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Cyrus W. Jarrett Jr.

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## A RETURN TO HISTORY AND TRADITION: REVISITING *LASSITER* AND GROUNDING CIVIL *GIDEON* IN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

CYRUS W. JARRETT, JR.\*

While indigent criminal defendants have enjoyed a right to counsel in both federal and state courts ever since the United States Supreme Court decided *Gideon v. Wainwright*<sup>1</sup> more than fifty years ago,<sup>2</sup> the movement to recognize a right to counsel for indigent civil litigants under the Due Process Clause of the Fourteenth Amendment was cut off at the knees when the Supreme Court decided *Lassiter v. Department of Social Services of Durham County, North Carolina*.<sup>3</sup> Though *Lassiter* has now stood for more than forty years, the time is right for the Court to revisit and overturn its holding. First, the notion of a broad right to counsel for indigent civil litigants is deeply rooted in the history and tradition of the United States—the touchstone for determining whether an unenumerated right is contained within the Due Process Clause.<sup>4</sup> Additionally, a proper application of the balancing test utilized by the *Lassiter* Court likewise reveals that due process requires that indigent civil litigants be appointed counsel under many circumstances.<sup>5</sup> Ultimately, the weight of *Lassiter*'s tenuous reasoning, unworkable rule, lack of reliance, and egregious error indicate that *stare decisis* should not be honored, and that *Lassiter* should be revisited and overruled.<sup>6</sup>

### I. BACKGROUND

In *Gideon v. Wainwright*, the United States Supreme Court recognized that the Sixth Amendment's guarantee of counsel for criminal defendants was fully applicable to the states by means of the Fourteenth

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\* J.D. Candidate, 2025, University of Maryland Francis King Carey School of Law. The author would like to thank his wife, Kolbi Stahl, for her unwavering support and encouragement. Additionally, the author would like to thank the editors of the *Maryland Law Journal of Race, Religion, Gender & Class* for all of their feedback, guidance, and support thorough the writing process. Finally, the author wishes to thank all of the attorneys who work tirelessly to safeguard the rights of those with limited financial resources.

<sup>1</sup> 372 U.S. 335 (1963).

<sup>2</sup> *Id.* at 344-45.

<sup>3</sup> 452 U.S. 18, 33 (1981).

<sup>4</sup> *See infra* Section III.B.

<sup>5</sup> *See infra* Section III.C.

<sup>6</sup> *See infra* Section III.D.

Amendment's Due Process Clause.<sup>7</sup> In doing so, the Court overruled *Betts v. Brady*<sup>8</sup>, wherein the Court had previously held that "appointment of counsel [was] not a fundamental right, essential to a fair trial," and left individual state legislatures and trial courts to continue deciding on their own when it was appropriate to appoint counsel for indigent criminal defendants.<sup>9</sup> Part of the Court's reasoning hinged on the fact that, at the time *Betts* was decided, twelve states understood their own state constitutional analogues to the Sixth Amendment as containing no requirement that counsel be appointed for indigent defendants.<sup>10</sup> The Court also considered the fact that state legislatures had often chosen to create their own statutory schemes for determining whether counsel was to be appointed for indigent defendants.<sup>11</sup> The Court viewed the fact that many of those schemes did not provide for unqualified appointment of counsel as further support for the notion that access to counsel was not fundamental, and instead was a mere policy issue.<sup>12</sup>

The *Gideon* Court summarily rejected the reasoning of *Betts*, pointing to a host of precedent demonstrating the fundamentality of access to counsel in criminal proceedings—all of which predated *Betts*.<sup>13</sup> Critically, the Court stated that "[n]ot only these precedents but also *reason and reflection* require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."<sup>14</sup> By incorporating the Sixth Amendment's guarantee of counsel for criminal defendants against the states, the *Gideon* Court sought to "restore constitutional principles established to achieve a fair system of justice."<sup>15</sup>

#### A. *Lassiter* and the Eldridge Test for Fundamentality

Despite taking a principled stand in *Gideon*, the Supreme Court declined to extend the right to counsel to civil proceedings when presented an opportunity to do so in *Lassiter v. Department of Social Services of Durham County, North Carolina*.<sup>16</sup> In *Lassiter*, the Court was

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<sup>7</sup> *Gideon*, 372 U.S. at 343-44.

<sup>8</sup> 316 U.S. 455 (1942).

<sup>9</sup> *Id.* at 471-72.

<sup>10</sup> *Id.* at 469-70.

<sup>11</sup> *Id.* at 470-71.

<sup>12</sup> *Id.*

<sup>13</sup> *Gideon*, 372 U.S. at 342-44.

<sup>14</sup> *Id.* at 344 (emphasis added).

<sup>15</sup> *Id.*

<sup>16</sup> 452 U.S. 18, 31-32 (1981).

faced with a claim from an indigent mother, Ms. Lassiter, whose parental rights were terminated following a hearing where she was unrepresented by counsel.<sup>17</sup> On appeal, Ms. Lassiter argued that “the Due Process Clause of the Fourteenth Amendment entitled her to the assistance of counsel, and that the trial court had therefore erred in not requiring the State to provide counsel for her.”<sup>18</sup> The Court ultimately determined that Ms. Lassiter did not have a right to counsel under the Due Process Clause, and held that the decision whether or not to appoint counsel for indigent parents facing termination proceedings was one for trial courts to address on a case-by-case basis.<sup>19</sup>

In reaching its conclusion, the *Lassiter* Court began its analysis with “the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”<sup>20</sup> The Court then looked to *Mathews v. Eldridge*, which provided three factors to evaluate and weigh, given that foundational presumption, in a balancing test: “the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.”<sup>21</sup> The Court reasoned that due process would only require that Ms. Lassiter and other indigent parents facing termination proceedings be appointed counsel if the weight of the *Eldridge* factors overcame the foundational presumption that one has a right to appointed counsel only when their physical liberty is at stake.<sup>22</sup>

The *Lassiter* Court recognized that the private interests at stake in the case were “commanding.”<sup>23</sup> After all, the paramount importance of a parent’s right to raise their child as they please had long been conclusively established.<sup>24</sup> Since the State sought to terminate those rights with respect to Ms. Lassiter, the Court admitted that she possessed a very strong interest in receiving “an accurate and just decision.”<sup>25</sup> Consequently, this factor seemed to weigh in favor of finding that due process required the appointment of counsel.<sup>26</sup>

In evaluating the State interests at play, the Court noted that the State, just as the parent, has an interest in promoting child welfare and

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<sup>17</sup> *Id.* at 20-24.

