2010

Right to Counsel in Parental-Rights Termination Cases: How a Clear and Consistent Legal Standard Would Better Protect Indigent Families, The

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THE RIGHT TO COUNSEL IN PARENTAL-RIGHTS TERMINATION CASES: HOW A CLEAR AND CONSISTENT LEGAL STANDARD WOULD BETTER PROTECT INDIGENT FAMILIES

Elizabeth Mills Viney*

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INTRODUCTION

THE right to one's family is a core institution in our country and a vital interest in our society that "undeniably warrants deference and, absent a powerful countervailing interest, protection." The right of a parent has long been considered "essential to the orderly pur-

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suit of happiness by free men," a fundamental liberty interest that "occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility." Thus, the termination of parental rights is a "unique kind of deprivation" and a proceeding in which the parent, at the very least, must have the right to be heard. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." The Supreme Court has held, however, that indigent parents do not have a constitutional right to counsel. Whether these parents receive counsel in termination cases is left to individual state legislatures or determined by the trial courts on case-by-case bases, leaving application of the right inconsistent from state to state and court to court.

On August 10, 2004, an indigent woman, Tracy Rhine, gave birth to her daughter, J.C. Texas Child Protective Services (CPS) immediately removed J.C. from her mother when she tested positive at birth for an illegal narcotic. CPS then commenced a parental-rights termination suit against Rhine in Dallas County. As required by the Texas Family Code, the Court appointed counsel to Rhine for the duration of the proceedings. After settlement negotiations, Rhine and CPS reached a mediated agreement that would have allowed Rhine to regain custody, stipulated on her satisfaction of certain conditions. A couple of weeks later, however, CPS nonsued its termination case, and on the same day, J.C.'s foster parents initiated their own private termination suit in Tarrant County, a plan the Fort Worth Court of Appeals labeled a "coordinated maneuver." Once the parental-rights termination suit became a private suit brought by the foster parents, rather than one brought by the state, Rhine lost her right to court-appointed counsel. After the Tarrant County trial court judge refused to appoint counsel to Rhine, she was forced to appear at the trial pro se, unable to properly make objections, cross-examine witnesses, or preserve the record for appeal. The trial predictably resulted in permanent termination of Rhine's parental rights.

On February 13, 2009, the Texas Supreme Court denied petition to hear Tracy Rhine's appeal regarding her due process and equal protection rights.

3. <i>Lassiter</i>, 452 U.S. at 37 (Blackmun, J., dissenting).
4. <i>Id.</i> at 27 (majority opinion).
6. <i>Lassiter</i>, 452 U.S. at 31.
7. <i>Id.</i> at 31–32 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
8. <i>In re J.C.</i>, 250 S.W.3d 486, 487 (Tex. App.—Fort Worth 2008, pet. denied); Mary Alice Robbins, <i>Cert Sought over Right to Counsel in Parental-Rights Termination Case</i>, <i>Tex. L.</i>, July 13, 2009, at 5.
9. <i>In re J.C.</i>, 250 S.W.3d at 487.
11. The substance of this mediated agreement is unknown as it was not made part of the trial record. Brief in Opposition to Petition for Writ of Certiorari at 11, Rhine v. Deaton, 130 S. Ct. 1281 (2010) (No. 08-1596), 2009 WL 2331988; Robbins, supra note 8.
12. <i>In re J.C.</i>, 250 S.W.3d at 487–88.
13. <i>Id.</i> at 487.
14. <i>Id.</i> at 488.
rights as an indigent mother denied counsel in a parental-rights termination case. The court properly denied petition due to the Texas Legislature’s clear rule on the issue. Under the Texas Family Code, indigent persons have a mandatory right to counsel in state-initiated termination suits. Those same persons, however, lose that right when a private party brings the termination case; the right to counsel is then left to the discretion of the trial court. This disparity prompts the question: Should an individual’s rights—rights that have constitutional implications—depend upon the entity or person that brings suit against the individual? Arguably, this discrepancy has implications in both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

This Comment will explore the various arguments and interpretations surrounding an indigent parent’s right to counsel in parental-rights termination suits, using the Rhine case as an illustration of the inadequacies of current Texas law and how a clear, consistent standard would provide better protection for parents and greater efficiency for courts.

The United States Supreme Court recently denied Rhine’s petition for certiorari to hear the case of In re J.C., although it has not addressed the constitutionality of right to counsel in a parental-rights termination case since 1981. And even when the Court did address the right to counsel in Lassiter v. Department of Social Services, it held that there is a presumption against the right to counsel in civil cases, and that courts should determine the right on a case-by-case basis using the due process balancing test, giving only vague guidance for determining whether an indigent parent has the right to counsel. The lack of clarity in the Supreme Court’s directive regarding right to counsel has engendered variation among state statutes and common law on this issue. This uncertainty has also allowed the creation of statutes such as section 107.013 of the Texas Family Code, which grants or withholds the right to counsel depending merely upon the suit’s initiator, with no rhyme or reason for the discrepancy in the statute’s text. The Texas statute has caused the strange situation of Tracy Rhine and J.C., which Rhine’s lawyers have labeled a “travesty of justice” for which “Texas should just be

15. Id. at 487 (pet. denied Feb. 13, 2009, reh’g of pet. denied Apr. 3, 2009).
16. The Texas Family Code grants the following right: “In a suit filed by a governmental entity in which termination of the parent-child relationship is requested, the court shall appoint an attorney ad litem to represent the interests ... of an indigent parent of the child who responds in opposition to the termination.” Tex. Fam. Code Ann. § 107.013(a)(1) (West 2008) (emphasis added).
17. Discretion is nevertheless subject to the due process standards of Lassiter, 452 U.S. at 27, and Mathews v. Eldridge, 424 U.S. 319, 335 (1976). See infra Part II.A.
22. Id.
23. See infra Part IV.
embarrassed."

The Supreme Court must clarify this area of law by providing a better defined rule regarding the constitutionality of the right to counsel in parental-rights termination cases. This issue is even more important now, as there has been a significant increase in the number of parental-rights termination cases due to societal and statutory changes in the last twenty-five years coupled with an increase in the variation of law among the states. Since 1981, states have taken the Supreme Court’s directive from Lassiter and interpreted it in a myriad of ways, with some states guaranteeing the right to counsel for indigent parents in nearly all termination suits and others not guaranteeing the right to counsel in any cases—merely abiding by the minimum constitutional standards set forth in Lassiter.

The Court must again address the right to counsel in parental-rights termination suits to render clarity and uniformity of law among the states for the benefit of practitioners, courts, and, most of all, parents. Tracy Rhine was neither a model parent nor model citizen. Perhaps not even the assistance of an attorney at the trial court would have altered the outcome, though an attorney would have certainly affected the court proceedings. Even so, the Court should have used Rhine’s case to address the constitutional question of whether a state statute that provides for mandatory right to counsel in a termination suit initiated by the state but does not provide such a right when suit is initiated by a private party violates the Equal Protection Clause. With the heightened number of parental-rights termination suits in the past couple decades as well as the heightened importance placed upon them, merely abiding by the minimum directives of Lassiter or conditionally giving the right to counsel is simply not enough guidance for parents facing parental rights termination—often called “the civil death penalty” due to its permanence.

Part I of this Comment will discuss the history of family issues, generally, and parental rights, specifically, including a discussion of the current procedures and pitfalls of parental-rights termination suits. Part II will

28. See discussion infra Part II.A.
29. Stoeltje, supra note 25.
32. In re K.A.W., 133 S.W.3d 1, 12 (Mo. 2004) (en banc) (internal quotations omitted).
discuss the judicial and statutory influences on parental-rights termination suits nationally and in Texas, including relevant U.S. Supreme Court precedent. Part II will also include an explanation of the history and context of Texas Family Code section 107.0133 and the right to counsel in termination suits in Texas specifically. Part III will discuss the In re J.C. parental-rights termination case and its unique progression through Texas state courts and to the U.S. Supreme Court. Part IV will look into other states' analyses of the constitutionality of the right to counsel in parental-rights termination cases and illuminate the disparity among the states in their interpretation of the landmark case Lassiter. Part V will explain how the Texas statute is inadequate in the way it addresses the right to counsel for indigent parents facing parental termination suits brought by private parties, especially when compared with other states' statutes. Finally, this Comment will explain why the U.S. Supreme Court must again address specifically the constitutionality of the right to counsel in parental-rights termination suits. Until the high Court provides such guidance, Texas should expand the coverage of its statute—to provide counsel to indigent parents in all termination suits rather than only those brought by the state—to give parents more equality in the courts and certainty of their rights when facing parental rights termination.

