 961 N.E.2d at 112; *In re Adoption of K.A.S.*, 499 N.W.2d 558, 563 (N.D. 1993); *Zockert v. Fanning*, 800 P.2d 773, 776 (Or. 1990). Two courts found that such denial of counsel violated due process. *In re K.L.J.*, 813 P.2d at 278; *Adoption of Meaghan*, 961 N.E.2d at 112–13.

81. *In re S.A.J.B.*, 679 N.W.2d at 648. The court described its analytic framework as “independently apply[ing] federal principles,” and expressly noted that “[i]ndependent application . . . might result in a dissimilar outcome from that reached by the [United States] Supreme Court in considering the federal constitutional claim.” *Id.* (third alteration in original) (quoting *Racing Ass’n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 6 (Iowa 2004)).

82. *See id.* at 649; *Adoption of Meaghan*, 961 N.E.2d at 113; *In re Adoption of K.A.S.*, 499 N.W.2d at 563–64.

83. *Custody of a Minor*, 389 N.E.2d 68, 74 (Mass. 1979).

84. *Adoption of Meaghan*, 961 N.E.2d at 113. As to the child’s right to counsel, the Massachusetts high court stated: “The decision whether or not to terminate is of enormous consequence to the child.” *Id.*

Supreme Court utilized even stronger language, noting that “[t]he ultimate termination of parental rights . . . has been described as [a] punishment more severe than many criminal sanctions”⁸⁵ and involves a fundamental right “of the highest order.”⁸⁶ The Iowa Supreme Court held that “the infringement on parental liberty interests implicated by the statute” had to be reviewed via strict scrutiny.⁸⁷

A number of these courts also rejected the argument that the state’s interest in conserving fiscal resources provided a sufficient reason to discriminate between private and public cases.⁸⁸ The Iowa Supreme Court held that this proffered state interest would suggest “no reason to provide for counsel at public expense in *any* termination case,”⁸⁹ which would contravene *Lassiter*’s pronouncement that the “automatic denial of counsel in all termination proceedings would deny due process.”⁹⁰ The Illinois Supreme Court observed that the State dismissing a termination case so that prospective adoptive parents could file a petition for adoption—a sequence of events that acted to deprive the birth parents of counsel—“saves the State the cost of providing counsel for the indigent parent and the services of the State’s Attorney to prosecute the case. This cannot be deemed a compelling state interest.”⁹¹ Other courts simply found that while the state had a fiscal interest, it was not compelling enough to overcome the extremely strong parental interest.⁹²

C. Addressing State Action

In reaching these holdings, most of the courts addressed the question of whether there was state action involved in a private termination, and these decisions concluded that there was state action in *all* such

85. *In re Adoption of K.A.S.*, 499 N.W.2d at 563 (quoting Joel E. Smith, Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 80 A.L.R.3d 1141, 1145 (1977)) (internal quotation marks omitted).

86. *Id.* at 564.

87. *In re S.A.J.B.*, 679 N.W.2d at 649 (quoting *Santi v. Santi*, 633 N.W.2d 312, 318 (Iowa 2001)) (internal quotation marks omitted).

88. *See id.* at 650; *In re Adoption of K.L.P.*, 763 N.E.2d 741, 753 (Ill. 2002).

89. *In re S.A.J.B.*, 679 N.W.2d at 650.

90. *Id.* (citing *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31–32 (1981)).

91. *In re Adoption of K.L.P.*, 763 N.E.2d at 753.

92. *See, e.g., In re Adoption of K.A.S.*, 499 N.W.2d 558, 565 (N.D. 1993).

proceedings without looking to the individual case.⁹³ The courts making this categorical decision used a number of rationales.

First, some relied on the way in which the state is generally involved in private terminations. The Oregon Supreme Court observed: “The state is involved similarly in both [public and private] proceedings. A state agency, Children’s Services Division, plays a significant role in adoptions under ORS 109.310(4) and 109.316, and also serves the juvenile court under chapter 419.”⁹⁴ The Alaska Supreme Court similarly noted: “The state’s participation continues throughout the process. For example, the clerk of the court issues the new birth certificate in the name of the adopted person, the court ensures the legislatively mandated confidentiality of the proceedings, and the Bureau of Vital Statistics maintains records on adoption.”⁹⁵ The North Dakota Supreme Court pointed out that the court clerk prepared the application for a birth record and forwarded the adoption decree to the state department, and the court was “required to ensure the legislatively mandated confidentiality of the proceedings and records.”⁹⁶ Moreover, North Dakota agencies were “involved throughout the proceedings,” since the statute required the petitioner to name the state or a county social service board as a party, and, as a named party, the State could participate fully in all proceedings.⁹⁷

Second, some of the decisions relied at least in part on the unique power of the state (through its courts) to adjudicate the rights of private parties in termination cases. This concept, which relates back to the Supreme Court’s 1948 holding in *Shelley v. Kraemer*,⁹⁸ was referenced approvingly in the Court’s 1996 decision of *M.L.B. v. S.L.J.*⁹⁹ Utilizing this doctrine, the Iowa Supreme Court rejected a purported distinction between public and private termination proceedings that was based on the

93. See, e.g., *In re K.L.J.*, 813 P.2d 276, 283 (Alaska 1991).

94. *Zockert v. Fanning*, 800 P.2d 773, 777 (Or. 1990).

95. *In re K.L.J.*, 813 P.2d at 283 (citing ALASKA STAT. §§ 25.23.150, .170, .185 (1991)).

96. *In re Adoption of K.A.S.*, 499 N.W.2d at 566.

97. *Id.*

98. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

99. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 n.8 (1996) (“Although the termination proceeding in this case was initiated by private parties as a prelude to an adoption petition, rather than by a state agency, the challenged state action remains essentially the same: M.L.B. resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationships.”).

argument that the “vast resources of the state” were only involved in the former.¹⁰⁰ Instead, the court found that the state was an “integral part of the process” in a private termination because it is asked to use its unique power to issue an order terminating the resisting individual’s parental rights.¹⁰¹ The Alaska Supreme Court similarly noted that termination by adoption could only be “accomplished through a state mechanism” and that “[o]nly a court may issue a final decree of adoption, and then only if it determines that the requisite consents have been obtained and that the adoption is in the child’s best interest. Moreover, the decree is fully enforceable by the court.”¹⁰² The North Dakota Supreme Court added:

Adoption, not recognized under the common law, is wholly a creature of statute. Only a court may issue a final decree of adoption and then, only if it determines that statutory grounds for doing so have been satisfied. Resort to the judicial process by the parties in this adoption proceeding was not voluntary; it was the only way the parties could accomplish their respective objectives.¹⁰³

Third, the Illinois Supreme Court looked to the nature of the equal protection challenge itself to find state action:

John’s equal protection claim challenges the way the Juvenile Court Act and the Adoption Act distribute the benefit of appointed counsel. John alleges the statutes denied him equal protection of the laws, not that [prospective adoptive parents] Jo Ellen and Randall did so. The question whether Jo Ellen and Randall are state actors therefore does not arise. . . .

Enactment of a statute is obviously state action, regardless of whether the state is responsible for a particular private litigant who relies on a statute.¹⁰⁴

100. *In re S.A.J.B.*, 679 N.W.2d 645, 650 (Iowa 2004) (quoting *In re Adoption of K.A.S.*, 499 N.W.2d at 565).

101. *Id.*

102. *In re K.L.J.*, 813 P.2d 276, 283 (Alaska 1991) (citing ALASKA STAT. § 25.23.120(c) (1991)).

103. *In re Adoption of K.A.S.*, 499 N.W.2d at 566 (citations omitted).

104. *In re Adoption of L.T.M.*, 824 N.E.2d 221, 230 (Ill. 2005) (citations omitted).

D. *Applicability of Terminations Cases to Private Custody Cases*

The logic supporting a right to counsel in private termination cases could equally apply to private custody cases. In both types of cases, the judicially recognized fundamental right to parent is at stake and the diminishment of the parental relationship is being sought by a private party. Additionally, it is hard to see how the risk of error is any lower in private custody proceedings in which the opposing side is represented by counsel. While private custody decisions are not as “permanent” as terminations because a parent can later seek to modify custody, unrepresented parents are unlikely to meet the very high standard required in order to obtain such a modification.¹⁰⁵ Additionally, while parents losing their custody case will likely retain some vestige of the parent/child relationship (visitation), the fact remains that going from full custody to joint custody or visitation is a drastic reduction in parental rights and significantly reduces the parent’s ability to raise the child as that parent sees fit.

Recognizing these truths, the Alaska Supreme Court held in *Flores v. Flores* that if one parent in a private custody proceeding is represented by counsel provided through a “public agency” (which the court found included the Alaska Legal Services Corporation), “[f]airness alone dictates that the petitioner should be entitled to a similar advantage.”¹⁰⁶ In reaching this holding under the Alaska Constitution’s due process clause, the court relied on “[t]he interest at stake in this case [being] one of the most basic of all civil liberties, the right to direct the upbringing of one’s child.”¹⁰⁷ Most recently, the high court held that the Alaska Network on Domestic Violence and Sexual Assault also counted as a “public agency.”¹⁰⁸

The reasoning behind the finding of state action in the private termination cases is also translatable to other contexts. As with private termination cases, foreclosure cases feature similar types of “behind the

105. See, e.g., *Blackley v. Blackley*, 204 S.E.2d 678, 681 (N.C. 1974) (“[T]he modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child, and the party moving for such modification assumes the burden of showing such change of circumstances.”).