<sup>18</sup> *Id.* at 24.

<sup>19</sup> *Id.* at 31-33.

<sup>20</sup> *Id.* at 26-27.

<sup>21</sup> *Id.* at 27 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

<sup>22</sup> *Lassiter*, 452 U.S. at 27.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 27-8.

reaching “an accurate and just decision.”<sup>27</sup> As a result, the Court recognized that the State “may share the indigent parent’s interest in the availability of appointed counsel,” so as to better facilitate the adversarial process.<sup>28</sup> However, the Court also recognized that the State and the parent’s interests diverged insofar as the State also had an interest in minimizing the costs that appointed counsel would impose.<sup>29</sup> Nevertheless, the Court did not believe this minor financial interest of the State could even come close to overcoming the important private interests of the parent.<sup>30</sup>

Finally, the Court turned to evaluate the risk that an erroneous decision could result from the termination of parental rights procedures.<sup>31</sup> The Court first acknowledged that the potential complexity of termination of parental rights proceedings, along with difficult life circumstances faced by many indigent parents, “may combine to overwhelm an uncounseled parent . . . .”<sup>32</sup> Many state courts had already held that indigent parents must be appointed counsel for such proceedings as a result of that risk.<sup>33</sup> In fact, the only state court case that the State could find holding that indigent parents had no right to counsel in termination proceedings was the lower court ruling which was then under review.<sup>34</sup>

After concluding its *Eldridge* analysis, the Court determined that in parental termination proceedings both the parent and the state share a strong interest in a correct decision being made, and that, without the parent being assisted by counsel, the risk of the parent’s rights being terminated in error could be “insupportably high.”<sup>35</sup> The Court nevertheless declined to find a constitutional right to counsel in such cases.<sup>36</sup> Though the Court acknowledged that the weight of the *Eldridge* factors very well could overcome the presumption against the right to counsel in civil cases, it could not conclude that the weight of the factors would overcome the presumption in *all* cases.<sup>37</sup> As a result, the Court chose to leave it up to individual trial courts to apply the balancing test on a case-by-case basis, to determine if individual litigants are owed state-

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<sup>27</sup> *Id.* at 27.

<sup>28</sup> *Id.* at 27-28.

<sup>29</sup> *Id.* at 28.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 30.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 30-31.

<sup>35</sup> *Id.* at 31.

<sup>36</sup> *Id.* at 31-32.

<sup>37</sup> *Id.*

provided counsel in parental termination proceedings.<sup>38</sup> In doing so, the Court seemed to largely foreclose the possibility of successful federal due process claims of a right to counsel in other types of civil cases, as the liberty interest at stake in *Lassiter* presents the strongest civil analogue to *Gideon*.<sup>39</sup>

### B. Criticism of *Lassiter*

From the day that it was decided, astute jurists recognized that *Lassiter* sits on shaky ground. Justice Blackmun, joined by Justice Brennan and Justice Marshall, wrote a scathing dissent outlining how the majority seemed to avoid the obvious conclusion stemming from their application of the *Eldridge* factors balancing test.<sup>40</sup> Recognizing that the majority understood Ms. *Lassiter*'s interest in being able to parent her child was of such a magnitude that no competing interest of the State could compare, Justice Blackmun questioned how the majority could then conclude that due process did not require that she be provided with the assistance of counsel.<sup>41</sup> Instead, Justice Blackmun wrote, the Court sidestepped "the obvious conclusion that due process requires the presence of counsel for a parent threatened with judicial termination of parental rights, and, instead, revive[d] an ad hoc approach thoroughly discredited nearly 20 years [earlier] in *Gideon v. Wainwright*."<sup>42</sup>

Justice Blackmun also took care to call out the impracticality of the majority's assertion that case-by-case evaluation and review can ensure fairness in parental termination proceedings.<sup>43</sup> Simply reviewing the record of a hearing at which a parent was uncounseled, he noted, "at most will show the obvious blunders and omissions of the defendant parent."<sup>44</sup> Consequently, reviewing courts would be forced to resort to a cumbersome process of "imagination, investigation, and [individualized] legal research" in attempting to reverse-engineer whether or not a parent's lack of counsel made a meaningful difference in the outcome

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<sup>38</sup> *Id.*

<sup>39</sup> See Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1231-32 (2010) ("[*Lassiter*] was a brutal defeat for civil *Gideon* because a termination of parental rights case presents the closest possible civil analogy to *Gideon* that does not involve imprisonment, but rather a liberty interest (the right to keep one's children) that the Court has repeatedly credited as powerful, as well as coercive, state action . . .").

<sup>40</sup> *Lassiter*, 452 U.S. at 35 (Blackmun, J., dissenting).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (internal citations omitted).

<sup>43</sup> *Id.* at 50-52.

<sup>44</sup> *Id.* at 51.

of their case.<sup>45</sup> Even if such review could ensure fairness, Justice Blackmun argued, the flood of litigation likely to result from the convoluted process could “transform the [United States Supreme] Court into a ‘super family court.’”<sup>46</sup>

Ultimately, the Court’s decision in *Lassiter* was likely due in no small part to just how unsympathetic Ms. Lassiter was as a plaintiff. In only the second sentence of its opinion, the majority made sure to point out that Ms. Lassiter had been sentenced to twenty-five to forty years in prison for a second-degree murder conviction.<sup>47</sup> Furthermore, as the majority promptly noted, Ms. Lassiter’s son had been adjudicated a neglected child three years before the Department of Social Services ultimately moved to terminate her parental rights.<sup>48</sup> While the majority almost certainly was influenced by Ms. Lassiter’s sordid past, Justice Blackmun remained focused on the important constitutional issue at hand:

Petitioner plainly has not led the life of the exemplary citizen or model parent. It may well be that if she were accorded competent legal representation, the ultimate result in this particular case would be the same. But the issue before the Court is not petitioner’s character; it is whether she was given a meaningful opportunity to be heard when the State moved to terminate absolutely her parental rights.<sup>49</sup>

Particularly given that Ms. Lassiter left defenses unraised, and clearly was unable to competently navigate the legal proceedings, fundamental fairness would require that she, and those similarly situated, have access to counsel no matter how distasteful their earlier actions may be.<sup>50</sup>

## II. POST-*LASSITER* STATUS OF CIVIL *GIDEON*

A frustrating defeat in *Lassiter* has not prevented zealous advocates and proactive legislatures from working to craft various avenues through which some indigent civil litigants are provided with the assistance of counsel. In 2006, the American Bar Association (“ABA”)

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 52.