I. HISTORICAL BACKGROUND

A. TERMINATION OF PARENTAL RIGHTS—PROCEEDINGS AND CONCERNS

Parental-rights termination suits are unique legal proceedings with an unusual history in through both state and federal law. Termination of parental rights is the process by which the legal relationship between a parent and child is completely severed. Far beyond the effects of other custody proceedings, termination of parental rights "leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child’s religious, educational, emotional, or physical development." The parent does not even have the right to know the child's activities or whereabouts. Further, the child loses all rights "to support or inheritance from the parent." Beyond the lost communication, relationship, and support, termination proceedings are grave in their finality; once the relationship is terminated, it can never be restored with the exception of extremely

39. Id.
Not all parental-rights termination suits, however, are involuntary. Voluntary termination suits may arise when a parent gives consent for the child's adoption by another family or individual. In Texas, for example, a parent may voluntarily relinquish all parental rights in a child by completing an Affidavit of Voluntary Relinquishment of Parental Rights. Alternatively, if a suit is filed or to be filed that would affect or terminate a person's parental rights, that parent may complete an Affidavit of Waiver of Interest in the Child, "disclaiming any interest in [that] child."

If the termination is involuntary, each state's statute lists the elements that the state or party must prove by clear and convincing evidence to terminate the parent-child relationship. For involuntary termination in Texas, the plaintiff or state must establish two elements: a statutory ground for termination and a finding "that termination is in the best interest of the child." To satisfy the first element, the court must "find by clear and convincing evidence that the parent has" committed one of the statute's enumerated grounds for termination. Some of the many enumerated statutory grounds for termination include proving that the parent has, among other things, constructively abandoned or left the child without the intention to return, put the child in dangerous surroundings, engaged in conduct that endangered the child, been convicted of certain crimes including crimes that caused "death or serious injury of a child," used controlled substances in a way dangerous to children, or been the cause of an infant "born addicted to alcohol or a controlled substance." Texas courts have repeatedly clarified that it is not enough to prove only a statutory ground for termination or to prove only that termination is in the best interest of the child—both must be established for involuntary termination. Even if a court finds that termination is in the best interest of the child, it must also find a statutory ground.

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40. Lassiter, 452 U.S. at 39 (Blackmun, J., dissenting).
42. TEX. FAM. CODE ANN. § 161.103 (West 2008).
43. Id. § 161.106.
45. TEX. FAM. CODE ANN. § 161.001 (West 2008).
46. Id. § 161.001(1).
47. Id.
48. See, e.g., Tex. Dep’t of Human Servs. v. Boyd, 727 S.W.2d 531, 533 (Tex. 1987); In re D.C., 128 S.W.3d 707, 714 (Tex. App.—Fort Worth 2004, no pet.); In re A.B., 125 S.W.3d 769, 777 (Tex. App.—Texarkana 2003, pet. denied); In re C.N.S., 105 S.W.3d 104, 105 (Tex. App.—Waco 2003, no pet.).
49. Boyd, 727 S.W.2d at 533.
B. Protecting The Family—Understanding the Two Sides of the Coin

Termination of parental rights is unique because it is the only civil penalty that permanently breaks apart the family relationship. It has been described as “tantamount to a civil death penalty.”\(^{50}\) It is well-established that the family is a fundamental tenet of our society, a “liberty interest”\(^{51}\) that is “essential to the orderly pursuit of happiness by free men.”\(^{52}\) But, there are many facets of, and some limitations to, this liberty. There are two sides to the coin, so to speak. On one hand, parents should be free to raise their children in the manner they see fit and should not lose this right if their parenting skills are less than perfect.\(^{53}\) On the other hand, this liberty is limited when it endangers the safety or well-being of children.\(^{54}\)

The unique nature of termination of parental rights has engendered heated and emotional responses from parties and onlookers alike. Some argue that sub-par parents should be “punished,” others berate state services for taking children away from their parents, and yet others focus their criticisms on the shortcomings of the foster care system.\(^{55}\) Some have touted it “a cruel fashion of our times to systematically target primarily poor families for permanent severance of their family ties.”\(^{56}\) Such heated responses are present even in the courts, as evinced by this dissenting opinion by Justice Springer of the Nevada Supreme Court:

> [T]he state’s modus operandi appears to be to go into the homes of handicapped, powerless and usually very poor parents, remove their children (almost always without the parents’ having counsel) and put the children into the home of substitute parents who are more affluent than the natural parents and more pleasing to social service agents than the natural parents.\(^{57}\)

Interests of both the parents and the children have been the subject of intense controversy and media attention in recent years. On the parents’ side of the coin, some have been subjected to erratic suits regarding the right to raise their children, exploited due to their poverty, and may face further future limitations on how to raise their children.\(^{58}\) At the end of

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50. In re K.A.W., 133 S.W.3d 1, 12 (Mo. 2004) (en banc) (internal quotations omitted).
53. Santosky, 455 U.S. at 753.
56. Thoma, supra note 26 (noting that Arizona and Kentucky have initiatives supporting termination, named the “Severance Project” and “Termination of Parental Rights Project,” respectively).
the twentieth century, a number of cases captured media attention when children filed parental-rights termination suits against their own parents, seeking what was termed a "divorce." One child as young as eleven years old filed such a suit in Florida attempting to terminate his parent's rights due to abandonment and neglect. In the area of private adoption, impoverished women are at risk of exploitation by unethical adoption agencies. There are accounts of private adoption agencies in Chicago that "prey upon populations of financially and emotionally vulnerable women, in particular Caucasian immigrant communities" to supply "a lucrative market for healthy white babies" in the United States. The struggles of parents fighting for rights to raise their own children as they see fit are not only ghosts of the past but also very real issues in the future. President Barack Obama, his administration—particularly Secretary of State Hillary Clinton, and U.S. Senator Barbara Boxer have advocated for ratification of the United Nations Convention on the Rights of the Child (CRC), which would drastically limit parents' rights in raising their children. The CRC contains a section regarding the government's duty and ability to unilaterally determine the "best interest of the child." Due to the increased government involvement in the family under the CRC, it has been harshly criticized as "nationalizing parenting" and allowing intrusion "into the family sphere to an unprecedented degree." Alternatively, others support the CRC for its recognition of "children's rights of participation, voice, and agency" as they gradually mature, which "is consistent with social and developmental realities." On the other side of the coin, there must be some limits to the protection of parental rights when it involves the safety and well-being of the child. A report by the Department of Health and Human Services showed that about 753,357 children were victims of some sort of maltreat-

59. See, e.g., Kingsley, 623 So. 2d at 782, 790; Twigg, 1993 WL 330624, at *2; see also Handschu, supra note 58.
60. Kingsley, 623 So. 2d at 782.
61. See, e.g., Boyer, supra note 58, at 372–74.
62. Id.
63. See, e.g., Rosemond, supra note 58.
65. Rosemond, supra note 58.
ment in 2007, nearly one-third of whom were under the age of four. Even worse, about 1,760 children died due to abuse or neglect, with over forty percent of the fatalities being infants less than one year old and over seventy-five percent under four years old. Termination of parental rights is a very real issue every day in the United States. In 2008 alone, one report counted 75,000 children waiting on adoption with the parent-child relationship terminated.

To add another facet to already complicated, highly emotional situations, there are serious concerns about the child's future and well-being after parental rights termination is complete. There are innumerable accounts of children who, after successful termination of parental rights, end up in "a series of foster homes, unable to return home but not free for adoption." In this scenario, the child's life has not necessarily improved in spite of the long, hard battle that ended the parent-child relationship. In an attempt to remedy this situation, Congress passed two major acts to address the "overloaded and expensive foster care system": the Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act of 1997.