106. *Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979).

107. *Id.*

108. *In re Alaska Network on Domestic Violence & Sexual Assault*, 264 P.3d 835, 836 (Alaska 2011).

scenes” state involvement,¹⁰⁹ and private custody proceedings similarly invoke the unique power of the court to adjudicate parental disputes. Moreover, the holding regarding the unique power of the courts in termination cases would apply to many other types of civil cases.

VI. PATERNITY: COMPLEX INTERESTS MIXED WITH HIGH RISK OF ERROR IN QUASI-CRIMINAL PROCEEDINGS

The Supreme Court of California aptly summed up the situation for all indigent defendants in paternity cases:

Unless the rights of indigent paternity defendants are protected, courts risk finding not the right man, but simply the poorest man to be the father of a child. If paternity is to be determined in an adversary proceeding at the behest of the state, surely the interests of all concerned demand that the defendant be able to defend fully and fairly. He cannot do so when his indigency prevents him from obtaining counsel.¹¹⁰

In recognition of this reality, courts across the country have found a categorical right to counsel in paternity proceedings using a variety of rationales: due process under either the state or federal constitutions, or both;¹¹¹ the court’s supervisory power to ensure the fair administration of justice;¹¹² federal and state equal protection;¹¹³ or a more nebulous

109. See John Pollock, *Going Public: The State-Action Requirement of Due Process in Foreclosure Litigation*, 43 CLEARINGHOUSE REV. 458 (2010), available at <http://www.civilrighttocounsel.org/pdfs/2010-Jan-Feb-Pollock-state-action.pdf>.

110. *Salas v. Cortez*, 593 P.2d 226, 232 (Cal. 1979) (footnote omitted) (citations omitted).

111. The federal Due Process Clause alone has been used as a rationale by three courts. See *Kennedy v. Wood*, 439 N.E.2d 1367, 1369, 1372 (Ind. Ct. App. 1982); *Clinton L.C. v. Lisa B.*, 741 N.Y.S.2d 834, 837 (Fam. Ct. 2002); *Corra v. Coll*, 451 A.2d 480, 488 (Pa. Super. Ct. 1982). Three other state courts have been willing to ground the right in their own broader state due process clauses. See *Reynolds v. Kimmons*, 569 P.2d 799, 801, 803 (Alaska 1977); *Artibee v. Cheboygan Circuit Judge*, 243 N.W.2d 248, 248–49 (Mich. 1976); *State ex rel. Graves v. Daugherty*, 266 S.E.2d 142, 144–45 (W. Va. 1980). Finally, five state courts have combined the two approaches and used both state and federal due process to find this right. See *Salas*, 593 P.2d at 229, 234; *Lavertue v. Niman*, 493 A.2d 213, 218–19 (Conn. 1985); *Carroll v. Moore*, 423 N.W.2d 757 (Neb. 1988); *Madeline G. v. David R.*, 407 N.Y.S.2d 414, 416 (Fam. Ct. 1978); *State ex rel. Cody v. Toner*, 456 N.E.2d 813, 815 (Ohio 1983).

112. *Hepfel v. Bashaw*, 279 N.W.2d 342, 348 (Minn. 1979).

113. *Dep’t of Soc. Servs. v. Witzel*, 398 N.Y.S.2d 86, 87 (Fam. Ct. 1977).

constitutional test.¹¹⁴ These rights are generally limited to cases in which the State prosecutes or helps prosecute the paternity action¹¹⁵—often because the mother is receiving public assistance.¹¹⁶ This narrower holding

114. *M. v. S.*, 404 A.2d 653, 656 (N.J. Super. Ct. Law Div. 1979) (providing a right to counsel under the state constitution because “[a] paternity action can result in consequences of magnitude,” a test established in *Rodriguez v. Rosenblatt*, 277 A.2d 216, 223 (N.J. 1971)).

115. *See Reynolds*, 569 P.2d at 802, 803 (noting that “paternity suits, in effect, are brought by the state”); *Salas*, 593 P.2d at 234; *Lavertue*, 493 A.2d at 215 (declining to address whether state action is requirement for state constitutional due process claims, but finding that paternity actions always involve state action when “the child whose paternity is in question is receiving public assistance”); *Kennedy*, 439 N.E.2d at 1368, 1372; *Artibee*, 243 N.W.2d at 249 (relying on the state prosecutor’s involvement in the case and noting that the county is required to “prosecute the action if the complainant is without the means to employ an attorney”); *Hepfel*, 279 N.W.2d at 348 (finding right to counsel when mother represented by county attorney due to having applied for public benefits); *Carroll*, 423 N.W.2d at 766 (noting that plaintiff was not recipient of public assistance and the state did not initiate the claim; however, the statute required the state to assist parent filing paternity case, so “the plaintiff was assisted by the Lancaster County attorney’s office in prosecuting her claim”); *M. v. S.*, 404 A.2d at 658 (noting but not necessarily relying on fact that “[t]he Plaintiff is receiving welfare assistance under AFDC program. The county welfare board required that plaintiff bring suit against the alleged father”); *Madeline G.*, 407 N.Y.S.2d at 416 (finding a right to counsel “where the petitioner receives counsel and/or other ‘paternity and support services’ provided by the state”); *State ex rel. Cody*, 456 N.E.2d at 814 (finding right for defendant “who faces the state as an adversary, when the complainant-mother and her child are recipients of public assistance”); *Corra*, 451 A.2d at 487 (“[I]n Pennsylvania, a complainant in a support action at which paternity is disputed shall, ‘upon the request of the court or a Commonwealth or local public welfare official’ be represented by the district attorney.” (quoting 42 PA. CONS. STAT. ANN. § 6711(b) (West 1982))); *Daugherty*, 266 S.E.2d at 144–45 (“The action is prosecuted by a county prosecutor and can be brought in the name of the county.”). *But see Clinton L.C.*, 741 N.Y.S.2d at 837 (finding a right to counsel for father *seeking* to establish paternity, when only state involvement was appointment of a law guardian for the child).

116. *See Lavertue*, 493 A.2d at 215–16. The Connecticut Supreme Court reasoned that “[a]bsent public assistance, a paternity suit is simply a private action brought by the child’s mother against the putative father,” whereas, “[w]hen public assistance is at stake . . . the state plays a dominant role in the initiation and the prosecution of a paternity suit.” *Id.* at 215. Regarding the role of the state in the proceeding when public assistance was in play, the court explained:

The mother of such a child is required, on pain of contempt, to identify the child’s father and, in the event he does not acknowledge paternity, to bring an action against him. The state assists the plaintiff in finding an attorney and pays the plaintiff’s legal fees and costs. The attorney general is

addresses the state action prerequisite for due process, but also is responsive to the “fundamental fairness” concern expressed in *Turner* regarding proceedings in which only one side is represented—and especially when that opponent is the State.¹¹⁷ As the Michigan Supreme Court put it, “[t]he Legislature has expressed its opinion that the complainant and her child would not receive a fair trial without benefit of counsel. The same consideration of fundamental fairness should apply to the defendant when faced with the power of the state arrayed against him.”¹¹⁸

Courts analyzing the right to counsel in paternity actions have generally followed the *Mathews* test by analyzing the interests of the individual, the interests of the state, and the risk of erroneous deprivation.¹¹⁹ The rest of this section looks at how these three prongs lend themselves to a categorical approach in the paternity context, and how the quasi-criminal nature of paternity affects that analysis.

A. Recognizing the Web of Interests at Stake in Paternity Proceedings

A paternity case is the reverse of a termination of parental rights case: in all cases, the proceedings seek to establish a new relationship between the parent and child—“a determination of one of society’s most important relationships”¹²⁰—and the tangled web of familial, financial, and other interests that goes along with it.¹²¹ The California Supreme Court noted that “[a]n adjudication of paternity may profoundly affect a person’s life”

automatically a party to such a paternity action, and no such action can be settled without the approval of a state official. If the paternity action is successful and results in an award of child support, the moneys so awarded are paid directly to the state because the mother of a child on public assistance must assign her rights of support to the state. The attorney general is in fact the only party defending this appeal.

The significance of the state’s involvement in actions involving the paternity of children receiving public assistance is enhanced by the fact that all paternity proceedings have “quasi-criminal” overtones.

Id. at 215–16 (citations omitted) (quoting *Little v. Streater*, 452 U.S. 1, 10 (1981)) (internal quotation marks omitted).

117. See *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011).
118. *Artibee*, 243 N.W.2d at 250.
119. See, e.g., *Corra*, 451 A.2d at 485.
120. *Reynolds*, 569 P.2d at 802.
121. See *id.*

because it might “disrupt an established family and damage reputations.”¹²² The West Virginia Supreme Court added that the multiple consequences of a paternity proceeding were far from trivial:

It is not trivial to force a man to pay a fixed sum of money each month for up to eighteen years. And it is not trivial for a man to be subjected to sanctions, including indeterminate incarceration, if he fails to pay. . . .

The results of a finding of paternity are often more severe than ones that attend violations of criminal laws, municipal ordinances or civil contempts, for the defense of which counsel must be provided to indigents. . . .