<sup>47</sup> *Id.* at 20 (majority opinion).

<sup>48</sup> *Id.* at 20-21.

<sup>49</sup> *Id.* at 57 (Blackmun, J., dissenting).

<sup>50</sup> *Id.*

approved Resolution 112A, “urg[ing] federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody . . . .”<sup>51</sup> Notably, the ABA called for a right to counsel that was far more broad than what had been sought in *Lassiter*.<sup>52</sup> This is because the ABA recognized that “many other proceedings that threaten loss of basic human needs are equally adversarial and often more complex” than the parental termination proceedings at issue in *Lassiter*.<sup>53</sup> While some states have attempted to address the broad call of the ABA by legislative means, those attempts have achieved minimal success.<sup>54</sup> Most states continue to have only a patchwork of statutory provisions and judicial decisions providing certain indigent civil litigants access to counsel, while leaving others high and dry.<sup>55</sup>

#### *A. Common Statutory Right-to-Counsel Mechanisms*

Many states have chosen to provide counsel at no cost to certain classes of indigent civil litigants.<sup>56</sup> Oftentimes, states choose to institute such statutory protections for proceedings that involve children.<sup>57</sup> A significant number of states have instituted statutory schemes to guarantee counsel to indigent parents facing termination proceedings in the same vein as Ms. Lassiter.<sup>58</sup> In Maryland, all indigent parties to Children in Need of Assistance (“CINA”) proceedings are provided with a statutory means of obtaining counsel.<sup>59</sup>

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<sup>51</sup> AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 112A 1 (2006).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 7.

<sup>54</sup> See, e.g., CAL. GOV’T. CODE § 68651 (Deering 2023) (creating and administering a pilot program to provide counsel to certain indigent parties to litigation affecting their basic human needs); S.B. 4689, 2023-2024 Leg., Reg. Sess. (N.Y. 2023) (attempting to establish a right to counsel in civil matters involving basic human needs).

<sup>55</sup> See, e.g., MD. CODE ANN., REAL PROP. § 8-901 *et. seq.* (West 2023) (providing access to counsel to indigent litigants facing certain types of eviction action); *In re T.M.*, 319 P.3d 338, 355 (Haw. 2014) (holding that the Hawaii Constitution contains a due process right to counsel for indigent litigants facing parental termination proceedings).

<sup>56</sup> See *infra* notes 58-62 and accompanying text.

<sup>57</sup> See *infra* notes 58-59 and accompanying text.

<sup>58</sup> See, e.g., ALA. CODE § 12-15-305 (2023) (establishing a right to appointed counsel for indigent parents or guardians facing termination proceedings); NEB. REV. STAT. § 43-279.01(1)(b) (2023) (providing that indigent parents or guardians facing state termination proceedings shall be informed of their right to appointed counsel).

<sup>59</sup> MD. CODE ANN., CTS. & JUD. PROC. § 3-813 (West 2023).



More recently, some states have begun to institute statutory regimes to provide counsel to indigent litigants facing certain types of eviction proceedings. In 2021, a Washington statute went into effect mandating that courts appoint counsel for indigent tenants facing unlawful detainer proceedings.<sup>60</sup> That same year, a similar Connecticut statute went into effect.<sup>61</sup> Maryland also passed legislation to create the Access to Counsel in Evictions (“ACE”) program in 2021, with the purpose of providing “counsel to individuals facing “judicial or administrative proceeding[s] to evict or terminate [] tenancy or housing subsidy.”<sup>62</sup> However, the funding provision for the ACE program did not go into effect until July of 2023.<sup>63</sup>

### *B. State Constitutional Right-to-Counsel Bases*

Though the United States Supreme Court in *Lassiter* declined to recognize a due process right to counsel for indigent parents facing termination proceedings, several states have found due process rights to counsel for indigent parents facing termination proceedings under their own state constitutions.<sup>64</sup> In *In re D.B.*, the Supreme Court of Florida determined that the Due Process Clauses of both the United States Constitution and the Florida Constitution established a right to counsel in termination of parental rights proceedings “where permanent termination of custody might result.”<sup>65</sup> Though the United States Supreme Court decided *Lassiter* just the next year, holding that no such right exists under the federal Due Process Clause, Florida courts have continued to hold that the Florida Constitution’s Due Process Clause independently establishes such a right.<sup>66</sup> Notably, the Florida Constitution maintains this broad protection regardless of the fact that the wording of both the federal and Florida Due Process Clauses is substantially identical.<sup>67</sup>

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<sup>60</sup> WASH. REV. CODE § 59.18.640 (2023).

<sup>61</sup> See CONN. GEN. STAT. § 47a-75 (2023).

<sup>62</sup> MD. CODE ANN., REAL PROP. § 8-904 (West 2023).

<sup>63</sup> MD. CODE ANN., REAL PROP. § 8-909 (West 2023). See ACCESS TO COUNSEL IN EVICTIONS TASK FORCE, REPORT OF THE ACCESS TO COUNSEL IN EVICTIONS TASK FORCE 3, 45 (2024).

<sup>64</sup> See *infra* notes 65-74 and accompanying text.

<sup>65</sup> 385 So. 2d 83, 90-91 (Fla. 1980).

<sup>66</sup> See *M.E.K. v. R.L.K.*, 921 So. 2d 787, 790 (Fla. Dist. Ct. App. 2006). The Due Process Clause of the Florida Constitution, in relevant part, reads: “No person shall be deprived of life, liberty or property without due process of law.” FLA. CONST. art. 1, § 9.

<sup>67</sup> Compare FLA. CONST. art. 1, § 9 (“No person shall be deprived of life, liberty or property without due process of law”), with U.S. CONST. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).