The sheer number of children in the foster care system and the time each spends in foster care are not the only issues. There are concerns about whether a child actually receives proper care in foster homes. The disturbing stories of children ill-clothed and ill-cared for in foster homes are as haunting as those of children in homes with their natural parents. Children who have already suffered in their natural homes due to the various circumstances that caused their removal are, unfortunately, "at high risk for further maltreatment while in foster care." There are numerous reports, and certainly even more occurrences, of foster children who have been "severely beaten, killed, and subject to bizarre punishments or parental neglect." The National Foster Care Education Project in 1986 reported that "rates of abuse . . . at their highest, were

70. Id.
73. ABRAMS & RAMSEY, supra note 38, at 375.
75. Id.
77. Id. §§ 673(b), 678, 679(b). For greater discussion of this Act, see infra Part I.C.
78. MUSHLIN, supra note 69, at 186–87.
79. Id.
80. Id. at 188.
81. To illustrate the type of abuse experienced in foster care, two anecdotes are helpful. One child went untreated for epilepsy in a foster home for two-and-one-half years, yet the state's child welfare department continued to send children to that same foster home. In another case, a foster parent "forced [a foster] child to drink his urine" after wetting the bed on numerous occasions. Id. at 186–89.
over ten times greater for foster children than for children in the general population."82 Thus, courts should proceed with caution in parental rights termination because placement in foster care is not always in the child's best interest.83 There are two sides to the proverbial coin of parent's and children's rights, both of which parties and practitioners must recognize and respect.

C. ADOPTION AND SAFE FAMILIES ACT OF 1997

The United States Congress's passage of the Adoption and Safe Families Act (ASFA) in 1997 significantly impacted parental-rights termination cases.84 Motivated by the disparity between foster children who needed permanent homes and those actually in permanent homes via adoption,85 the Act aimed to "improve the safety of children, to promote adoption and other permanent homes for children who need them, and to support families."86 The effort to find children permanent homes, however, is directly related to parental rights termination because adoption requires permanent severance of the child's relationship with his natural parents.87 In an effort to increase successful adoptions, the Act instituted more lenient standards for parental rights termination.88 For example, the ASFA requires states to commence termination suits and actively seek adoptive parents for all children having spent "15 out of the most recent 22 months" in foster care.89 This newer, time-sensitive, mandatory termination term has caused especially severe effects for incarcerated mothers who give birth during their prison sentences.90 According to the ASFA, the "clock starts ticking" for the time spent in foster care as soon as the child is born, given to the state, and placed in a foster home.91 Thus, if an incarcerated mother's sentence is not complete within twenty-two months of giving birth, a termination suit will commence.92 This new time limitation created under the ASFA was a significant departure from previous law, which did not have any requirements to initiate termination

82. Id. at 187.
83. Abrams & Ramsey, supra note 38, at 375.
85. Thoma, supra note 26.
88. See Summary of the Adoption and Safe Families Act of 1997 (P.L. 105-89), supra note 86.
89. Id. (noting that a child had entered foster care on the date of "the first judicial finding of abuse or neglect, or 60 days after the child is removed from the home," whichever is earliest).
91. Id.
92. Id.
suits based on a child's length of stay in a foster home. States have conformed their statutes to reflect the ASFA's time requirement. In Texas, for example, the state legislature modified the termination statute after the ASFA to allow initiation of a termination upon a finding that the parent has been convicted of a criminal offense that resulted in "confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition."

Another effect of the AFSA's lower standards for parental rights termination was an "explosion" in the number of children taken out of homes and placed into foster care. Commentators have stated that the ASFA has not achieved its goal of getting children adopted but has only increased the number of children in the foster care system. Mathematically, therefore, it has increased the disparity between children in foster care in need of a home and those in adopted homes. Regardless of the ASFA's purposes, however, it resulted in a dramatic increase in the number of parental termination suits after it was passed. For example, after the passage of the ASFA, parental-rights termination suits in Michigan alone increased by fifty-five percent from the previous year. This increase in the number of parental-rights termination suits throughout the United States makes the right-to-counsel issue of even greater importance than at the time of Lassiter in 1981 and makes it imperative that the Court clarify its Lassiter ruling.

II. THE RIGHT TO COUNSEL

A. PARENTAL RIGHTS TERMINATION IN THE COURTS

The issue of involuntary termination of parental rights raises constitutional issues of due process and equal protection. The right to parenthood has long been held a fundamental right of all Americans. Therefore, "[i]t is not disputed that state intervention to terminate the relationship between [a parent] and her child must be accomplished by

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95. TEX. FAM. CODE ANN. § 161.001(1)(Q) (West Supp. 2010).
97. Id.
98. Id.
99. See id.
100. Id.
101. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399 (1923); see also, e.g., Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."); Santosky v. Kramer, 455 U.S. 745, 759 (1982) ("[A] parental rights termination proceeding . . . [does] not merely infringe that fundamental liberty interest, but . . . end[s] it."); In re L.M.I., 119 S.W.3d 707, 733 (Tex. 2003) ("termination of parental rights, fundamental and constitutional in their magnitude"); Hollek v. Smith, 685 S.W.2d 18, 20 (Tex. 1985) ("This natural parental right has been characterized as . . . 'a basic civil right of man,' and 'far more precious than property rights.'").
procedures meeting the requisites of the Due Process Clause." 102 Due to the constitutional consideration of the right at stake, the ability for parents to have attorney assistance to protect those rights is one of utmost importance, though the U.S. Supreme Court has addressed it on only a few occasions. While the Court’s holdings illuminate the stage on which parental-rights termination debates have commenced, they have not gone far enough to create uniformity among the states regarding the constitutionality of the right to counsel.

The saga of an indigent person’s right to counsel began in 1967 with the Supreme Court’s holding in In re Gault. 103 In a juvenile delinquency proceeding, the Court held that the Due Process Clause required that the juvenile and his parents be informed of the right to counsel and given counsel to represent the child in the proceedings. 104 Though Gault addressed the due process requirements regarding counsel in juvenile proceedings, it left significant questions open about right to counsel in parental-rights termination cases. 105 In 1981, the Supreme Court handed down the famous decision in Lassiter v. Department of Social Services. 106

The issue in Lassiter was whether denial of court-appointed counsel for an indigent parent in a parental-rights termination case was a Due Process Clause violation. 107 The Court held that, under due process, the “preeminent generalization” is that an indigent person has a mandatory right to counsel in a suit where he “may lose his physical liberty if he loses the litigation.” 108 Thus, if an indigent person risks going to prison if he loses the suit, even for a small crime, the court must provide counsel. 109 Historically, however, the Court had been very reluctant to extend this mandatory right in cases, even criminal, that may not result in confinement or loss of personal liberty. 110

Thus, Justice Stewart, writing for the majority, “meld[ed] the criminal right-to-counsel cases and the due process cases, and [did] so in a way that add[ed] an enormous obstacle to obtaining appointed counsel in civil cases.” 111 With a presumption that litigants in civil cases do not receive a right to counsel, the Court used the test from Mathews v. Eldridge 112 to determine whether due process requires mandatory appointment of counsel in parental-rights termination suits: balancing “the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.” 113 Although the Court noted that
the right to parenthood “undeniably warrants deference,” it concluded that the “complexity of the proceeding and the incapacity of the uncounseled parent” are not always so great as to “make the risk of an erroneous deprivation of the parent’s rights insupportably high.” Thus, the Court refused to issue a blanket rule that “the Constitution requires the appointment of counsel in every parental termination proceeding.” The Court left the decision to the trial courts, requiring them to make a case-by-case fact determination on the ground level utilizing the Mathews due process balancing test, coupled with the presumption against right to counsel unless there is a risk to physical liberty. The Court, however, did not define how to make this case-by-case determination, reasoning that “[it was] neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements.” The Court deemed specific guidelines imprudent in the face of the “almost infinite variation” of facts presented in termination suits. Thus, the Court left the states with a balancing test “largely free of objective criteria for valuing or comparing the interests at stake.” Importantly, although the Court refused to adopt a blanket rule or to issue specific guidelines, it did advise states that “a wise public policy... may require that higher standards be adopted than those minimally tolerable under the Constitution.”