The significant liberty and property consequences of a paternity determination require utmost due process protection.¹²³

Similarly, the Minnesota Supreme Court demonstrated a comprehensive understanding of the multitude of different interests at stake:

The paternity defendant, of course, has a substantial interest in the accuracy of the adjudication. He has a direct financial interest, for as an adjudicated father he will be ordered to contribute to the support of the child throughout its minority. Similarly, in light of recent case law, the adjudicated father’s estate can also be burdened by the child’s claims to inheritance, workers’ compensation benefits, and insurance proceeds. In addition to his financial interests, the defendant, if found to be the father, is also indirectly threatened with loss of liberty, since incarceration may be imposed for criminal nonsupport under [Minnesota Statutes] § 609.375. . . . Finally, the social stigma resulting from an adjudication of paternity cannot be ignored.¹²⁴

A Pennsylvania Superior Court that recognized a right to counsel also pointed out that, with respect to the financial interests, “an illegitimate child has rights to an adjudged father’s estate and workmen’s compensation benefits.”¹²⁵

Many of the decisions displayed sensitivity to the fact that while

122. Salas v. Cortez, 593 P.2d 226, 230 (Cal. 1979).

123. State *ex rel.* Graves v. Daugherty, 266 S.E.2d 142, 145 (W. Va. 1980) (citations omitted).

124. Hepfel v. Bashaw, 279 N.W.2d 342, 345 (Minn. 1979) (citations omitted).

125. Corra v. Coll, 451 A.2d 480, 486 (Pa. Super. Ct. 1982) (citations omitted).

defendants cannot be jailed at the paternity proceeding itself, a paternity adjudication can lead to a *later* finding of contempt and a consequent jail sentence for failure to comply with the child support order. For example, the Michigan Supreme Court observed: “Although the immediate consequence of the paternity judgment is an order of filiation and for support, the order is enforceable by contempt proceedings. Penalties for contempt include up to one year in the county jail or state prison or until the amount due is fully paid.”¹²⁶ The Alaska Supreme Court pointed out that, under Alaska law:

[A] parent of a child under sixteen years of age who willfully fails to furnish support, without lawful excuse, may be held criminally liable and subject to a fine of not more than \$500.00 or imprisonment for not more than twelve months or both. Thus, an indirect outcome of this suit could be a criminal charge.¹²⁷

The Pennsylvania Superior Court held it “cannot agree with the [p]ublic [d]efender’s position that this threatened deprivation of liberty is too remote to justify the appointment of counsel at the hearing at which paternity is established.”¹²⁸ Nor is contempt the only liberty threat possibly arising from paternity: the Alaska Supreme Court warned that, in a paternity proceeding, “[t]he court may be required to assess testimony pertaining to sexual conduct which is labeled as a crime by an Alaska statute,”¹²⁹ which could place an uncounseled litigant at especial risk.

Additionally, some courts recognized that the child also has significant interests in the case that mitigate in favor of the putative father having counsel in order to ensure an accurate outcome.¹³⁰ The Connecticut Supreme Court noted that while the father would be “liable for past, present and future child support,” the child, later in life, could be liable for

126. *Artibee v. Cheboygan Circuit Judge*, 243 N.W.2d 248, 249 (Mich. 1976) (footnote omitted).

127. *Reynolds v. Kimmons*, 569 P.2d 799, 801–02 (Alaska 1977) (footnote omitted).

128. *Corra*, 451 A.2d at 485.

129. *Reynolds*, 569 P.2d at 802–03 (footnote omitted) (noting that paternity cases may create an even greater need for counsel than custody cases because the court may have to assess testimony pertaining to sexual conduct which is labeled a crime by an Alaska statute). The criminal statute at issue in *Reynolds v. Kimmons* was repealed in 1978. ALASKA STAT. § 11.40.040 (1970) (repealed 1978).

130. *See, e.g., Lavertue v. Niman*, 493 A.2d 213, 217 (Conn. 1985).

the support of the father under Connecticut statutory law.¹³¹ Moreover, the court recognized that the child's interests also extended to the child's health, as an accurate family medical history is an important tool in any person's health care.¹³²

B. Risk of Error: Case Complexity Magnified by Science, Power Imbalances, and Other Factors

In analyzing the possibility of error, some decisions outlined the essential complexity of all paternity cases and the need for the skills a lawyer possesses. The Alaska Supreme Court stated that, in its view, paternity proceedings involved issues with "an even greater complexity than those involved in a custody termination proceeding. This consideration underscores the need for counsel."¹³³ The Michigan Supreme Court commented that "the nature of the proceedings is sufficiently complex so as to require counsel to insure a fair trial"; it noted that paternity cases could involve "sharply disputed factual question[s] concerning the relationship of the parties"; and pointed out that a defendant in a paternity case, who might not believe he is the actual father, might not know to "file notice of alibi if he intends to rely upon that defense."¹³⁴ The Connecticut Supreme Court observed the kinds of things the lawyer would do to protect the rights of the defendant:

An attorney would develop defenses independent of the blood test evidence, such as lack of access to the mother or the existence of another potential father. An attorney would conduct discovery, counsel the defendant on the possibility of reaching a pretrial settlement, subpoena witnesses and conduct cross-examination. The record in this case discloses the likelihood that a pro se defendant's own inartful questioning and failure to obtain witnesses will substantially impair the truth-finding function of the trial court.¹³⁵

A number of courts also pointed to the scientific issues arising from blood tests administered as part of the paternity proceeding as significantly

131. *Id.* (citations omitted).

132. *Id.*

133. *Reynolds*, 569 P.2d at 802.

134. *Artibee v. Cheboygan Circuit Judge*, 243 N.W.2d 248, 249 (Mich. 1976) (footnote omitted).

135. *Lavertue*, 493 A.2d at 218 (citing *Nordgren v. Mitchell*, 716 F.2d 1335, 1338 (10th Cir. 1983)).

increasing the likelihood of error in the generality of cases. The Ohio Supreme Court explained that paternity cases implicate statutory rights to certain types of blood tests and a “likelihood that expert witnesses will be called to testify,” meaning that “it appears that one unknowledgeable of his rights and unskilled in the art of advocacy could easily go astray in conducting his defense.”¹³⁶ The Indiana Court of Appeals stated:

An indigent defendant’s right to a free blood grouping test may be rendered meaningless without counsel to advise him of the right to demand such a test, to explain its significance, to ensure that the test is properly administered and to ensure that the results are properly admitted into evidence.¹³⁷

The Michigan Supreme Court recognized that the defendant might be “unaware of his statutory right to demand blood tests or unable to analyze the legal implications of the results.”¹³⁸ Likewise, the Connecticut Supreme Court observed:

The use of scientific evidence itself may contribute to the risk of error because it increases the complexity of the litigation. The state’s provision of counsel for the mother is, in part, a recognition of this fact. Moreover, the defendant still bears a heavy evidentiary burden and must face the [S]tate as an adversary. Both of these factors “skew . . . the outcome of the case.”

. . . Counsel would alert the defendant of his right to have blood tests performed, advise him about the kinds of tests available and inform him of the procedures that must be followed to obtain accurate results. Counsel would also be able to challenge test results submitted by the [S]tate.¹³⁹

Finally, some of the decisions identified a few other factors generally applicable to all paternity cases that magnify the risk of error. The California Supreme Court pointed out that the risk was magnified by the potential *res judicata* effect of the paternity findings in later contempt proceedings: “While an indigent is entitled to counsel if prosecuted criminally for nonsupport, the most significant element of the offense—

136. *State ex rel. Cody v. Toner*, 456 N.E.2d 813, 815 (Ohio 1983).

137. *Kennedy v. Wood*, 439 N.E.2d 1367, 1372 (Ind. Ct. App. 1982) (citing *Wake Cnty. ex rel. Carrington v. Townes*, 281 S.E.2d 765, 771 (N.C. Ct. App. 1981)).

138. *Artibee*, 243 N.W.2d at 249.

139. *Lavertue*, 493 A.2d at 218 (footnote omitted) (citations omitted).

paternity—may have already been determined in a civil proceeding in which the defendant was unrepresented by counsel.”¹⁴⁰ The Nebraska Supreme Court came to the same conclusion.¹⁴¹ Some courts, like the Ohio Supreme Court, relied on the imbalance of power between the defendant and the State as a factor that increases the risk of error: “Emphasizing the fact that the paternity case below was initiated at the [S]tate’s insistence and prosecuted at the [S]tate’s expense, we realize that appellant is presented with a formidable task if he should be required to defend himself.”¹⁴² Lastly, the Connecticut Supreme Court rejected the case-by-case approach “not only because of the unique evidentiary problems of our paternity proceedings,” but also because “[i]t is often difficult to assess the complexities which might arise in a given paternity trial before that trial is held; thus, a case-by-case approach would necessarily require an after-the-fact evaluation of the record to determine whether appointed counsel could have affected the result reached in a paternity proceeding.”¹⁴³

C. *The State’s Interests: More than Just Money*

While a number of decisions simply concluded that the state’s financial interest was not sufficient to overcome the strong interests of the defendant,¹⁴⁴ a few saw the state’s interests as more layered in a way that further strengthened the need for appointed counsel. The Connecticut Supreme Court recognized that the State had multiple interests that conflicted in a potentially problematic way.¹⁴⁵ On the one hand, in its role as *parens patriae*, the State had an interest in the welfare of the child and thus shared the child’s interest in accurately identifying the father and holding that person responsible for child support.¹⁴⁶ In other words, the State had an interest in ensuring an accurate outcome—an interest that supports the provision of counsel.¹⁴⁷ On the other hand, as the child was

140. Salas v. Cortez, 593 P.2d 226, 231 (Cal. 1979).

141. Carroll v. Moore, 423 N.W.2d 757, 767 (Neb. 1988).

142. State ex rel. Cody v. Toner, 456 N.E.2d 813, 815 (Ohio 1983).

143. Lavertue, 493 A.2d at 219 (alteration in original) (quoting Corra v. Coll, 451 A.2d 480, 488 n.11 (Pa. Super. Ct. 1982)) (internal quotation marks omitted).