Alaska has also recognized a right to counsel for certain indigent civil litigants within the Due Process Clause of its state constitution.<sup>68</sup> Like the United States Supreme Court in *Lassiter*, the Supreme Court of Alaska applied the *Eldridge* factor test to its own constitution to determine if due process required that an indigent father facing a proceeding which could result in the termination of his parental rights be provided counsel.<sup>69</sup> Though the Alaska Constitution's Due Process Clause also uses nearly identical language to its federal analogue,<sup>70</sup> the Supreme Court of Alaska concluded that its state constitution's Due Process Clause required that the indigent father be appointed counsel to assist him in the proceedings.<sup>71</sup>

Most recently, in 2014, the Supreme Court of Hawaii recognized a due process right to counsel on state constitutional grounds for indigent parents facing termination proceedings.<sup>72</sup> Recognizing that the case-by-case approach articulated in *Lassiter* created considerable administrability issues, the court held that "indigent parents are guaranteed the right to court-appointed counsel in termination proceedings under the due process clause" of the Hawaii State Constitution.<sup>73</sup> Just like Florida and Alaska, Hawaii's Due Process Clause mirrors the language of the Fourteenth Amendment.<sup>74</sup>

### III. ARGUMENT

Though some indigent civil litigants are afforded access to counsel through limited state-level constitutional and statutory guarantees, many litigants in need are left uncounseled, necessitating a federal due process guarantee of counsel only achievable by overturning *Lassiter*.<sup>75</sup> *Lassiter* can—and should—be overturned because the concept of a right to counsel for indigent civil litigants is deeply rooted within the history and tradition of the United States.<sup>76</sup> Even if the Supreme Court were not

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<sup>68</sup> See *In re K.L.J.*, 813 P.2d 276, 286 (Alaska 1991).

<sup>69</sup> *Id.* at 279.

<sup>70</sup> Compare ALASKA CONST. art. 1, § 7 ("No person shall be deprived of life, liberty, or property, without due process of law."), with U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

<sup>71</sup> *In re K.L.J.*, 813 P.2d at 286.

<sup>72</sup> *In re T.M.*, 319 P.3d 338, 355 (Haw. 2014).

<sup>73</sup> *Id.*

<sup>74</sup> Compare HAW. CONST. art. 1, § 5 ("No person shall be deprived of life, liberty or property without due process of law"), with U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

<sup>75</sup> See *infra* Section III.A.

<sup>76</sup> See *infra* Section III.B.

to consider a right to counsel for indigent civil litigants to be deeply rooted, *Lassiter* must nevertheless be overruled because the *Lassiter* Court's application of the *Eldridge* factor balancing test failed to properly weigh the "risk of erroneous decisions" element, resulting in an outcome that does not adequately recognize the fundamentality of the right sought.<sup>77</sup> When a case is so wrongly decided as *Lassiter*, *stare decisis* should not preclude it from being overturned.<sup>78</sup>

### A. A Federal Due Process Right to Counsel is Still Necessary

While some indigent civil litigants are fortunate enough to receive access to counsel through a patchwork of state constitutional guarantees and statutory provisions, many vulnerable litigants remain uncovered. For example, only three states provide a categorical right to counsel<sup>79</sup> for indigent persons facing eviction actions.<sup>80</sup> And, even in states that have statutory regimes to provide counsel to individuals facing eviction, the operation of their programs may be contingent on continued funding—which is not guaranteed.<sup>81</sup> Furthermore, such programs still may leave other vulnerable litigants—like those seeking to bring housing discrimination suits—without a guarantee of counsel.<sup>82</sup>

When it comes to actions like the parental termination proceedings faced by Ms. Lassiter, four states still do not categorically appoint counsel for indigent parents.<sup>83</sup> If an action to terminate parental rights

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<sup>77</sup> See *infra* Section III.C.

<sup>78</sup> See *infra* Section III.D.

<sup>79</sup> This article uses the National Coalition for a Civil Right to Counsel's definition of a categorical right to counsel, which is "a right to counsel without qualification for all individuals . . . (except that the individual may be required to request counsel). *Status Map Housing–Evictions*, NAT'L COAL. FOR A CIV. RIGHT TO COUNSEL (2023) <http://civilrighttocounsel.org/map> (select "Right to Counsel Status" option; then choose "Housing – Evictions" from subject area dropdown; then hover cursor over question mark symbol to the right of "Categorical Right to Counsel") (last visited Apr. 17, 2024).

<sup>80</sup> *Status Map Housing–Evictions*, NAT'L COAL. FOR A CIV. RIGHT TO COUNSEL (2023) <http://civilrighttocounsel.org/map>.

<sup>81</sup> See *e.g.*, MD. CODE ANN., REAL PROP. § 8-909(h)(2) (West 2023) (showing that Maryland's Access to Counsel in Evictions program has only been funded through 2027).

<sup>82</sup> See MD. CODE ANN., STATE GOV'T § 20-1035(d) (West 2023) (providing courts with discretionary authority to appoint counsel for indigent litigants in housing discrimination suits); *Status Map Housing - Discrimination*, NAT'L COAL. FOR A CIV. RIGHT TO COUNSEL, <http://civilrighttocounsel.org/map> (select "Right to Counsel Status" option; then choose "Housing - Discrimination" from subject area dropdown) (last visited Feb. 26, 2024) (showing that only ten total states have any statutory mechanism to afford courts the opportunity to appoint counsel for indigent litigants in housing discrimination suits).

<sup>83</sup> *Status Map Termination of Parental Rights (State) - Birth Parents*, NAT'L COAL. FOR A CIV. RIGHT TO COUNSEL, <http://civilrighttocounsel.org/map> (select "Right to Counsel Status" option;

is brought by a private party rather than the state, only twenty-six states afford indigent parents a categorical right to counsel.<sup>84</sup> Even fewer states provide access to counsel for indigent litigants seeking state benefits such as worker's compensation or unemployment, with only five states providing even a qualified right.<sup>85</sup> In order to successfully provide access to counsel for the multitude of uncovered litigants in need, a broad, federal, due process right to counsel remains crucial.