Justice Blackmun dissented in Lassiter, disagreeing with the Court’s conclusion that “deprivation [of parental rights] somehow is less serious than threatened losses deemed to require appointed counsel, because in this instance the parent’s own ‘personal liberty’ is not at stake.” Blackmun did not accept Court’s presumption that “physical confinement is the only loss of liberty grievous enough to trigger a right to appointed counsel under the Due Process Clause.” Further, Blackmun warned that the majority’s case-by-case instruction to trial courts would endanger parental rights, because the Court chose to avoid “the obvious conclusion that due process requires the presence of counsel” for indigent parents.

Less than one year after Lassiter, the Supreme Court again addressed parental rights termination in Santosky v. Kramer. Here, however, the Supreme Court addressed only the standard of proof required by due process to “sever completely and irrevocably the rights of parents in their

114. Id. at 27, 31 (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).
115. Id. at 31.
116. Id. at 31-32 (adopting the rule in Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)); see also Thornburg, supra note 111, at 29-30.
117. Id. at 32 (quoting Gagnon, 411 U.S. at 790).
118. Id.
119. Thornburg, supra note 111, at 31.
120. Id. at 33.
121. Id. at 40.
122. Id.
123. Id. at 35, 50-51.
natural child." Justice Blackmun now wrote for the majority, holding that the standard of proof is "by at least clear and convincing evidence." The Court noted that standard of proof is vital in cases addressing a constitutional right because it reflects "a societal judgment about how the risk of error should be distributed between the litigants" and "the value society places on [that] individual liberty." Allocating the risk of error nearly evenly between the two parties in a termination suit, as the preponderance of the evidence would permit, "does not properly reflect their relative severity." Therefore, a heightened standard is required, to ensure that a parent's natural child would not be taken from him "based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior" or because a parent was not always a "model parent[ ]." The clear and convincing evidence standard of proof is proper, as the "interests at stake in [termination suits] are both 'particularly important' and 'more substantial than mere loss of money.'" The dissent, on the other hand, argued the prudence of leaving this decision to the states to determine how to best deal with "unhappy but necessary" state intervention into familial relations.

The Supreme Court addressed parental rights termination yet again in 1996 in a case styled M.L.B. v. S.L.J., holding that an appellate court may not deny review due to an indigent parent's inability to pay for the trial record. In M.L.B., a Mississippi Chancery Court terminated a mother's parental rights as to her two children. The court dismissed her appeal, however, because she lacked the funds to satisfy the trial record fee, estimated to be $2,352.36. The Supreme Court held that it was a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment for the state of Mississippi to deny appellate review from a ruling that found the petitioner "unfit to remain a parent," for the mere reason of her poverty. The Court again stressed the uniqueness of parental-rights termination suits and their difference from other civil suits, as they "involve the awesome authority of the State 'to destroy permanently all legal recognition of the parental relationship.'" The precise contours of this holding, however, are still debated, and it only certainly applies to termination suits brought by the state, leaving private termination suits up for debate and judicial discretion.

125. Id. at 747-48.
126. Id. at 748.
127. Id. at 755.
128. Id. at 756 (citing Addington v. Texas, 441 U.S. 418, 425 (1979)).
129. Id. at 766.
130. Id. at 753, 764 (quoting Addington, 441 U.S. at 427) (internal quotations omitted).
131. Id. at 756 (quoting Addington, 441 U.S. at 424).
132. Id. at 770-71 (Rehnquist, J., dissenting).
134. Id. at 106.
135. Id.
136. Id. at 107.
137. Id. at 128 (quoting Rivera v. Minnien, 483 U.S. 574, 580 (1987) (citation omitted).
138. See Boyer, supra note 58, at 371-72.
While these rulings are instructive and demonstrate the Court’s recognition of the importance of the parent–child relationship, they provide minimal guidance for states regarding the rights of the parents themselves, especially when the termination suit is brought by a private entity rather than the state. The Court has failed to render the requisite clarity needed for states to have uniform statutory procedures and policies in these precedential cases. As an illustration of the inequity engendered by this lack of legal clarity and uniformity, this Comment will explore the right to counsel in Texas specifically.

B. THE RIGHT TO COUNSEL IN TEXAS

When a suit is filed for the termination of parental rights in Texas, the court will appoint an attorney to the child and to the parent in some, but not all, cases.139 With respect to the child, when a suit is brought by a governmental entity, the court is required to appoint both an attorney ad litem and a guardian ad litem.140 With respect to the parent, the Texas Family Code goes beyond the minimum requirement in Lassiter and requires appointed counsel for an indigent parent141 in parental-rights termination suits brought by a governmental entity.142 But because attorney appointment for parents is mandatory only when suit is brought by a governmental entity, appointment in private termination suits is at the discretion of the trial court.143 In such private suits, the court’s only duty is to “[g]ive due consideration to the ability of the parties to pay reasonable fees to the appointee; and balance the child’s interest against the cost to the parties that would result from an appointment by taking into consideration the cost of available alternatives for resolving issues without making an appointment.”144

In the statute’s original version, however, it did not specify that suit had to be brought by a governmental entity in order for a parent to have the mandatory right to counsel.145 Rather, the statute’s original version stated simply that appointment of counsel was mandatory for indigent parents in (presumably all) parental-rights termination suits.146 Courts across the state gave the text a broad interpretation.147 One Texas court even held that a parent specifically has a right to government-appointed

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139. TEX. FAM. CODE ANN. § 107.001–0125 (West 2008).
140. Id. §§ 107.011–012. An attorney may be appointed to fill both roles of attorney and guardian ad litem for the child. Id. § 107.0125.
141. Id. § 107.013(a)(1).
142. Id. § 107.013.
143. Id. § 107.021.
144. Id.
145. Id. § 107.013 (West 1996).
146. Id.
147. See, e.g., In re J.C., 108 S.W.3d 914, 916 (Tex. App.—Texarkana 2003, no pet.) (The Texas Family Code, as of 2002, “requires a trial court to appoint an attorney ad litem to represent the interest of an indigent parent.”); In re T.V., 8 S.W.3d 448, 449 (Tex. App.—Waco 1999, no pet.) (citing TEX. FAM. CODE ANN. § 107.013 (West Supp. 2000)) (“The appointment of an attorney for indigent parents contesting the termination of their parental rights is mandatory.”).
counsel in a termination suit brought by a private party, and that "failure to [appoint such counsel] constitutes reversible error."\textsuperscript{148} The statute, when read alone, "clearly impose[d] a mandatory duty on the trial court to appoint an attorney \textit{ad litem} to represent an indigent parent \textit{in any suit} seeking termination of parental rights."\textsuperscript{149} In the 2003 amendments to the Texas Family Code, however, the text was changed to add the text "by a governmental entity."\textsuperscript{150}

After the passage of the 2003 amendment, it became clear that the right to counsel in Texas was only supplied to indigent parents facing termination suits initiated by a governmental entity.\textsuperscript{151} This simple addition to the text had a profound effect on the rights of indigent parents facing parental-rights termination suits. But what was the reason for the limitation? All versions of the Texas statute regarding right to counsel were codified long after \textit{Lassiter}. Thus, the amendment was not a direct result of U.S. Supreme Court's 1981 holding.\textsuperscript{152} Upon review of the state legislative documents, however, there does not seem to have been much discussion or debate regarding this 2003 statutory amendment.\textsuperscript{153} In the House analysis of the bill, the bill's author, Representative Toby Goodman,\textsuperscript{154} discussed the effects of other statutory amendments but did not explain the addition to section 107.013.\textsuperscript{155} Goodman's report merely states that "[s]ection 107.013 is current law unchanged with regard to the functions of an attorney \textit{ad litem} in a suit by a governmental entity."\textsuperscript{156} Thus, it seems this significant alteration to section 107.013 of the Texas Family Code was made without any notable discussion or analysis.