144. See, e.g., State ex rel. Cody, 456 N.E.2d at 815 (“Although we understand the state’s desire to proceed as economically as possible, the state’s financial stake in providing appellant with court[-]appointed counsel during the paternity proceedings is hardly significant to overcome the private interest involved.”).

145. See Lavertue, 493 A.2d at 217.

146. See id.

147. See id.

being supported at state expense, the court recognized that the State's interest in "find[ing] any man it can hold financially liable to reimburse it may undermine its interest in an accurate outcome."¹⁴⁸ Moreover, the State's interest in keeping the costs of such paternity actions to a minimum could also have a negative effect on achieving an "accurate outcome."¹⁴⁹ Meanwhile, in Pennsylvania, the superior court concluded that future administrative burdens would be lessened by a correct determination of paternity, "since a correct determination of paternity increases the chance that the adjudged parent will comply with support obligations."¹⁵⁰ Therefore, the State's interest would be best served by appointment of counsel to ensure that correct determination.

D. Paternity Proceedings as Quasi-Criminal

Beyond the *Mathews* factors,¹⁵¹ some courts relied on the quasi-criminal nature of paternity proceedings and the fact that various criminal procedures have been applied to paternity cases to find that appointment of counsel (as another type of criminal procedure) should apply as well. For example, the West Virginia Supreme Court relied in part on the similarity between paternity proceedings and criminal prosecutions to find a state constitutional due process right to counsel in paternity cases:

Criminal prosecutions are characterized by the sovereign's use of resources and expertise to deprive citizens of liberty, property, and reputation interests. They carry the right to trial by jury.

All these factors are present in paternity prosecutions. The putative father is arrested by authority of a warrant and brought before a magistrate. He is required to post a bond to guarantee his appearance at trial and may be imprisoned if he does not make that bond. The action is prosecuted by a county prosecutor and can be brought in the name of the county. A defendant has an absolute right to trial by jury. If determined to be the father, a defendant is required to support and maintain his child until its majority, and if he does not, he can be jailed.¹⁵²

148. *Id.* (alteration in original) (quoting *Kennedy v. Wood*, 439 N.E.2d 1367, 1371 (Ind. Ct. App. 1982)) (internal quotation marks omitted).

149. *See id.*

150. *See Corra v. Coll*, 451 A.2d 480, 488 (Pa. Super. Ct. 1982).

151. *See* discussion *supra* Part VI.

152. *State ex rel. Daugherty*, 266 S.E.2d 142, 144–45 (W. Va. 1980) (footnote

Applying a holding from a prior criminal contempt case to the instant case, the West Virginia court stated: “Where the penalty is not trivial as determined from the facts of the case, due process requires appointed counsel for indigents.”¹⁵³ Similarly, the Michigan Supreme Court explained: “The fact that many procedural safeguards attendant to criminal trials have been made applicable to paternity proceedings . . . constitute[s] recognition that the outcome is of great importance both to the defendant and to the [S]tate.”¹⁵⁴ The Connecticut Supreme Court added that “all paternity proceedings have quasi-criminal overtones. A paternity action results in a finding of ‘guilt’ or ‘innocence,’ and nonpayment of support orders attendant to a finding of ‘guilt’ may lead to contempt and imprisonment.”¹⁵⁵

E. Extending the Reasoning of the Paternity Cases to Other Civil Cases

Paternity cases are not the only civil cases to feature complex layers of interests. As previously mentioned, parties in domestic violence proceedings stand to lose access to both their home and their children, and the victim and alleged abuser are at risk of physical harm and loss of liberty, respectively. Moreover, just as the paternity cases recognized the indirect threat to physical liberty caused by a later civil contempt proceeding, so should courts realize that tenants and homeowners who are removed from their homes often wind up homeless, which in turn often leads to arrests for vagrancy or (if suffering from mental illness) institutionalization.¹⁵⁶ Homeowners also often have significant financial interests at stake, as they can be subject to a deficiency judgment if the home sells at auction for less than the loan amount,¹⁵⁷ and the foreclosure impairs their ability to access credit in the future.¹⁵⁸ And people who lose

omitted) (citation omitted).

153. *Id.* at 145 (citing *E. Associated Coal Corp. v. Doe*, 220 S.E.2d 672 (W. Va. 1975)).

154. *Artibee v. Cheboygan Circuit Judge*, 243 N.W.2d 243, 250 (Mich. 1976).

155. *Lavertue v. Niman*, 493 A.2d 213, 216 (Conn. 1985) (quoting *Little v. Streater*, 452 U.S. 1, 10 (1981)) (internal quotation marks omitted) (citing CONN. GEN. STAT. §§ 46b-171, 46b-215, 53-304 (1985)).

156. Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 567 (1988).

157. Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1404 (2004).

158. Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 983 n.49

their medical or public benefits likely face a cascade of collateral consequences that could include homelessness, unemployment, and loss of child custody.¹⁵⁹

The recognition by some paternity cases that the state's interest is also layered could be relevant to other types of civil proceedings. Just as the state may seek to find "any" father to hold financially liable in a paternity proceeding, so too might a state paying benefits to a custodial parent be interested in holding the non-custodial parent liable in a child support civil contempt proceeding (in order to reduce the state's burden) regardless of whether such a determination is accurate, a risk that increases the need for counsel. And just like in paternity proceedings, the government in all civil cases should be concerned with the collateral consequences for litigants who suffer an adverse decision simply because they lack counsel, because these consequences have real financial costs to the government. For instance, the consequences of losing an eviction, protection order, or benefits case can be increased use of shelters, police, and hospitals, all of which can cost significantly more than the provision of counsel as a preventative measure.¹⁶⁰

It is not just the layering of interests that makes paternity cases similar to other civil cases. Just as paternity proceedings may be res judicata for later contempt proceedings, there are other types of cases in which the lack of counsel in an initial proceeding can affect a subsequent related proceeding, such as truancy (contempt proceedings for continued

(2010) ("[G]enerally, one can expect a 100 to 140 point hit to his or her credit as a result of a foreclosure . . .").

159. Stephen Loffredo & Don Friedman, *Gideon Meets Goldberg: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 *TOURO L. REV.* 273, 313–14 (2009), available at http://www.tourolaw.edu/LawReview/uploads/pdfs/_11_WWW_Gideon%20Meets%20Goldberg_SM_Final_12.23.08_.pdf.

160. See, e.g., *Graves v. Adult & Family Servs. Div.*, 708 P.2d 1180, 1186 (Or. Ct. App. 1985) ("[A]s *amicus* points out, the state also has an interest in the least costly alternative to the care of the mentally ill. It notes that mentally ill persons who are destitute are likely to end up in state institutions and that the cost of *post hoc* institutionalizations must be substantially greater than the subsistence payments made to such people under the welfare system."); Loffredo & Friedman, *supra* note 159 at 325–26 ("[U]nfounded denials of subsistence benefits not only inflict harm on the wronged individuals, but may well increase net public expenditures in the form of emergency shelter costs for families who become homeless, increased Medicaid and municipal hospital expenditures for those who take ill, increased social services costs, and child protective costs, to name just a few of the immediate short-term outlays.").

truancy), abuse/neglect (termination of parental rights hearings), and domestic violence protection orders (contempt hearings for violating the protection order). Similarly, a person denied counsel during a guardianship or civil commitment proceeding may find it difficult to undo these impositions, even with counsel, at a later review proceeding.