*B. Lassiter Should be Overturned Because the Concept of a Right to Counsel for Indigent Civil Litigants is Deeply Rooted in the History and Tradition of the United States*

In attempting to determine if the Due Process Clause contained a right to counsel for an indigent mother facing termination of parental rights proceedings, the *Lassiter* Court looked to whether such a right was encompassed by the notion of “fundamental fairness.”<sup>86</sup> To ascertain what “fundamental fairness” required with respect to the issue of court-appointed counsel for indigent civil litigants, the Court looked to precedent, and then to the various interests at stake.<sup>87</sup> After reviewing prior cases dealing with the appointment of counsel for indigent litigants, the Court drew “the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”<sup>88</sup> It was against that weighty presumption that the Court chose to balance the *Eldridge* factors, prompting the Court's ultimate decision not to establish a broad standard requiring the appointment of counsel for indigent parents in termination proceedings.<sup>89</sup>

The *Lassiter* Court conducted a “fundamental fairness” inquiry in its attempt to determine what the Due Process Clause required with respect to appointment of counsel for indigent civil litigants.<sup>90</sup> However, in recent years, the Supreme Court has clarified that, in

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then choose “Termination of Parental Rights (State) - Birth Parents” from subject area dropdown) (last visited Feb. 26, 2024).

<sup>84</sup> *Status Map Termination of Parental Rights (Private) - Birth Parents*, NAT'L COAL. FOR A CIV. RIGHT TO COUNSEL, <http://civilrighttocounsel.org/map> (select “Right to Counsel Status” option; then choose “Termination of Parental Rights (Private) - Birth Parents” from subject area dropdown) (last visited Feb. 26, 2024).

<sup>85</sup> *Status Map Benefits - Claimant*, NAT'L COAL. FOR A CIV. RIGHT TO COUNSEL, <http://civilrighttocounsel.org/map> (select “Right to Counsel Status” option; then choose “Benefits - Claimant” from subject area dropdown) (last visited Feb. 26, 2024).

<sup>86</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24-25 (1981).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 26-27.

<sup>89</sup> *Id.* at 27, 31-32.

<sup>90</sup> *Id.* at 24-25.

considering whether the “liberty” referenced by the Fourteenth Amendment contains a particular right, courts must instead conduct an inquiry into whether such a right is “rooted in our Nation’s history and tradition.”<sup>91</sup> Recognizing that previous Supreme Court abortion decisions in *Roe v. Wade*<sup>92</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>93</sup> had grounded a right to abortion in the Fourteenth Amendment’s Due Process Clause, and understanding that such a right was not one enumerated in the Constitution, the Court in *Dobbs v. Jackson Women’s Health Organization*<sup>94</sup> conducted a historical inquiry to determine whether a right to abortion was “‘deeply rooted in [our] history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty.’”<sup>95</sup> Such an inquiry required “careful analysis of the history of the right at issue.”<sup>96</sup> Writing for the majority in *Dobbs*, Justice Alito explained that “[h]istorical inquiries of this nature are essential whenever we are asked to recognize a new component of the ‘liberty’ protected by the Due Process Clause because the term ‘liberty’ alone provides little guidance.”<sup>97</sup>

The *Dobbs* Court’s inquiry into the history of the right to abortion ran deep; the Court gave weight to English Common Law from as early as the 13th century, and carefully considered the 17th and 18th century writings of Hale and Coke.<sup>98</sup> The Court also found early 17th century Colonial cases significant in attempting to determine what rights our nation’s history and tradition support.<sup>99</sup> Finding it significant that the respondents could find “no support for the existence of an abortion right that predates the latter part of the 20th century,” the *Dobbs* Court concluded that the Fourteenth Amendment does not protect the right to an abortion.<sup>100</sup>

Just as the *Dobbs* Court applied the “history and tradition” test to determine if a right to abortion was contained within the Due Process Clause of the Fourteenth Amendment, so should the Court apply its “history and tradition” test to the issue of right-to-counsel for indigent civil litigants. A proper application of that test will reveal that the *Las-siter* Court erred, and that a right-to-counsel for indigent civil litigants

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<sup>91</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228, 2246 (2022).

<sup>92</sup> 410 U.S. 113 (1973).

<sup>93</sup> 505 U.S. 833 (1992).

<sup>94</sup> 142 S.Ct. 2228 (2022).

<sup>95</sup> *Dobbs*, 142 S.Ct. at 2245-46.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 2247.

<sup>98</sup> *Id.* at 2249.

<sup>99</sup> *Id.* at 2251.

<sup>100</sup> *Id.* at 2248, 2254.

is deeply rooted in our history and tradition, and therefore should be recognized as protected by the Due Process Clause of the Fourteenth Amendment. While the *Dobbs* Court made much of the fact that the respondents “found no support for the existence of an abortion right that predates the latter part of the 20th century,”<sup>101</sup> a broad right to counsel for indigent civil litigants is supported by the existence of a statute far older and more deeply rooted. The statute, 11 Hen. 7, c. 12 (“Pauper Statute”), states in relevant part:

that every poor person or persons which have and hereafter shall have cause of action against any person or persons within the realm shall have . . . original writ or writs . . . [a]nd after the said writ or writs be returned, if it is before the King’s Bench, the Justices there shall assign the same person or persons learned counsel . . . taking nothing for the same . . . .<sup>102</sup>

The Pauper Statute required indigent persons be appointed counsel, with no greater qualification than their willingness to swear to their indigency.<sup>103</sup>

The Pauper Statute is deeply rooted in the history and tradition of the United States because it has been incorporated into the common law of many of the individual states.<sup>104</sup> At least twenty-seven states have either constitutional provisions or statutes which function to incorporate early English statutes and common law into state law.<sup>105</sup> For example, Article 5 of the Maryland Declaration of Rights functions to incorporate into the law of Maryland relevant statutes and common law of England that existed at the time of the colony’s independence.<sup>106</sup> The Pauper Statute is one such statute that has been recognized as appropriate for

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<sup>101</sup> *Dobbs*, 142 S.Ct. at 2254.

<sup>102</sup> An Act to Admit Such Persons as are Poor to Sue in Forma Pauperis, 1495, 11 Hen. 7, c. 12. (Eng.), reprinted in 2 STATUTES OF THE REALM 578 (1816) (spelling modernized).

<sup>103</sup> Stephen H. Sachs, *Keynote Address: Seeking a Right to Appointed Counsel in Civil Cases in Maryland*, 37 U. BALT. L. REV. 5, 17 (2007).