The Texas statute's evolution in the past decade illustrates the seemingly whimsical changes to parental rights the broad strokes left from \textit{Lassiter} allows. The 2003 amendment to the Texas statute, though more precise than the rule from \textit{Lassiter}, has not rendered clarity in application in Texas courts.\textsuperscript{157} After the 2003 Code amendment, the Texas Supreme Court soon held that "[i]n Texas, there is a statutory right to counsel for indigent persons in parental-rights termination cases."\textsuperscript{158} The court, how-

\textsuperscript{149} Baird v. Harris, 778 S.W.2d 147, 148 (Tex. App.—Dallas 1989, no writ) (holding, however, that mandamus is not available if no such counsel is appointed in a private suit).
\textsuperscript{151} TEX. FAM. CODE ANN. § 107.013 (West 2008).
\textsuperscript{155} \textit{See} Goodman Analysis, \textit{supra} note 153.
\textsuperscript{156} \textit{Id}.
\textsuperscript{158} \textit{In re} M.S., 115 S.W.3d 534, 544 (Tex. 2003).
ever, said nothing of whether this right is limited only to suits brought by a governmental entity. In fact, no Texas appellate court had explicitly ruled that there was "no statutory right" to counsel for an indigent parent in a private termination suit until *In re J.C.*160 In *In re J.C.*, the Fort Worth Court of Appeals cited no authority for its decision outside the Texas Family Code itself.161 After *In re J.C.*, however, other state appellate courts cited its holding as precedent for the rule that there is no statutory right to counsel in a private parental-rights termination suit in Texas.162

III. TRACY RHINE AND J.C.

A. Texas

In the past couple of years, the *In re J.C.* case has worked its way through Texas state courts and highlighted the incompleteness of the Texas Family Code section 107.013 as well as the *Lassiter* holding.163 In March 2008, Tracy Rhine appealed *pro se* from a decision by a Tarrant County trial court terminating her parental rights regarding her child, J.C.164 Upon the birth of J.C., who tested positive for phencyclidine,165 Texas Child Protective Services (CPS) immediately removed J.C. from Rhine166 and placed her with foster parents.167 CPS proceeded with a

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159. Id.
160. See infra Part III.
163. *In re J.C.*, 250 S.W.3d at 487.
164. Id.
165. Phencyclidine (PCP) is an illegal drug with "sedative and anesthetic effects." Medically, the use of PCP can cause "respiratory depression, heart rate abnormalities, and a withdrawal syndrome." National Institute on Drug Abuse, *Hallucinogens And Dissociative Drugs: Including LSD, PCP, Ketamine, Dextromethorphan*, NIDA RESEARCH REPORT SERIES, Mar. 2001, at 1, 5–6.
166. This type of prosecution, in itself, has led to constitutional questions regarding the right to bear a child and the "right[] of privacy and reproductive freedom." DORETA MASSARDO McGINNIS, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, in CHILD, PARENT, & STATE, supra note 69, at 84, 85. While this issue is not discussed in this comment, it is nevertheless a relevant aspect in parental rights termination, especially when coupled with the unsurprising link between poverty, drug-exposed infants, and parental rights termination. BARBARA BENNETT WOODHOUSE, *Poor Mothers, Poor Babies: Law, Medicine, and Crack*, in CHILD, PARENT, & STATE, supra note 69, at 111, 115. See generally Ellen Marrus, *Crack Babies and the Constitution: Ruminations About Addicted Pregnant Women After Ferguson v. City of Charleston*, 47 VILL. L. REV. 299 (2002).
167. J.C.'s foster parents are referred to by the fictitious names "Mr. and Mrs. Smith" in the Fort Worth Court of Appeals for their identity protection. *In re J.C.*, 250 S.W.3d at 487. However, they have subsequently used their proper names (Carl and Yolanda Deaton), reasoning that "at this juncture there is no point in not using the parties names." Brief in Opposition to Petition for Writ of Certiorari, supra note 30, at 1.
parental-rights termination suit against Rhine in Dallas County. As this termination suit proceeded, J.C.'s foster parents, Mr. and Mrs. Deaton, attempted to intervene and become a party to the suit. The court, however, struck the Deaton's petition for intervention. Later, "CPS nonsuited its termination suit" because the "statutory deadline for disposition of the termination suit was approaching ...." On the same day that CPS dropped its termination suit, the Deatons, in what the Fort Worth Court of Appeals termed a "coordinated maneuver," filed a termination suit in the Tarrant County 324th District Court within hours. During this time, Rhine had received court appointed counsel ad litem for the CPS termination suit in Dallas County because that suit was filed by a governmental entity. But when a private party (the Deatons) brought the suit anew, Rhine lost her right to court-appointed counsel. Though Rhine repeatedly pleaded to the court to appoint her an attorney, she received none. At the end of a trial in which Rhine appeared pro se, the Tarrant County court terminated her parental rights.

After Rhine filed a "Mother's Motion for Re-Trial" and a "Mother's Affidavit of Inability to Pay Costs of Appeal," the trial court denied motion for retrial and ordered that Rhine pay $405 for a reporter's record for appeal. Rhine also requested court-appointed counsel for her appeal; the trial court denied this request, holding there was "no statutory mandate" for counsel in a private suit. Therefore, the Fort Worth Court of Appeals received Rhine's appeal with no reporter's record and without the aid of counsel. Rhine attacked the sufficiency of the evi-

168. *In re J.C.*, 250 S.W.3d at 487.
169. *Id.* at 487–88.
170. *Id.* at 488.
171. *Id.*
172. *Id.* at 487.
173. *Id.*; see TEX. FAM. CODE ANN. § 107.013 (West 2008) (granting indigent parents the statutory right to counsel in a government initiated parental rights termination suit).
174. *In re J.C.*, 250 S.W.3d at 487.
175. Rhine informed to the court that she was "indigent and [could not] afford counsel" though she loved her daughter and was "currently attending community college in hopes to be able to provide [her daughter] with a better future and security." *Id.* at 488.
176. *Id.*

[The court found] by clear and convincing evidence that [Rhine] had:
a. knowingly placed or knowingly allowed the child to remained in conditions or surroundings that endanger the physical or emotional well-being of the child;
b. failed to support the child in accordance with [her] ability during a period of one year ending within six months of the date of the filing of the petition;
c. engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangers the physical or emotional well-being of the child; and

d. been the cause of the child's being born addicted to alcohol or a controlled substance legally obtained by prescription, as defined by section 261.001 of the Texas Family Code.

*Id.*
177. *Id.* at 488–89.
178. *Id.* at 489.
179. *Id.*
dence in the trial court, but the court of appeals could not review the evidence without a reporter’s record. The appellate court also held that "no statutory right exists to appointed counsel in a private termination suit" because Texas mandates court-appointed counsel only when a governmental entity initiates the suit. Though it is permissive for a court to appoint an attorney *ad litem* for a parent in a private termination suit, the statute does not mandate such appointment. Here, the trial court decided not to appoint an attorney for Rhine and the court of appeals, upon a proper reading of the Texas Family Code, did not overturn the finding.

B. THE HIGH COURTS

Rhine appealed to the Texas Supreme Court, which denied petition for review, then to the Supreme Court of the United States, which recently denied certiorari. Rhine’s arguments were similar in both petitions. She argued, *inter alia,* that the Texas statute, by giving an indigent person right to counsel in a government-initiated termination suit while withholding such right in a privately-initiated suit, violates equal protection rights under the Fourteenth Amendment. First, she admitted that the Texas statute, requiring appointed counsel for a termination suit brought by a governmental entity, "[goes] beyond the *Lassiter* mandate" but argued that because Texas has chosen to extend this procedural right in some actions, it must give the right to all persons equally. For example, the U.S. Supreme Court has held that it is a violation of the Equal Protection Clause for a statute to guarantee jury trial to mentally ill patients facing commitment proceedings under one statute but deny such right under another statute. Similarly, Rhine argued that Texas could not guarantee counsel to parents in one termination suit while arbitrarily denying it in another suit without cause.