VII. CIVIL COMMITMENT: LAYERED LIBERTY INTERESTS AND THE NEXT WAVE OF CASES

All states and Washington, D.C., provide a statutory right to counsel for the respondent in at least some civil commitment proceedings.¹⁶¹

161. The following list of statutes is by no means exhaustive for each state, as there are often various types of commitment proceedings (such as emergency/short-term commitment, commitment for substance abuse, proceedings pertaining specifically to juveniles or developmentally disabled adults, procedures governing involuntary medication, and commitment of sexually dangerous/violent persons). ALA. CODE § 22-52-4(a) (LexisNexis 2006); ALASKA STAT. § 18.85.100 (2012); ARIZ. REV. STAT. ANN. § 36-529(D) (2009 & Supp. 2012); ARK. CODE ANN. § 20-47-212 (2001); CAL. WELF. & INST. CODE § 6500(a)(4) (West Supp. 2013); COLO. REV. STAT. § 27-65-106(10) (2012); CONN. GEN. STAT. ANN. § 17a-498(b) (West 2006 & Supp. 2013); D.C. CODE § 21-543 (2001); DEL. CODE ANN. tit. 16, § 5006(3) (2003); FLA. STAT. ANN. § 394.467(4) (West 2011 & Supp. 2013); GA. CODE ANN. § 37-3-81(a)(2) (West 2010); HAW. REV. STAT. § 802-1 (1993 & Supp. 2007); IDAHO CODE ANN. § 66-329(7) (2007 & Supp. 2012); 405 ILL. COMP. STAT. ANN. § 5/3-805 (West 2011 & Supp. 2012); IND. CODE ANN. § 12-26-2-2(b)(4) (LexisNexis 2006 & Supp. 2012); IOWA CODE § 229.8(1) (2013); KAN. STAT. ANN. § 59-2965(e) (2012); KY. REV. STAT. ANN. § 202A.121 (LexisNexis 2007); LA. REV. STAT. ANN. § 28:54(C) (2011); ME. REV. STAT. ANN. tit. 34-B, § 3864(5)(D) (2010); MD. CODE ANN., CRIM. PROC. § 16-204(b)(1)(iv) (West 2008 & Supp. 2012); MASS. GEN. LAWS ANN. ch. 123, § 5 (West 2003 & Supp. 2013); MICH. COMP. LAWS ANN. § 330.1454 (West 1999 & Supp. 2012); MINN. STAT. ANN. § 253B.07(2c) (West 2007 & Supp. 2013); MISS. CODE ANN. § 41-21-67(3) (West 2007 & Supp. 2012); MO. ANN. STAT. § 632.325 (West 2006) (noting respondent must be advised that “[a]n attorney has been appointed who will represent him before and after the hearing and who will be notified as soon as possible”); MONT. CODE ANN. § 53-21-116 (2011); NEB. REV. STAT. ANN. § 71-945 (LexisNexis 2008); NEV. REV. STAT. § 433A.270(1) (2011); N.H. REV. STAT. ANN. § 135-C:22 (LexisNexis 2012); N.J. STAT. ANN. § 30:4-27.14 (West 2008 & Supp. 2012); N.M. STAT. ANN. § 43-1-4 (2012); N.Y. MENTAL HYG. LAW § 47.03(b)–(c) (McKinney 2011 & Supp. 2013); N.C. GEN. STAT. ANN. § 7A-451(a)(6) (2012); N.D. CENT. CODE § 25-03.1-13 (2002 & Supp. 2011); OHIO REV. CODE ANN. § 5122.05(C) (LexisNexis 2011); OKLA. STAT. ANN. tit. 43A, 5-411(A)(2) (West YEAR); OR. REV. STAT. ANN. § 426.100(3)(b) (West 2011 & Supp. 2012); 50 PA. STAT. ANN. § 7304(e)(1) (West 2001 & Supp. 2012); R.I. GEN. LAWS § 40.1-5-8(d)(2) (2006); S.C. CODE ANN. § 44-17-530 (2002); S.D. CODIFIED LAWS § 27A-11A-7 (2011); TENN. CODE ANN. § 33-6-419 (2007); TEX. HEALTH & SAFETY CODE ANN. § 574.003 (West 2010 & Supp. 2012); UTAH CODE ANN. § 62A-15-631(9)

However, some courts have also recognized a constitutional right to counsel.¹⁶²

One case that helped lay the groundwork for this was *Vitek v. Jones*, a Supreme Court case holding that indigent prisoners who are involuntarily transferred to mental health facilities have a right to “independent assistance,” but not necessarily a licensed attorney.¹⁶³ In reaching the ruling, the Court made several important findings that lend themselves to a categorical right to counsel in civil commitment proceedings.¹⁶⁴ First, the Court recognized a very important element of the liberty interest at issue in all such cases, namely being free of “stigma.”

The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital “can engender adverse social consequences to the individual” and that [w]hether we label this phenomena ‘stigma’ or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual.¹⁶⁵

Second, while Justice Powell felt that something less than an attorney would meet the due process requirements,¹⁶⁶ his concurring opinion aptly summarized the inherent inability of *all* people faced with involuntary psychiatric transfer or commitment to defend themselves in such proceedings:

(LexisNexis 2011 & Supp. 2012); VA. CODE ANN. § 37.2-814(c) (2011); VT. STAT. ANN. tit. 18, § 7111 (1977); WASH. REV. CODE ANN. § 71.05.300(2) (West 2008 & Supp. 2013); W. VA. CODE § 29-21-2(2) (LexisNexis 2008); WIS. STAT. ANN. § 51.20(3) (West 2008 & Supp. 2012); WYO. STAT. ANN. § 25-10-110(b) (2011); *F.J. v. State*, 411 N.E.2d 372, 384 (Ind. Ct. App. 1980) (construing predecessor statute with identical “right . . . to be represented by counsel” language to mean right to appointed counsel); *Mooney v. Frazier*, 693 S.E.2d 333, 337 (W. Va. 2010) (noting that the proceedings listed in W. VA. CODE § 29-21-2(2) are “[t]he legal proceedings to which indigents are entitled to court appointed counsel”); *see also* Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245, 264–68 (2006) (listing similar statutes in various states).

162. *See infra* note 168 and accompanying text.

163. *Vitek v. Jones*, 445 U.S. 480, 497 (1980); *id.* at 497–500 (Powell, J., concurring).

164. *See id.* at 492–93 (majority opinion); *id.* at 498 (Powell, J., concurring).

165. *Id.* at 492 (majority opinion) (alterations in original) (quoting *Addington v. Texas*, 441 U.S. 418, 425–26 (1979)) (internal quotation marks omitted).

166. *Id.* at 499–500 (Powell, J., concurring).

The resolution of factual disputes will be less important than the ability to understand and analyze expert psychiatric testimony that is often expressed in language relatively incomprehensible to laymen. It is unlikely that an inmate threatened with involuntary transfer to mental hospitals will possess the competence or training to protect adequately his own interest in these [S]tate-initiated proceedings.¹⁶⁷

There are numerous instances of state courts finding a right to counsel in civil commitment proceedings, sometimes under state constitutional demands for due process, and often relying on *Vitek*.¹⁶⁸ But more specifically, some courts that have confronted the civil commitment of people who have completed their prison sentences but have been classified as sexually dangerous or sexually violent persons (SDP/SVP) have found a right to counsel. Courts have also taken on collateral matters to SDP/SVP proceedings, including conditions of confinement, sex offender classification hearings, and appeals of any of these types of decisions. In these rulings, the courts established categorical rights to counsel by looking to the universal nature of the complex liberty interest at stake or the imbalance of power, or by relying on equal protection (which,

167. *Id.* at 498.

168. *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 383 (Alaska 2007) (finding a right to counsel under the state constitution's due process clause due to the infringement on both liberty and privacy interests); *Pullen v. State*, 802 So. 2d 1113, 1119 (Fla. 2001) ("While the right to appointed counsel in Baker Act involuntary civil commitment proceedings is provided by Florida statute, the constitutional guarantee of due process would require no less." (footnote omitted) (citing *Lynch v. Baxley*, 386 F. Supp. 378, 388 (M.D. Ala. 1974))); *True v. State Dep't of Health & Welfare*, 645 P.2d 891, 903 (Idaho 1982) (relying on federal due process); *In re Simons*, 698 P.2d 850, 851 (Mont. 1985) (finding that the statutory guarantee of counsel enshrined state and federal constitutional due process rights to counsel); *In re S.L.*, 462 A.2d 1252, 1256 (N.J. 1983) (relying on *Vitek*); *People ex rel. Rogers v. Stanley*, 17 N.Y.2d 256, 259 (1966) (relying on various U.S. Supreme Court cases); *Rashid v. J.B.*, 410 N.W.2d 530, 532 (N.D. 1987) (recognizing commitment as "a massive curtailment of liberty," and noting that "the constitutional safeguards afforded criminal defendants are generally extended to those involved in civil commitment proceedings. One such procedural safeguard provided in mental health proceedings is the right to counsel." (citations omitted) (quoting *Vitek*, 445 U.S. at 491) (internal quotation marks omitted)); *In re Fisher*, 313 N.E.2d 851, 854 (Ohio 1974) (finding federal constitutional right); *State v. Collman*, 497 P.2d 1233, 1236 (Or. Ct. App. 1972) (relying in part on *Gault* and finding federal due process right to counsel). Moreover, some decisions have also identified a constitutional right to counsel for involuntary administration of psychotropic drugs. *See, e.g., Wetherhorn*, 156 P.3d at 383–84 (relying on Alaska Constitution, due to infringement on "fundamental rights to liberty and to privacy"); *Rivers v. Katz*, 495 N.E.2d 337, 344 (N.Y. 1986).

as previously noted, is not as amenable to a case-by-case approach because the analysis already involves comparing classes of individuals).¹⁶⁹

The Kansas Supreme Court found a constitutional right to counsel for commitment proceedings under the Kansas Sexually Violent Predator Act, reversing the decision of the Kansas Court of Appeals.¹⁷⁰ While the court acknowledged the Supreme Court's decision in *Turner*,¹⁷¹ it found more applicability in *Vitek*:

[I]t is difficult to conceive of a stronger liberty interest because Ontiberos' confinement has the potential of being indefinite and it includes participation in a sex offender treatment program while committed to state custody. Ontiberos' interest is certainly greater than the prisoner's interest in *Vitek* because Ontiberos would be free from state custody were it not for the KSVPA proceeding, whereas *Vitek* would have been transferred back to prison.¹⁷²

While the court acknowledged that the risk of error was lower because of several procedural protections,¹⁷³ it pointed to *Turner*'s suggestion that one important consideration is whether the opponent in an action is the State represented by counsel (as is the case with all sexually violent person proceedings).¹⁷⁴ Finally, the court concluded, "[t]he burden of providing counsel is small when compared to the substantial liberty issue at risk here."¹⁷⁵ The Virginia Supreme Court came to a similar conclusion regarding SDP/SVP proceedings when it found a state and federal due process "right to counsel at all significant stages of the judicial proceedings, including the appellate process."¹⁷⁶

The Wisconsin Supreme Court found that a person adjudicated to be sexually dangerous had a federal due process and equal protection right to appointed counsel in that person's by-right appeal (in Wisconsin, there is a statutory right to appointed counsel for the trial).¹⁷⁷ The court relied upon

169. *See supra* Part V.A.