<sup>104</sup> See Scott F. Llewellyn & Brian Hawkins, *Taking the English Right to Counsel Seriously in American Civil Gideon Litigation*, 45 U. MICH. J. L. REFORM 635, 640 (2012).

<sup>105</sup> *Id.* at 639-40.

<sup>106</sup> See MD. CONST. Decl. of Rts., art. 5(a)(1) (“[T]he Inhabitants of Maryland are entitled to the Common Law of England . . . and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity . . .”).

incorporation under Article 5.<sup>107</sup> Other states have invoked the Pauper Statute in various capacities throughout the 19th and 20th centuries.<sup>108</sup> In 1985, a Pennsylvania court recognized that the Pauper Statute was applicable to the case in front of it, and determined that the statute required the court to use its discretion to ascertain if the indigent plaintiff at bar should be appointed counsel.<sup>109</sup> Because the proper test for whether a right is protected by the Due Process Clause is the “history and tradition” test used in *Dobbs*, and because a broad right-to-counsel for indigent civil litigants is deeply rooted in the history and tradition of our country, the United States Supreme Court should overturn *Lassiter* and recognize a right to counsel for indigent civil litigants at least with respect to cases involving basic human needs.

### *C. The Lassiter Court Misapplied the Eldridge Factor Test*

In order to determine whether Ms. Lassiter had a due process right to appointed counsel for her termination of parental rights hearing, the Court applied a test using the *Eldridge* factors, balancing the weight of “the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions” against “the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”<sup>110</sup> The Court promptly noted that the first of the *Eldridge* factors, the private interests at stake, clearly weighed in favor of a right-to-counsel in such proceedings because of the incredible importance of a parent’s right to raise their own child.<sup>111</sup> Understanding that if the State prevails in termination proceedings “it will have worked a unique kind of deprivation,” the Court characterized the private interests of the parent as “commanding.”<sup>112</sup>

The *Lassiter* Court recognized that the second *Eldridge* factor, the government’s interest, also weighed in favor of a right-to-counsel,

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<sup>107</sup> See WILLIAM KILTY, A REPORT OF ALL SUCH ENGLISH STATUTES AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE OF MARYLAND, AND WHICH BY EXPERIENCE HAVE BEEN FOUND APPLICABLE TO THEIR LOCAL AND OTHER CIRCUMSTANCES; AND OF SUCH OTHERS AS HAVE SINCE BEEN MADE IN ENGLAND OR GREAT-BRITAIN, AND HAVE BEEN INTRODUCED, USED AND PRACTICED, BY THE COURTS OF LAW OR EQUITY; AND ALSO ALL SUCH PARTS OF THE SAME AS MAY BE PROPER TO BE INTRODUCED AND INCORPORATED INTO THE BODY OF THE STATUTE LAW OF THE STATE 229 (1811).

<sup>108</sup> See Llewellyn & Hawkins, *supra* note 104, at 649-50.

<sup>109</sup> Zerr v. Scott, 39 Pa. D. & C.3d 459, 460-61 (Ct. C.P. Berks Cnty. 1985).

<sup>110</sup> Lassiter v. Dep’t of Soc. Servs., N.C., 452 U.S. 18, 26-27 (1981).

<sup>111</sup> *Id.* at 27.

<sup>112</sup> *Id.*

albeit not as strongly as the first.<sup>113</sup> The Court understood that the State and the parents share a common interest in the welfare of the child, and that in an adversarial system such as ours, that interest is best served when both parties are represented by counsel so as to effectively advocate for their positions in court in hopes of reaching an accurate and just decision.<sup>114</sup> Though the Court was aware that the government also has a financial interest in avoiding the expense of appointing counsel to indigent parents, it viewed this interest as clearly subordinate to the powerful interest of a parent's right to parent their child.<sup>115</sup> Even the Durham County Department of Social Services admitted that the potential cost of appointing counsel in cases such as the one at bar would be relatively inconsequential.<sup>116</sup>

In looking at the final *Eldridge* factor, risk of erroneous decision, the *Lassiter* Court again found reasons why a right-to-counsel could be necessary.<sup>117</sup> Though the State argued that termination proceedings were unlikely to present complex, technical issues of law, the Court acknowledged that even such routine procedures could pose significant challenges for uncounseled parents.<sup>118</sup> Furthermore, the Court understood that many parents subject to such proceedings were likely to have faced considerable challenges in life which, combined with the inherent stress of potentially losing one's child, could further hinder an uncounseled parent's ability to adequately represent themselves.<sup>119</sup>

Despite recognizing that both the parent and the State share an interest in the welfare of the child which would be served by the appointment of counsel, that the State's financial interest in avoiding the cost of appointed counsel was relatively minor, and that almost all lower courts which had addressed the issue of right-to-counsel for indigent parents facing termination proceedings had held that the State must appoint counsel because of the unacceptable risk that uncounseled parents would be unable to effectively represent themselves, the *Lassiter* Court came to the perplexing conclusion that the Constitution does not require that indigent parents facing termination proceedings be appointed counsel.<sup>120</sup> In so holding, the Court acknowledged that the weight of the

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<sup>113</sup> *Id.* at 27-28.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 28.

<sup>116</sup> *See id.* (mentioning how the respondent conceded that the potential costs of appointing counsel for indigent parties to termination proceedings was *de minimis* compared to the cost of appointing counsel for indigent criminal defendants).

<sup>117</sup> *Id.* at 29-30.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 30.

<sup>120</sup> *Id.* at 30-32.



*Eldridge* factors *could* overcome the presumption against appointed counsel when one's liberty is not at stake, but reasoned that because they may not *always* do so, the decision whether to appoint counsel for such litigants should remain with individual trial courts.<sup>121</sup> This dubious reasoning not only was an unwarranted departure from the rationale underscoring *Gideon*,<sup>122</sup> but grossly undervalued the weight of the third *Eldridge* factor, risk of erroneous decision.