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180. *Id.* (citing Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994)).
181. *Id.*
182. See *TEX. FAM. CODE ANN.* §§ 107.001(1), (2), .015(a), (b), .021 (West 2008).
183. *In re J.C.*, 250 S.W.3d at 489.
Further, Rhine argued that because the right to parenthood is fundamental and because the Texas statute affects the equal protection of that right, courts must review with "heightened scrutiny" any limitations on such a right.191 "Heightened scrutiny" requires a statute that inequitably distributes a fundamental right do so only in furtherance of a narrowly tailored "compelling state interest."192 In this case, Rhine argues that any interest the state may assert is not compelling when a litigant is faced with termination of parental rights.193 The state’s possible "pecuniary interest" in the cost of appointed counsel is "hardly significant"194 and "unimpressive" against a parent facing termination of her right of parenthood.195 Further, if Texas believes that counsel is not deserved in private suits because the parent is not up against the "vast resources of the state" as in criminal cases,196 it "understates the actual involvement of the state . . . [which] is called upon to exercise its exclusive authority to terminate the legal relationship of parent and child . . . ."197 Finally, if the state's interest is to resolve the termination case in an efficient and economic manner, it "pale[s] in comparison"198 to the risk of a parent improperly losing her parental rights. Even if this interest in efficiency were a compelling interest, it is likely best served by having effective counsel for both parties.199

Rhine also argued that, because the statute is a violation of the Equal Protection Clause due to "underinclusion," the court must either "declare the statute a nullity" in its entirety or "extend the statute's coverage to those who are aggrieved by exclusion."200 Rhine argued for the second approach, because "deny[ing] all counsel would violate [the] Court's directive in Lassiter that some cases require appointment of counsel to comport with due process."201

In her argument, Rhine pointed to the trend among state supreme courts to rule that a state statute giving the right to court-appointed counsel in some instances of parental rights termination but denying it in others is a violation of either the Equal Protection Clause or the Due Process Clause.202 Rhine's argument illuminates both the underinclusion

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192. Id. (citing Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Loving v. Virginia, 388 U.S. 1, 11 (1967)). Though Rhine does recognize this standard may have changed slightly over recent years. E.g., M.L.B. v. S.L.J., 519 U.S. 102, 120–21 (1996) (weighing "the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other").
194. Id. (citing Lassiter, 452 U.S. at 28).
195. Id. (citing M.L.B., 519 U.S. at 121).
199. Id.
200. Id. at 23; Petitioner's Brief on the Merits, supra note 185, at 17 (citing Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)).
201. Petition for a Writ of Certiorari, supra note 185, at 23–24.
202. Id. at 19–20.
of the Texas statute as well as the disparate treatment of the right to counsel that has evolved throughout the states in the wake of *Lassiter*.

**C. Arguments in Opposition**

Interestingly, the private party (the Deatons) bringing the termination suit spent little time in their brief combating Rhine’s constitutional arguments.203 The Deatons focused their response on Rhine’s lack of preservation of the issues, pointing to the Court’s numerous holdings that appellate courts do not rule on issues that parties did not preserve at the trial court, a principle Texas has applied to equal protection and due process claims.204

In fact, the Deatons agreed with Rhine on her constitutional issue regarding the Texas Family Code but argued that while this statute should certainly be changed, *this* case was not the case to do it.205 Rhine preserved no error and gave no evidence that she was injured by the lack of counsel. She did not show that the appointment of counsel would have changed the outcome of the case.206 With or without counsel, the facts remained the same:

J.C. was born positive for cocaine and PCP. Ms. Rhine provided no prenatal care[,] . . . gave the hospital and the Department a false name[,] . . . provided incorrect information about the identity of J.C.’s birth father[,] . . . had convictions for forgery, identity theft, failure to identify, and fraud[,] . . . engaged in physical altercations and made violent threats[,] . . . [and] tested positive for PCP when J.C. was born. . . . [Also,] J.C. was born premature[,] . . . required physical therapy[,] . . . did not start walking until she was sixteen month old[,] . . . [and] was speech delayed.207

Further, Rhine received a conviction for driving while intoxicated only two months after J.C.’s birth208 and has, in the past year, been arrested for mail theft in the Dallas-Fort Worth area.209

Under *Lassiter*, one factor to determine “whether the failure to appoint counsel resulted in a due process violation,” is “whether the presence of counsel could have made a determinative difference.”210 Thus, the Deatons argued that the results from the trial court were reliable because

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205. The Deatons agree that the Texas statute should not have different standards for public and private termination suits, as such suits “ask[] far too much of foster parents” who often end up financing the suit in its entirety. *Id.* at 31–32.
206. *Id.* at 4–9.
207. *Id.* at 18–19.
208. *Id.* at 19.
Rhine "never had any hope of obtaining the return of her child and that her strategy has always been one of delay and prolongation."\(^{211}\)

D. The Supreme Court's Unprecedented Request

After all parties had filed their briefs to the U.S. Supreme Court, something unprecedented occurred. The Supreme Court invited the Solicitor General of Texas to "file a brief in this case expressing the views of the State of Texas."\(^{212}\) Although the Court may occasionally invite the opinion of a state attorney general, it had "never before asked a state solicitor general to [file a brief]."\(^{213}\) The Solicitor General promptly responded with a Brief for the State of Texas as Amicus Curiae, recommending that the Court deny Rhine's petition.\(^{214}\) Solicitor General James Ho first argued that Rhine's petition does not meet the "threshold presentation requirement" of 28 U.S.C. § 1257(a).\(^{215}\) Though she did grieve her lack of counsel, the Solicitor General argued Rhine's constitutional issues of due process and equal protection were never "squarely pressed or passed upon in state court."\(^{216}\) The Court has "almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision.'"\(^{217}\) Because the federal question of equal protection of the Texas Family Code was not presented in the state court below, it "deprived Texas courts of the critical 'first opportunity to consider the applicability of [the] state statute[,] in light of constitutional challenge' and construe [it] 'in a way which saves [its] constitutionality.'"\(^{218}\)

Solicitor General Ho went on to attack Rhine's equal protection claim regarding the Texas statute, labeling it "splitless" and "wrong" and for which review was "not warranted."\(^{219}\) The Solicitor General concluded that, because the decisions of the four state courts cited by Rhine as conflicting were based on state, not federal, law, "no meaningful conflict" exists.\(^{220}\) Further, because "the federal question was not pressed below . . . on that particular issue, Texas courts have held nothing" and it would be "premature to grant review on what Texas courts might someday hold."\(^{221}\) The Solicitor General also noted Rhine raised only a facial

\(^{211}\) Id. at 31 (noting that the "case has been going on now for nearly five years--J.C.'s entire life--during which time J.C. has not spent even one day in Ms. Rhine's unsupervised care").


\(^{214}\) See Brief for the State of Texas as Amicus Curiae at 25, Rhine v. Deaton, No. 08-01596 (2009), 2009 WL 5021971.

\(^{215}\) Id. at 6–7 (citing 28 U.S.C. § 1257(a) (1988)).

\(^{216}\) Id. at 5, 8.

\(^{217}\) Id. at 7 (quoting Howell v. Mississippi, 543 U.S. 440, 443 (2005) (per curiam)).

\(^{218}\) Id. at 11–12 (quoting Cardinale v. Louisiana, 394 U.S. 437, 439 (1969)).

\(^{219}\) Id. at 6.

\(^{220}\) Id. at 21.

\(^{221}\) Id.
challenge to the Texas statute, attacking "[t]he Texas statutory framework," which cannot be facially unconstitutional because it does not withhold counsel from the entire class of indigent parents.222 Even if the argument is "re-cast as an as-applied challenge," it still fails because there is "nothing arbitrary" in "separating [a parent] who face[s] the government from [a parent] who face[s] private part[ies]."223 Ho argued that the distinction is "supported by an important element of fairness" in the litigation—parents in a private termination suit are not in the same position as those against all the resources of the State.224 Thus, the Solicitor General Ho concluded that Rhine's petition "should be denied."225

The Court's unprecedented request to the Texas Solicitor General shows the nationwide concern and debate regarding this case, specifically, and parental rights issues, generally. Although Rhine originally represented herself pro se, an impressive team of lawyers came to her aid on appeal, including Erwin Chemerinsky, Dean of the University of California, Irvine Law School.226 Her other representation included Charles "Chad" Baruch of Rowlett, Texas; Ike Vanden Eykel of Dallas, Texas; and Eliot D. Shavin of Dallas, Texas.227 Baruch commented on the case: "Due process means was it fair . . . you just can't stack this many things and look at what happened to this women and say this is fair."228 Baruch gave additional impassioned statements to a San Antonio magazine, labeling this case a "travesty of justice."229 Baruch opined that while Rhine is no "poster child" for parental rights, "Texas should just be embarrassed that it's one of the few states left that lets this happen."230