170. *In re Ontiberos*, 287 P.3d 855, 865 (Kan. 2012).

171. *Id.* at 864.

172. *Id.* at 865.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Jenkins v. Dir. of Va. Ctr. for Behavioral Rehab.*, 624 S.E.2d 453, 459–60 (Va. 2006) (citations omitted).

177. *State ex rel. Seibert v. Macht*, 627 N.W.2d 881, 883 (Wis. 2001).

the U.S. Supreme Court's decision in *Douglas v. California*, which held that states providing a by-right appeal in criminal cases had to provide appointed counsel for that appeal as a matter of equal protection.¹⁷⁸ The Wisconsin Supreme Court went on to hold:

Although a sexually violent person, committed under Chapter 980, is not a criminal defendant, he or she has the same constitutional rights as a criminal defendant. It therefore follows that an individual committed under Chapter 980 has a constitutional right of counsel in bringing his or her first appeal as of right, emanating from both the Fourteenth Amendment's Equal Protection Clause and Due Process Clause as well as the Sixth Amendment's right of counsel.¹⁷⁹

A New Jersey appellate court came to the same conclusion regarding the right to counsel on appeal of such proceedings, although it relied only on federal due process.¹⁸⁰

A number of courts have looked beyond the commitment itself to find a right to counsel in various corollary proceedings. For instance, the Kansas Court of Appeals held that the failure to provide appointed counsel for a person challenging the quality of treatment under the Kansas Sexual Predator Treatment Program was a violation of both due process and equal protection.¹⁸¹ The petitioner brought a habeas corpus petition alleging that the facility in which he had been confined for more than a decade did not provide constitutionally adequate care, and he challenged the training of the staff as well as some of the facility's methods.¹⁸² The court relied on the strength of the petitioner's liberty interest and on cases from other state and federal courts (including the Virginia Supreme Court decision mentioned above)¹⁸³ in order to find a due process right to counsel in such proceedings.¹⁸⁴ The court stated that the petitioner "contends—with sufficient basis to warrant an evidentiary hearing—that the treatment provided to him is so ineffective that it could never give him the help he would need to regain his freedom," and that such a person "must be

178. *Douglas v. California*, 372 U.S. 353, 357–58 (1963).

179. *Seibert*, 627 N.W.2d at 885–86 (footnote omitted) (citations omitted).

180. *In re Civil Commitment of D.L.*, 797 A.2d 166, 174 (N.J. Super. Ct. App. Div. 2002).

181. *Merryfield v. State*, 241 P.3d 573, 579–80 (Kan. Ct. App. 2010).

182. *Id.* at 576.

183. *See supra* note 176 and accompanying text.

184. *Merryfield*, 241 P.3d at 579–80.

entitled to the assistance of counsel in the resolution of such substantial claims.”¹⁸⁵ The court also held that even under a rational basis analysis, the statutory scheme flunked equal protection, given that Kansas provided counsel to other civilly committed individuals.¹⁸⁶ The court explained that while the State had sufficient reasons for treating sexually violent people differently from other civilly committed individuals in terms of *treatment*, it did not have a sufficient reason for treating them differently in terms of providing *counsel*.¹⁸⁷ The court concluded: “There is no rational basis for making it fundamentally more difficult for those committed to the sexual predator treatment program to seek court redress for unconstitutional conduct—including conduct that suggests the constitutionality of the entire program may be questioned—than other civilly committed individuals or inmates.”¹⁸⁸

Additionally, the New Jersey Supreme Court held that due process and fundamental fairness under the New Jersey constitution guaranteed a right to a hearing for convicted sex offenders at Megan’s Law tier classification hearings, and that appointed counsel had to be provided at such hearings.¹⁸⁹ The court explained: “We attempt by these procedures to reach a difficult accommodation between the [s]tate’s legitimate and substantial interest in effecting prompt notification and the offender’s legitimate interests in assuring accurate evaluation of the risk of reoffense and the proper determination of the manner of notification.”¹⁹⁰

The most translatable aspect of these civil commitment cases to other types of civil proceedings is the recognition of the stigma that attaches to being committed or classified as a sex offender. Generally, the U.S. Supreme Court has said that when “a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential,”¹⁹¹ and it cited this doctrine in a school discipline case, noting:

185. *Id.* at 579.

186. *Id.* at 580.

187. *Id.*

188. *Id.* (citing *State ex rel. Seibert v. Macht*, 627 N.W.2d 881 (Wis. 2001)).

189. *Doe v. Poritz*, 662 A.2d 367, 382 (N.J. 1995). While *Poritz* itself does not make it clear that the court’s ruling is based on the state constitution, the court later made it clear in *Pasqua v. Council*, 892 A.2d 663, 675 (N.J. 2006).

190. *Poritz*, 662 A.2d at 383.

191. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 573 (1972) (citations omitted).

School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.¹⁹²

Certainly, other types of basic human needs civil cases raise a similar risk of stigma. It is not difficult to think of the stigmatizing effect of being deprived of one's children by a court, or becoming homeless, or being expelled from a school. And the Minnesota Supreme Court recognized, for example, that "the social stigma resulting from an adjudication of paternity cannot be ignored."¹⁹³

VIII. MISCELLANEOUS: CIVIL CONTEMPT, CIVIL FORFEITURE, AND
OTHER TYPES OF CIVIL CASES IN WHICH COURTS HAVE IDENTIFIED
CATEGORICAL RIGHTS TO COUNSEL

A. *Civil Contempt: Going Beyond Turner v. Rogers*

Prior to *Turner*, a number of courts recognized a categorical right to counsel in civil contempt proceedings under the federal constitution, based on the threat to physical liberty.¹⁹⁴ Some of these decisions were likely unaffected by *Turner*, since they were limited to a category of cases expressly left unaddressed by *Turner*: cases in which the plaintiff is the government.¹⁹⁵ Additionally, some decisions clearly rested on that state

192. Goss v. Lopez, 419 U.S. 565, 574–75 (1975).

193. Hepfel v. Bashaw, 279 N.W.2d 342, 345 (Minn. 1979).

194. See, e.g., McNabb v. Osmundson, 315 N.W.2d 9, 14 (Iowa 1982) (Allen v. Sheriff of Lancaster Cnty., 511 N.W.2d 125, 127 (Neb. 1994), *overruled on other grounds* by Smeal Fire Apparatus Co. v. Kreikemeier, 782 N.W.2d 848 (Neb. 2010); McBride v. McBride, 431 S.E.2d 14, 19 (N.C. 1993).

195. See, e.g., Black v. Div. of Child Support Enforcement, 686 A.2d 164, 166 (Del. 1996) ("[A]n indigent obligor who faces the possibility of incarceration in a *State initiated* civil contempt proceeding does have a due process right to court appointed counsel." (emphasis added)); Mead v. Batchlor, 460 N.W.2d 493, 503 (Mich. 1990) ("[S]ince the state's representative at such a hearing is well versed in the laws relating to child support, fundamental fairness requires that the indigent who faces incarceration should also have qualified representation." (citing Bowerman v. McDonald, 427 N.W.2d 477, 481 (Mich. 1988))); State v. Pultz, 556 N.W.2d 708, 713 (Wis. 1996) (finding the right to counsel attaches "when an arm of government brings a motion for a remedial contempt hearing against an individual, and that person's liberty is threatened").

constitution's due process clause and are thus immune from *Turner*.¹⁹⁶ Maryland's high court rejected the "minority rule" (a case-by-case approach that examines whether a case has "special circumstances") in finding a categorical right to counsel in civil contempt, commenting that "very often the 'special circumstances' requiring the assistance of counsel are not apparent until the defendant is represented by counsel."¹⁹⁷

The Minnesota Supreme Court's recognition of a right to counsel in civil contempt proceedings took an entirely different jurisprudential path, eschewing due process in favor of the court's supervisory power "to ensure the fair administration of justice."¹⁹⁸ The court reiterated its reasoning from prior cases that given the adversarial nature of the proceedings, the right to counsel established the best method to protect the important interests at hand.¹⁹⁹ Furthermore, it noted that "[an] indigent facing civil contempt has a greater need for a court-appointed attorney than a paternity defendant," due to the immediate threat to physical liberty.²⁰⁰

B. Judicial Bypass: Protecting the Rights of Minors Seeking Abortions

Many states require that a minor attempting to obtain an abortion either receive parental consent or notify the parent.²⁰¹ The Supreme Court, however, held that with respect to at least parental consent, the state is required to offer a judicial process whereby the minor can obtain a waiver of the consent requirement.²⁰² Most states with consent requirements provide appointed counsel to the minor at the bypass proceeding as a

196. See, e.g., *Pasqua v. Council*, 892 A.2d 663, 674 n.5 (N.J. 2006) (commenting that "the right to appointed counsel for indigent litigants has received more expansive protection under our state law than federal law" and that such expansive protection had reached even those who were not at risk of incarceration, but "face a consequence of magnitude" (citations omitted) (quoting *State v. Hrycak*, 877 A.2d 1209, 1216 (N.J. 2005)) (internal quotation marks omitted)); *Moore v. Hall*, 341 S.E.2d 703, 705 (W. Va. 1986) ("[A] right to counsel in a contempt proceeding that may result in incarceration is specifically required by the Due Process Clause of Article III, section 10 of the West Virginia Constitution.").