Though the *Lassiter* majority acknowledged that an uncounseled parent may be overwhelmed by the potential complexities of termination proceedings, it declined to go so far as to categorically declare that parents could not ever adequately represent themselves.<sup>123</sup> In failing to do so, the majority neglected to acknowledge the fact that the proceedings at issue closely resembled a criminal prosecution, and clearly had a similarly punitive focus.<sup>124</sup> Furthermore, the majority undersold the complexity of such proceedings, disregarding the fact that the proceedings at bar required Ms. Lassiter to respond to imprecise charges in a highly technical manner.<sup>125</sup> Clearly, a parent in Ms. Lassiter's position would have almost no possibility of presenting an effective defense without the assistance of counsel.<sup>126</sup> Then, of course, without the ability to properly mount a defense or call attention to errors in the State's case, the risk of error "assumes extraordinary proportions."<sup>127</sup> Because the Court misapplied its own *Eldridge* factor test by failing to account for the probability of erroneous outcomes stemming from the inability of uncounseled parents to navigate the complexities of the legal system, the United States Supreme Court should overturn *Lassiter* and recognize a right to counsel for indigent civil litigants.

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<sup>121</sup> *Id.* at 31-32.

<sup>122</sup> *See id.* at 35-36 (Blackmun, J., dissenting) (arguing that *Gideon* discredited the "ad-hoc" approach to appointment of counsel utilized by the majority).

<sup>123</sup> *See id.* at 30 (majority opinion) ("That these factors may combine to overwhelm an uncounseled parent is evident from the findings some courts have made.").

<sup>124</sup> *Id.* at 42-43 (Blackmun, J., dissenting).

<sup>125</sup> *See id.* at 45-46 ("A parent seeking to prevail against the State must be prepared to adduce evidence about his or her personal abilities and lack of fault, as well as proof of progress and foresight as a parent that the State would deem adequate and improved over the situation underlying a previous adverse judgment of child neglect. The parent cannot possibly succeed without being able to identify material issues, develop defenses, gather and present sufficient supporting nonhearsay evidence, and conduct cross-examination of adverse witnesses.").

<sup>126</sup> *Id.* at 46.

<sup>127</sup> *Id.* at 46-47.

*D. Stare Decisis Should Not Preclude the Overturning of a Case so Wrongly Decided as Lassiter*

*Lassiter* was so wrongly decided that *stare decisis* cannot justify continuing to follow its precedent. The Supreme Court has “long recognized [] that *stare decisis* is ‘not an inexorable command,’” and that it is weakest in situations involving constitutional interpretation.<sup>128</sup> When considering whether to overturn past precedent, the Supreme Court looks to factors including: “quality of the precedent’s reasoning; the precedent’s consistency and coherence with previous or subsequent decisions; changed law since the prior decision; changed facts since the prior decision; the workability of the precedent; the reliance interests of those who have relied on the precedent; [] the age of the precedent,” and the nature of the Court’s error.<sup>129</sup> At least four of these factors weigh heavily in favor of overturning *Lassiter*: (1) the poor quality of *Lassiter*’s reasoning; (2) the lack of workability of its holding; (3) the lack of reliance interests; and (4) the nature of the *Lassiter* Court’s error.<sup>130</sup>

*i. Lassiter’s Exceptionally Poor Reasoning Weighs in Favor of its Overturn*

If a prior Court’s reasoning was “exceptionally weak,” then a subsequent court may be justified in revisiting and overturning the precedent set by the poorly reasoned case.<sup>131</sup> Just as the *Dobbs* Court felt that *Roe* and *Casey* contained weak reasoning insufficiently grounded in text and history, so too did the *Lassiter* Court make the same mistake.<sup>132</sup> The *Dobbs* majority found that “*Roe*’s failure even to note the overwhelming consensus of state laws in effect in 1868 [was] striking.”<sup>133</sup> Similarly damning is the *Lassiter* Court’s failure to note the existence of the Pauper Statute, which grounds a right-to-counsel for indigent civil litigants deep within American history and tradition.<sup>134</sup> The paramount importance of conducting a historical analysis when evaluating whether unenumerated rights are contained within the Due Process Clause of the Fourteenth Amendment was stressed so heavily

<sup>128</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228, 2262 (2022).

<sup>129</sup> *Ramos v. Louisiana*, 140 S.Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring); *see also Dobbs*, 142 S.Ct. at 2265.

<sup>130</sup> *See infra* Sections III.D.i, III.D.ii, III.D.iii, III.D.iv.

<sup>131</sup> *See Dobbs*, 142 S.Ct. at 2265-66.

<sup>132</sup> *Id.* at 2266.

<sup>133</sup> *Id.* at 2267.

<sup>134</sup> *See supra* Section III.B.

by the *Dobbs* Court as to indicate that the *Lassiter* Court's failure to do so may alone be enough to warrant reconsideration.<sup>135</sup>

In addition to neglecting to properly consider historical support for a right-to-counsel for indigent civil litigants, the *Lassiter* Court's expressed rationale for reaching its conclusion simply does not add up.<sup>136</sup> The Court recognized that in termination of parental rights proceedings the interest of the parent in raising their child is so powerful and deserving of deference as to be outweighed by no cognizable State interest, and that the complexity of such proceedings creates a risk of erroneous decision with respect to an uncounseled parent.<sup>137</sup> Nevertheless, the Court reached the confounding conclusion that these vital interests do not outweigh its presumption that a right to counsel only exists if one's personal liberty is at risk.<sup>138</sup> Justice Blackmun and the other dissenting justices recognized this absurdity the day *Lassiter* was decided,<sup>139</sup> and the reasoning stands no less absurd today. Because *Lassiter*'s reasoning was exceptionally poor and failed to consider essential facts in its analysis, its holding should be revisited and overturned.

*ii. Lassiter's Lack of a Workable Holding Weighs in Favor of its Overturn*

If a case results in a rule which is difficult to understand and apply, then the case may be ripe for revisitation and being overruled.<sup>140</sup> *Lassiter* resulted in a rule which required individual trial courts to apply its *Eldridge* factors test on a case-by-case basis to determine if indigent civil litigants should be appointed counsel.<sup>141</sup> This rule is markedly similar to the totality of the circumstances test articulated in *Betts*, which operated as the standard for determining whether a defendant had a right to appointed counsel under the Sixth and Fourteenth Amendments.<sup>142</sup> The *Gideon* Court repudiated the case-by-case totality of the circumstances test of *Betts* by holding that access to counsel is so fundamental to a fair trial that the right-to-counsel for indigent criminal defendants

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<sup>135</sup> See *Dobbs*, 142 S.Ct. at 2244-45.