This case highlights both the underinclusiveness of the Texas statute as well as the lack of one general standard throughout the United States regarding the right to counsel in termination cases. As Texas Solicitor General Ho himself noted, the Texas courts have not squarely ruled on the issue.231 Therefore, since the 2003 Amendment to the Texas Family Code limiting an indigent person's mandatory right to counsel to only those termination suits brought by a governmental entity, the Texas high court has not commented on the statute or discussed its constitutionality whatsoever. Thus, this amendment slipped into the Code in 2003, apparently without much debate or adversity, and has been accepted as constitutional and proper since then, with no discussion or affirmation from Texas's highest court. This confusion regarding the contours of a parent's right to counsel is not limited to Texas. Application of Lassiter varies

222. Id. at 21–22 (citing Petitioner's Brief on the Merits, supra note 185, at 24).
223. Id. at 22–23.
224. Id.
225. Id. at 24.
226. See Petitioner's Brief on the Merits, supra note 185, at i; Robbins, supra note 8.
227. See Petitioner's Brief on the Merits, supra note 185, at i; Robbins, supra note 8.
228. Robbins, supra note 8.
229. Stoeltje, supra note 25.
230. Id.
231. Brief for the State of Texas as Amicus Curiae, supra note 214, at 21.
among the states, with some granting the right to counsel in all suits and others abiding by only the constitutional minimum of Lassiter.

IV. STATES' INTERPRETATIONS OF LASSITER

As Rhine cited in her briefs to the Texas Supreme Court and U.S. Supreme Court,232 other states have different approaches to the appointment of attorneys in parental-rights termination suits. In fact, at least five other state supreme courts have held that due process or equal protection concerns require that there must be identical rules for appointment of an attorney for indigent parents (whether mandatory or not) for all termination suits.233 Additionally, other states that have expanded their statutes by legislative process, rather than by the courts.234

Two of the states that have expanded their statutes through state legislatures are Louisiana and Alabama.235 The Louisiana statute was signed into law in July 2008.236 Louisiana's statute previously gave a right to court-appointed counsel for indigent parents in a state-initiated suit, but it has expanded to provide that, upon the court's finding of the parent's indigency, "an attorney shall be appointed to represent that parent" regardless of who brings suit.237 The Alabama Code was also modified, following a 1996 decision from the Alabama Court of Civil Appeals.238 The current Alabama statute was signed into law in May 2008, and does not distinguish among the possible parties bringing suit, merely requiring that "counsel shall be appointed where the respondent parent . . . is unable for financial reasons to retain his or her own counsel."239 Notably, these two recently amended statutes are quite similar to the Texas statute before its unsubstantiated modification in 2003.

In other states, the state supreme courts have held that certain limitations of state statutes regarding an indigent person's right to counsel violate state due process or equal protection clauses.240 A survey of these state statutes and the corresponding high court holdings is instructive to show the disparity between these states and Texas. Beginning chronologically, the Supreme Court of Oregon heard the case of Zockert v. Fanning, in which an indigent father was denied state-appointed counsel in a

232. See Petitioner's Brief on the Merits, supra note 185, at 13; Petition for a Writ of Certiorari, supra note 31, at 20.
237. See LA. CHILD. CODE ANN. art. 320 (2004); see also LA. CHILD CODE ANN. art. 1245.1 (2008).
240. See cases cited supra note 233.
parental-rights termination suit, though he repeatedly requested counsel, because he feared that he was “being railroaded in this case.”

At the time, Oregon had two statutes under which parental rights could be terminated. One dealt with termination proceedings brought in juvenile court under Oregon statute chapter 419, while the other addressed termination proceedings due to private adoption under Oregon statutes chapter 109. While the juvenile proceedings chapter gave indigent parents a right to state-appointed counsel, the adoption proceedings chapter was silent on whether such right existed.

The court held that, while “giving an indigent parent an opportunity to receive assistance of appointed counsel to protect parental rights is a ‘privilege,’” that privilege should not be partially given where there is no clear distinction between the two statutes for grounds of termination. "The state is involved similarly in both proceedings” and “[n]o distinction may be founded upon the fact that a private person initiates an adoption." The court held, therefore, that the “privilege of having counsel appointed in termination cases ... applies equally” regardless of who brought suit or the code chapter under which it was filed.

In Alaska in 1991, a disabled, indigent father was denied court-appointed counsel in a termination suit brought by the child’s birth mother after the trial court ruled that “it had no authority to appoint [such counsel] “... unless the other side was represented by a state agency.” The Supreme Court of Alaska ruled that the right of parenthood is “of the highest magnitude" and “one of the most basic of all civil liberties.” The court held that, although a private entity brought this action, there was “sufficient state involvement ... to require court appointed counsel” because this proceeding is “wholly a creature of the state” and “the only way the parties could accomplish [the adoption and termination]." The Supreme Court of North Dakota held that an indigent parent was entitled to court-appointed counsel in private adoption cases that require termination of parental rights. To disallow such representation would “run afoul of the equal protection provision of [the] state constitu-

243. Id. § 109.119.
245. Zockert, 800 P.2d at 777–78 (internal citations omitted).
246. Id.
247. Id. at 778.
248. Id. at 779.
250. Id. at 279.
251. Id. at 279 (quoting Flores v. Flores, 598 P.2d 893, 895 (Alaska 1979)).
252. Id. at 283.
The court stated that, even if the termination suit is brought by a private party, the state is nevertheless "called upon to exercise its exclusive authority to terminate the legal relationship of parent and child"; to say that the state is somehow not greatly involved in private suits "understates the actual involvement of the state."

The Supreme Court of Illinois ruled in a similar manner as its sister state supreme courts. The court first noted that the "[e]qual protection analysis is identical under the United States and Illinois Constitutions." The court then held that equal protection required that an indigent mother receive court-appointed counsel whether the suit is initiated by the state "or by the child's guardian or custodian," as equal protection requires the government to deal with "similarly situated individuals in a similar manner."

Iowa has also expanded its statute regarding a parent's right to counsel. The prior Iowa statute provided for an attorney appointed to a parent if the suit was brought under chapter 232 of the Iowa Code (suits brought by the state) but not if the suit was brought under chapter 600A of the Iowa Code (suits brought by a private party or relative). In 2004, the Iowa Supreme Court looked at this inequity in the case In re S.A.J.B. under the lens of the state equal protection and due process clauses. The court concluded that even though a private party brings the suit under Chapter 600A of the Iowa Code, "the state is an integral part of the process in a 600A termination." Further, "there is no narrowly tailored compelling state interest to deny counsel at public expense to indigent parents facing an involuntary termination of their parental rights." Thus, the court held that the state equal protection clause guarantees an indigent parent the right to state-funded counsel even in cases brought by a private party. Not long after this ruling, a new statute was added to the Iowa Code providing for court-appointed counsel for an indigent parent in all involuntary termination suits.

Not all states, however, have held in this same manner. For example, the Supreme Court of Mississippi strictly followed Lassiter, noting that "appointment of counsel in termination proceedings, while wise, is not mandatory and therefore should be determined by state courts on a case-

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254. Id. at 563.
255. Id. at 565.
256. Id. at 566 (quoting In re Jay [R.], 197 Cal. Rptr. 672, 680 (1983)).
258. Id. at 752 (quoting Jacobson v. Dep't of Pub. Aid, 664 N.E.2d 1024 (Ill. 1996)).
259. Id. at 753.
260. Id. at 752.
262. Id. § 600A.5(1) (2003).
263. 679 N.W.2d 645 (Iowa 2004).
264. Id. at 647.
265. Id. at 650.
266. Id.
267. Id. at 651.
by-case basis." The court stated that one of the most important factors in determining whether a lower court followed due process was "whether the presence of counsel would have made a determinative difference." But, the court noted that Mississippi, at that time, did not have any statute or case law "on the question of whether an indigent parent is entitled to counsel at a termination of parental rights proceeding." Thus, it only had the Lassiter holding as precedent.

These varying state legislative and judicial interpretations in parental-rights termination suits illustrate the disparate law throughout the nation regarding an indigent person's right to counsel in parental-rights termination proceedings and should be remedied for the benefit of not only parents but also practitioners and courts.