197. *Rutherford v. Rutherford*, 464 A.2d 228, 235 (Md. 1983).

198. See *Cox v. Slama*, 355 N.W.2d 401, 403 (Minn. 1984).

199. *Id.*

200. *Id.*

201. See NARAL Pro-Choice Am. Found., *WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES* 19 (22d ed. 2013), available at <http://www.prochoiceamerica.org/assets/download-files/2013-who-decides.pdf>.

202. *Bellotti v. Baird*, 443 U.S. 622, 643 (1979).

matter of statutory law.²⁰³ However, the Florida Supreme Court found appointed counsel necessary in all such hearings by relying on a unique provision of the Florida constitution.²⁰⁴

The Florida Supreme Court started by recognizing that “Florida is unusual in that it is one of at least four states having its own express constitutional provision guaranteeing an independent right to privacy,” making a state constitutional approach to the question of appointment of counsel more appropriate.²⁰⁵ It held that “[i]n [parental consent hearings] wherein a minor [seeking to obtain an abortion] can be wholly deprived of authority to exercise her fundamental right to privacy, counsel is required under our state constitution.”²⁰⁶ The court noted that providing counsel in termination of parental rights proceedings was based on the fact that “an individual’s interest in preserving the family unit and raising children is fundamental.”²⁰⁷ Thus, since “a woman’s right to decide whether or not to continue her pregnancy constitutes a fundamental constitutional right,” counsel is similarly required whenever one can be deprived of the authority to exercise those rights.²⁰⁸ Despite citing approvingly to Seventh Circuit caselaw coming to a similar conclusion, the court maintained that it was “expressly decid[ing] this case on state law grounds.”²⁰⁹

One disturbing aspect of the Florida case’s fact pattern demonstrates an additional reason why counsel is appropriate to protect all minors in judicial bypass proceedings. It is not unheard of for minors to encounter judges who are not willing to grant a waiver of parental consent owing to the strong religious beliefs of the judge (and the remaining judges in the area may have recused themselves due to religious beliefs or fear of public backlash).²¹⁰ It is also not unheard of for trial judges who are willing to hear such cases to appoint a GAL for the fetus, transforming a supposedly neutral proceeding into an adversarial one.²¹¹ In the Florida case, the trial

203. See NAT’L P’SHIP FOR WOMEN & FAMILIES, *BYPASSING JUSTICE: PREGNANT MINORS AND PARENTAL-INVOLVEMENT LAWS* 13 (2010), http://www.nationalpartnership.org/site/PageServer?pagename=issues_repro_bypass_landing.

204. See *In re T.W.*, 551 So. 2d 1186, 1196 (Fla. 1989).

205. *Id.* at 1190 (citation omitted).

206. *Id.* at 1196.

207. *Id.*

208. *Id.*

209. *Id.*

210. See NAT’L P’SHIP FOR WOMEN & FAMILIES, *supra* note 203, at 23, 26.

211. See, e.g., Helena Silverstein, *In the Matter of Anonymous, A Minor: Fetal*

court judge appointed a GAL for the fetus for the express purpose of challenging the legitimacy of the judicial bypass procedure, thus allowing the judge to oppose the waiver process indirectly.²¹² The Florida Supreme Court held that “the appointment of a [GAL] for the fetus was clearly improper,”²¹³ and went on to explain the impropriety of the judge’s action in making the appointment:

We are compelled to comment on the trial judge’s finding that the court, “as the only entity otherwise involved [i]n the proceeding which could possibly protect the [S]tate’s interest,” could have standing to challenge the constitutionality of the statute. Under no circumstances is a trial judge permitted to argue one side of a case as though he were a litigant in the proceedings. The survival of our system of justice depends on the maintenance of the judge as an independent and impartial decisionmaker. A judge who becomes an advocate cannot claim even the pretense of impartiality.²¹⁴

Routine appointment of attorneys in bypass proceedings can ensure that the interests of minors are not infringed due to the heavily charged nature of these proceedings.²¹⁵

C. Civil Forfeiture: Criminal Implications When Forfeiture Comes First

In civil forfeiture proceedings, the government attempts to seize property that is connected in some way to criminal activity—either used to facilitate the crime or purchased with funds from the crime.²¹⁶ A relatively obscure federal statute covering such proceedings provides one of the few rights to counsel granted by federal law, and it specifies that if the property subject to forfeiture is the person’s primary residence, the court *must* ensure the indigent person is represented by a Legal Services Corporation attorney.²¹⁷ This statute, however, only controls federal forfeiture proceedings.²¹⁸

Representation in Hearings to Waive Parental Consent for Abortion, 11 CORNELL J.L. & PUB. POL’Y 69, 79 (2001) (describing an Alabama case in which the trial court appointed a guardian ad litem for a fetus).

212. *In re T.W.*, 551 So. 2d at 1189.

213. *Id.* at 1190.

214. *Id.* at 1190 n.3 (alteration in original).

215. *See id.* at 1189–90, 1196.

216. 18 U.S.C. § 981 (2006).

217. *Id.* § 983(b)(2)(A).

218. *See* Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons from the*

One relatively recent case from the South Dakota Supreme Court established a right to counsel for forfeiture proceedings, but limited it to forfeiture cases initiated prior to the criminal charges being brought.²¹⁹ This is another example of a court declaring a categorical right that is narrower than the entire class of cases. In the case, the South Dakota Supreme Court examined whether “an indigent defendant has a Fourteenth Amendment due process right to appointed counsel in a civil forfeiture action” when criminal proceedings had not yet been initiated by the State.²²⁰ Noting that the Supreme Court had not addressed the right to counsel in such proceedings, the court applied the *Mathews* factors²²¹ and conceded that it found “no case that holds a property interest, standing alone, requires appointment of counsel in civil forfeiture proceedings.”²²² However, the court also pointed out that in *Lassiter*, there was no risk of a subsequent criminal proceeding, whereas in the civil forfeiture case before it, “Apple faces a subsequent criminal prosecution based upon [his] conduct. Thus, the paramount concern . . . notably absent in . . . *Lassiter*, is present here: there is a real and significant danger that Apple could prejudice himself in respect to the subsequent criminal proceeding.”²²³ The court also noted that by pursuing the civil forfeiture prior to even seeking an indictment against the defendant, the State’s interest in minimizing financial resources was less significant.²²⁴ It then found that the risk of erroneous deprivation was high, given that there had not yet been any criminal proceedings against the defendant to establish the basic underlying facts.²²⁵ The court concluded:

After examining these factors, we hold that the significant risk of

Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings, 19 J.L. & POL’Y 683, 713 (2011).

219. State v. \$1,010.00 in Am. Currency, 722 N.W.2d 92, 98–99 (S.D. 2006).

220. *Id.* at 94.

221. *Id.* at 98–99.

222. *Id.* at 98.

223. *Id.* at 98–99.

224. *Id.* at 99.

225. *Id.* See also Jay A. Rosenberg, Note, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390, 404–05 (1988) (“In a post-conviction forfeiture, the chance of an erroneous outcome and the concomitant benefit of providing appointed counsel is greatly reduced because the criminal act implicating the property owner has already been proven, presumably with the indigent property owner having had benefit of appointed counsel and a beyond-a-reasonable-doubt standard. In contrast, a preconviction forfeiture proceeding involves unlitigated issues.”).

prejudice in the future criminal proceeding coupled with the State's minimal interest in pursuing these matters prior to a criminal prosecution and the risk of erroneous deprivation outweighs the presumption against appointed counsel. To hold otherwise, would allow the State an end run around the Sixth Amendment by filing civil forfeiture proceedings in order to gain admissions to bolster its criminal case against the defendant.²²⁶

While the State argued that many previous cases had not found a right to counsel in civil forfeiture cases, the court pointed out that "the State cites no case that involved a civil forfeiture proceeding initiated prior to criminal charges."²²⁷ The court's concern with the litigant prejudicing himself in respect to the later criminal proceeding is similar to the concern of some courts, previously discussed, of the res judicata effects of initial civil proceedings on later ones (such as abuse/neglect hearings on termination of parental rights, paternity hearings on child support civil contempt, and so on).

D. Benefits: Mental Illness and Imbalances of Power

While no court yet has recognized a categorical right to counsel in benefits cases,²²⁸ a concurring opinion from one decision urged recognition

226. \$1,010.00 in Am. Currency, 722 N.W.2d at 99.

227. *Id.*

228. In *Graves v. Adult & Family Servs. Div.*, the Oregon Court of Appeals held:

[W]hen a claimant is mentally ill, is not represented by counsel and appears to be unable to address the issues involved in the hearing, the hearings officer must develop the record adequately to determine whether the claimant is entitled to benefits, not just decide the case on an inadequate record. . . . If the hearings officer is unable to get sufficient information from the applicant to develop an adequate record by the hearing process, counsel must be appointed.

Graves v. Adult & Family Servs. Div., 708 P.2d 1180, 1185–86 (Or. Ct. App. 1985). This is the only court known to recognize even a contingent right to counsel in a benefits proceeding. The *Graves* court rejected the state's argument that the claimant had sufficiently understood the proceedings and therefore did not need counsel, and it doubted that the claimant understood "many of the privileges to which he was entitled," such as cross-examination. *Id.* at 1185. It also found that found that the petitioner's interest in the benefits was "commanding," given that they were his "means to obtain essential food, clothing, housing and medical care . . . the very means by which to live." *Id.* at 1186 (alteration in original) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970)) (internal quotation marks omitted). The court also pointed out

of such a right. In a case before the Wyoming Supreme Court, then-Chief Justice Walter Urbigkit wrote a lengthy concurring opinion urging the court to find a state constitutional right to counsel in workers' compensation cases.²²⁹ Justice Urbigkit first noted that Wyoming's due process clause, enshrined in Wyoming Constitution article 1, section 6, "provides protection not accorded under the federal due process clause."²³⁰ He also observed that "most injured employees would be unable to afford an attorney to battle the Attorney General representing the Wyoming Workers' Compensation Division and also employer counsel at a time when they are unable to work and are faced with medical bills."²³¹ The justice then posited that because the Wyoming constitution establishes a right to workers' compensation,²³² and "because of the potential unfairness of such an unequal contest, the right to counsel in a worker's compensation adversarial contest is constitutionally required under Wyo. Const. art. 1, § 6."²³³ The imbalance of power between the parties is an important point—as the Supreme Court recognized in *Turner*—and here the justice noted the presence of not one adversary, but two (the State and the employer), heightening the need for counsel.²³⁴ The imbalance factor, particularly if multiple parties are on the other side, could form additional elements to the category of cases entitled to counsel in benefits cases, including, for example, unemployment compensation.

Justice Urbigkit's concurring opinion provides some important clues as to how such a right might be established in the future. It noted the imbalance of power in worker's compensation proceedings, but a similar imbalance often plays out in other types of benefits proceedings, such as unemployment compensation (in which employers, if not represented by counsel, are represented by trained advocates familiar with the hearing

that the U.S. Supreme Court's ruling in *Goldberg v. Kelly*—"We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to obtain an attorney if he so desires"—was not determinative, as the Court had "considered the right to counsel only in the context of the procedural rights of welfare recipients in general," and had not considered litigants with mental disabilities specifically. *Graves*, 708 P.2d at 1184.

229. See *State ex rel. Wyo. Workers' Comp. Div. v. Brown*, 805 P.2d 830, 845–47 (Wyo. 1991) (Urbigkit, C.J., specially concurring).

230. *Id.* at 846 (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 35 (1981)).

231. *Id.* at 845–46.

232. WYO. CONST. art. X, § 4.

233. *Brown*, 805 P.2d at 847.

234. *Id.* at 845–46.

process). It also tied the right to counsel to a right to a state constitutional right to workers' compensation, similar to when the Florida Supreme Court grounded a right to counsel in judicial bypass proceedings on the unique right to privacy enshrined in the Florida constitution.²³⁵

IX. EXITING THE *MATHEWS* BOX: COURTS ADOPTING BROADER STATE CONSTITUTIONAL TESTS THAT CREATE POSSIBILITIES FOR CATEGORICAL RIGHTS TO COUNSEL

To some courts, it may seem that the *Mathews* test contains elements that militate in favor of looking at each individual case—such as the risk of error.²³⁶ However, Justice Blackmun addressed this in his *Lassiter* dissent, pointing out that “[t]he flexibility of due process, the Court has held, requires case-by-case consideration of different decisionmaking contexts, not of different litigants within a given context.”²³⁷ In other words, a court’s role is to examine the risk of error for the type of proceeding generally, not for the particular litigant before the court. Nonetheless, some courts have taken advantage of the flexibility that state constitutions offer to adopt broader tests that are not as seemingly hemmed in as the *Mathews* factors.

The New Jersey Supreme Court has spoken of its long history of interpreting the state constitution more expansively, noting, for instance, its adoption of a criminal right to counsel more than 150 years before *Gideon*²³⁸ and that “the right to appointed counsel for indigent litigants has received more expansive protection under our state law than federal law.”²³⁹ In this vein, in a case involving an indigent defendant charged with petty offenses, the court broadly held, “no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost.”²⁴⁰ The court made no explicit mention of due process, resting its decision instead on “considerations of fairness” and “simple justice.”²⁴¹ This “consequence of magnitude” standard puts the interest at risk at the center, rather than as

235. See *In re T.W.*, 551 So. 2d 1186, 1196 (Fla. 1989).

236. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

237. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 49 (1981) (Blackmun, J., dissenting).

238. *State v. Sanchez*, 609 A.2d 400, 407 (N.J. 1992).

239. *Pasqua v. Council*, 892 A.2d 663, 674 n.5 (N.J. 2006).

240. *Rodriguez*, 277 A.2d at 223.

241. *Id.*

one of the three prongs to be balanced by the *Mathews* test. The court had in mind protections far more expansive than those under federal law, as its notion of a “consequence of magnitude” included such penalties as the “substantial loss of driving privileges.”²⁴² New Jersey courts have since relied on this test to provide counsel in non-criminal cases involving fines,²⁴³ paternity,²⁴⁴ and driving while intoxicated.²⁴⁵ It is certainly not a stretch to see the court recognizing something like benefits as a “consequence of magnitude”; as the Oregon Court of Appeals has noted, benefits can be “the very means by which to live.”²⁴⁶

Other courts have created similarly broad tests. For instance, the Nebraska Supreme Court has held that “in either a criminal or a civil action, due process may require appointment of counsel where a significant right is at stake in a case ordinarily brought on by the State or where a deprivation of liberty is threatened.”²⁴⁷ Similarly, in finding a right to counsel in paternity cases under the state constitution, the West Virginia Supreme Court led off by holding, “[o]ur state constitutional due process right to counsel requires court-appointed attorneys in criminal and civil actions which may constrain one’s liberty or important personal rights.”²⁴⁸

X. CONCLUSION

Many of the decisions above show courts embracing the principles of federalism to interpret their state constitutions more expansively than the Supreme Court has done with the federal Constitution. The decisions also demonstrate the many different jurisprudential routes that can be taken to identify new categorical rights to counsel: due process, equal protection, equitable power, inherent power to promote justice, protecting against consequences of magnitude, and so on. And the decisions show that in

242. *See id.*

243. *See, e.g.,* State v. Hermanns, 650 A.2d 360, 366 (N.J. Super. Ct. App. Div. 1994) (fine of just \$1,800 constitutes “consequence of magnitude” that requires assignment of counsel under *Rodriguez*).

244. *See, e.g.,* M. v. S., 404 A.2d 653, 656 (N.J. Super. Ct. Law Div. 1979) (commenting that “Bastardy proceedings are at least quasi-criminal in nature”).

245. *See, e.g.,* State v. Hrycak, 877 A.2d 1209, 1216 (N.J. 2005).

246. *Graves v. Adult & Family Servs. Div.*, 708 P.2d 1180, 1186 (Or. Ct. App. 1985).

247. *Poll v. Poll*, 588 N.W.2d 583, 587 (Neb. 1999), *overruled in part on other grounds*, *Gibilisco v. Gibilisco*, 637 N.W.2d 898 (Neb. 2002).

248. *State ex rel. Graves v. Daugherty*, 266 S.E.2d 142, 144 (W. Va. 1980) (citations omitted).

some instances, it may be possible or necessary to identify a discrete *class* of cases within a subject area that presents a compelling case for appointment of counsel. In other words, the fact that a court is not ready to say that *all* litigants should have counsel in a certain type of case does not mean that the right cannot be categorical for a smaller subset of individuals. While broader categorical rights are necessary in the long run in order to protect *all* indigent litigants in critically important basic human needs proceedings, establishing a narrower categorical approach may be all that a court is willing or able to do initially.

Of course, not every approach will work in every jurisdiction. Some state constitutions may have been interpreted to be coextensive with the federal Constitution. In other states, the procedures used in a particular type of case might not lend themselves to an argument that those cases are inherently complex, or there may be certain procedural protections that lessen the risk of later criminal sanctions, or there may be negative case law for that particular type of case. But given the basic human needs involved in civil cases (e.g., housing, health, safety, sustenance, and child custody), the various groups of litigants (e.g., children, people with mental disabilities or other limits), the numerous interests at stake in cases (e.g., physical liberty, stigma, financial interests, parenting, livelihood), the different jurisprudential approaches (e.g., due process, equal protection, supervisory/inherent power, fundamental fairness), and the different ways to construct sub-categories, there may be a combination of factors that works for a jurisdiction. Even *Turner* recognized that there might be a category of civil contempt cases—government-initiated cases—entitled to categorical protection.²⁴⁹ Moreover, as described in this article, the reasoning supporting a categorical right to counsel in one area is often easily translatable to another type of civil case, or to basic human needs civil cases generally. Given the numerous structural problems inherent in the case-by-case approach, establishing a categorical right to counsel is a sound approach, and one with significant potential.

249. See *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011).