V. SUGGESTIONS FOR CHANGE

Though the issue of family protection and family rights is a "fundamental liberty interest," the aftermath of Lassiter has unfortunately left the "door ... open to experimentation by the states." It has also left indigent parents wondering what individual states have decided regarding the right to counsel. In Texas, for example, while the state statute has a higher standard than Lassiter for state-initiated suits, the same is not true for private suits. This disparity should be changed both to attain uniformity among the states and to have a clear standard for parents to have notice of whether they have a right to counsel in involuntary termination proceedings. In doing so, the Supreme Court should revisit its "loss of liberty" standard for the right to counsel and expand it to give the right to indigent parents in termination proceedings. Such expansion would not only allow greater equity and clarity in these important proceedings, but would also provide for greater efficiency of these suits, benefiting both the state and the child. While the Court passed on its opportunity in In re I.C., it must revisit this issue again soon because the current economic situation and ever-changing state statutes make this issue ever more urgent.

The economic times we face now have pushed, and predictably will push more, Americans into poverty or indigency. Because most termination suits involve indigent families, courts must take a hard look at the

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270. Id.
271. Id. ¶ 14.
272. Id.
274. Boyer, supra note 58, at 367.
275. See id.
rights given to those indigent parents. It would be tantamount to invasion of the fundamental right to family if the right to parent and develop a relationship with one’s child depended on the state of the economy and one’s ability to afford counsel. Judge Devany, in 1987 during another economic downturn, best stated this potential danger in his dissenting opinion in a Texas court of appeals case:

When we are faced with an economic depression and parents cannot provide adequate food for their children, . . . parental rights will be terminated [due to their inability to provide for their children]. . . . [This would allow the] state [to] become a “big brother” form of government of such supremacy that it can destroy the very base of freedom and democracy in this country by destroying the family.280

If parents’ right to counsel and right to defend themselves in a parental-rights termination suit were dependent upon their finances, it seems the economy would have an unprecedented role in dictating who is fit to be a parent.

Current Texas law ignores the fact that an indigent person’s right to counsel is just as important against private parties as against a governmental entity. The state is the only entity that may terminate the parent-child relationship.281 Thus, to say that the state is not involved in a private party termination “understates the actual involvement of the state.”282 Further, though indigent parents are often not guaranteed counsel in private termination suits, it is in “private custody and adoption disputes [that] parties frequently trade allegations of child abuse or neglect that are integral to a charge of unfitness against the parent . . . whose rights are threatened.”283 Thus, it may be even more imperative in some circumstances that a parent has counsel in private termination suits.

As the Oregon Supreme Court stated in Zockert, discussing its own state constitution, an indigent person’s to assistance from counsel is indeed a “privilege.”284 While the U.S. Supreme Court did mandate that trial courts give requests for assistance of counsel a case-by-case analysis under the due process considerations of Mathews,285 it did not go so far as to require counsel in all termination suits with indigent parents.286 Heeding the recommendation from in Lassiter,287 however, the Texas legislature went beyond the constitutional minimum by requiring the mandatory appointment of counsel for indigent parents in termination
cases brought by a government entity. Thus, it is a privilege in Texas that indigent parents are automatically appointed counsel in all termination cases brought by the state. But, just because it is a privilege does not mean the state can give it arbitrarily. The Texas Legislature gave no rhyme or reason for granting this privilege in certain instances while denying it in others. As the Oregon Supreme Court held nearly twenty years ago, "[n]o distinction may be founded upon the fact that a private person initiates an adoption" or seeks to terminate parental rights. If a state extends the privilege of counsel above and beyond the minimal requirements of Lassiter, it should do so without arbitrary delineations. As Rhine argued, this is a denial of equal protection under the law, giving very different rights to similarly situated persons. While Solicitor General Ho argued that there is nothing arbitrary about distinguishing between parents facing a termination suit brought by the government and those facing a termination suit brought by private parties, that argument assumes there is something quite different in the challenges faced in each. But, that is simply not the case when, in either suit, the state itself is the entity by which a parents rights are terminated. In other words, the state is heavily involved whether it is a government termination suit or a private termination suit.

Further, having counsel for indigent parents in all cases supports judicial efficiency, allowing the child to have a settled home and family rather than dragging him or her through an elongated appellate process as we have seen in the Rhine case. It is notable that in at least two cases regarding right to counsel in a private termination case, the opposing side agreed with the indigent parent that he or she should have counsel provided by the state. Even the attorneys for the Deatons in the Rhine case wholeheartedly agreed with Rhine that the Texas statute needs change.

Uniformity and bright-line rules are imperative in parental-rights termination cases because they often involve indigent and unsophisticated parents and parties. If an indigent parent is denied counsel in a termination suit brought by a private entity, it is highly unlikely he or she will know the applicable law and whether the court properly applied the Matthews balancing test. If the right is discretionary in certain instances but not in others, the indigent parent is left to the mercy of a judge to ensure

291. See Petition for a writ of Certiorari, supra note 31, at 20.
292. Brief for the State of Texas as Amicus Curaie, supra note 214, at 22-23.
294. Stoeltje, supra note 25.
procedural constitutionality, because the parent (without counsel) has no
way of knowing if the judge did not. Such lack of assurance of procedural
integrity for a parent facing the possibility of being permanently sepa-
rated from his or her child is simply wrong. Further, the lack of uniform-
ity among the states heightens this problem. For example, if a parent is
haled into another state for a parental-rights termination suit, he or she—
without appointed counsel—is wholly unknowledgeable of the other
state’s laws and is again at the mercy of the court, hoping the court fol-
lows its own state procedures regarding the right to counsel, because the
parent would not otherwise know.

Further, disparity in the right to counsel between a case brought by the
state and one brought by a private party leaves a loophole ripe for ex-
ploration. For example, Texas CPS and the Deatons in the Rhine case
dropped and filed their respective suits within mere hours.296 As Rhine’s
attorney said, although this is legal, it causes grave concern for possible
implications of CPS being able to say to a foster parent or other private
person, “‘We’ll dismiss and you file,’ and then the (biological parent)
doesn’t get a lawyer.”297 Rhine’s attorney further opined that such a situ-
ation just “doesn’t pass the smell test.”298

In order to resolve these questions, the Supreme Court should revisit
its holding in Lassiter and formulate a more specific, bright-line rule re-
garding the appointment of counsel in parental rights termination cases.
As Justice Blackmun stated, it was improper for the Court to presume
that the permanent loss of parental rights “somehow is less serious than
threatened losses deemed to require appointed counsel.”299 It takes little
more than common sense to conclude that most loving parents would
gladly give up their own personal liberty, if the choice were between loss
of liberty or loss of a child. Further, allowing indigent parents the right to
counsel does not necessarily mean that more unfit parents will get to
keep their children. Rather, providing indigent parents with counsel in
termination suits will serve as an assurance of fair process and efficient
administration of justice—an end beneficial to parent, child, and state.

VI. CONCLUSION

The resounding theme in parental-rights termination cases is the ten-
dency of our society to treat, or desire to treat, litigants differently when
the object of the litigation is the parent–child relationship. The clear and
convincing standard of proof and the varying requirements for mandatory
appointment of counsel in these cases evinces this respect for the familial
relationship. Issues relating family relationships strike a chord at the very
core of our society, and warrant protection and deference.300

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297. Stoeltje, supra note 25.
298. Id.
300. Id. at 27.
In the case of *In re J.C.* and its long progression through the courts, the U.S. Supreme Court—after long determination—deemed the case unfit for the Court to hear and passed on the opportunity to clarify the constitutionality of an indigent parent's right to counsel. Such a determination, however, is long overdue, as the facts of *In re J.C.* illustrate. While *Lassiter* provides minimal guidance, the Court itself noted that states should seek a higher standard. But while the Court implored states to reach for a loftier standard, it gave no indication as to what that standard should be. This lack of guidance has engendered variation among the states, as well as underinclusive coverage by statutes such as the Texas Family Code. At the very least, the question of whether an indigent parent has the right to counsel in termination suits should be uniform among the states. The current scene, in which an indigent parent's ability to defend a suit regarding her fitness to parent her own child can so drastically change depending on who brings suit or the state in which it is brought, drips of inequity and impropriety. The Supreme Court must, therefore, clarify the standards that govern the proceedings so that our families, the cornerstone of our society, receive the protection and process they deserve.

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