<sup>136</sup> See *supra* Section III.C.

<sup>137</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27-28, 30-31 (1981).

<sup>138</sup> *Id.* at 31.

<sup>139</sup> See *id.* at 35 (Blackmun, J., dissenting).

<sup>140</sup> *Dobbs*, 142 S.Ct. at 2272.

<sup>141</sup> *Lassiter*, 452 U.S. at 31-32.

<sup>142</sup> See *Betts v. Brady*, 316 U.S. 455, 462 (1942) ("Asserted denial is to be tested by an appraisal of the totality of facts in a given case.").

of the Sixth Amendment was incorporated against the states by the Fourteenth Amendment.<sup>143</sup>

Just as the *Gideon* Court found the case-by-case test of *Betts* to be insufficient, so should the Supreme Court recognize the insufficiency and lack of workability inherent to the case-by-case test espoused in *Lassiter*. In fact, the balancing test required by *Lassiter* is even more complex and unworkable than the case-by-case analysis required by *Betts* and overturned by *Gideon*, as it requires two distinct analyses and balancing maneuvers, rather than only one.<sup>144</sup> States have recognized how difficult and unworkable the *Lassiter* standard is, with the Supreme Court of Hawaii explicitly referencing that unworkability as one of the reasons why it chose to recognize a due process right to counsel for indigent parents facing termination proceedings under its own state constitution.<sup>145</sup> Because *Lassiter* has resulted in an unworkable standard that is impractical to apply, its holding should be revisited and overturned.

*iii. The Lack of Reliance Interests Relating to Lassiter Weighs in Favor of its Overturn*

A court may be more wary of revisiting and overturning a prior decision if that decision implicates significant reliance interests.<sup>146</sup> “Traditional reliance interests arise ‘where advance planning of great precision is most obviously a necessity.’”<sup>147</sup> The *Dobbs* Court reasoned that the abortion rights supported by the *Roe* and *Casey* decisions did not implicate serious conventional reliance interests, particularly because the unplanned nature of abortions precluded the necessity of advance planning.<sup>148</sup> Likewise, the *Lassiter* holding does not implicate any significant reliance interests. No individuals are currently relying

<sup>143</sup> *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

<sup>144</sup> Compare *Betts*, 316 U.S. at 471 (“[W]e are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.”), with *Lassiter*, 452 U.S. at 27 (“We must balance [the *Eldridge* Factors] against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.”).

<sup>145</sup> See *In re T.M.*, 319 P.3d 338, 436 (Haw. 2014) (acknowledging that “difficulties stemming from the case-by-case approach can result in the erroneous termination of parental rights” and holding that the due process clause of the Hawaii Constitution contains a right to counsel for indigent parents in termination proceedings).

<sup>146</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228, 2276 (2022).

<sup>147</sup> *Id.* (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992)).

<sup>148</sup> *Id.*

on the existence of a broad right to counsel for indigent civil litigants where basic human needs are at stake, because no such right currently exists. On the other side, to the extent that the State has a reliance interest in avoiding the costs associated with appointing counsel in such cases, the *Lassiter* Court itself recognized how minimal those costs would be with respect to parental termination proceedings.<sup>149</sup> While the costs to implement a broad right in other areas of the law would admittedly be greater, providing access to counsel for indigent civil litigants in other arenas, such as eviction prevention, has ultimately been recognized as having the potential to reduce state costs in the long run.<sup>150</sup> Consequently, because the *Lassiter* holding does not implicate any traditional reliance interests, and may actually hinder the state's interest in fiscally responsible management of courts and state supportive services, its holding should be revisited and overturned.

*iv. The Nature of the Lassiter Court's Error Weighs in Favor of its Overturn*

If a prior case was decided in an “egregiously wrong” manner, and deals with subject matter that is “deeply damaging” to the American people, then it may be ripe to be overturned.<sup>151</sup> The *Dobbs* Court concluded that *Roe* and *Casey*'s erroneous reasoning, combined with the fact that they dealt with “a question of profound moral and social importance” which should have been left to the people, weighed heavily in favor of their choice to overrule those decisions.<sup>152</sup> Just as the *Dobbs* Court viewed *Roe* and *Casey* as egregiously wrong, so was *Lassiter* egregiously wrong because of its failure to account for the history and tradition of right-to-counsel for indigent civil litigants, and because of its flawed reasoning.<sup>153</sup> However, unlike *Roe* and *Casey*, the *Lassiter* Court did not wrongfully decide a question which should have been left for the legislature; rather, the *Lassiter* Court did something arguably more egregious—it abandoned a cognizable right which is deeply rooted in the history and tradition of our country,<sup>154</sup> handing the power to individual courts and state legislatures to dole that right out in a

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<sup>149</sup> See *Lassiter*, 452 U.S. at 28.

<sup>150</sup> See STOUT, THE ECONOMIC IMPACT OF AN EVICTION RIGHT TO COUNSEL IN BALTIMORE CITY 80-81 (2020) (noting that fully implementing a right to counsel for eviction proceedings in Baltimore City alone would cost 5.7 million dollars, but could save the City and State more than 17.5 million dollars).

<sup>151</sup> *Dobbs*, 142 S.Ct. at 2265.

<sup>152</sup> *Id.*

<sup>153</sup> See *supra* Sections III.B, III.C.

<sup>154</sup> See *supra* Section III.B.

piecemeal manner—or not at all.<sup>155</sup> Because of the egregious nature of the *Lassiter* Court’s error in deciding the case, its holding should be revisited and overturned.

#### CONCLUSION

When the Supreme Court decided *Lassiter*, it seemingly foreclosed the possibility of a broad, federal right to counsel for indigent civil litigants under the Due Process Clause of the Fourteenth Amendment.<sup>156</sup> Nevertheless, advocates have continued to push for such a right in cases where indigent litigants’ basic needs are at stake.<sup>157</sup> Such advocates have met some measure of success, but it remains that many vulnerable litigants do not receive the assistance they need without a broad civil *Gideon* right.<sup>158</sup>

*Lassiter* must be overturned in order to achieve the goal of civil *Gideon*, and now is the time to do so. The *Lassiter* Court applied the wrong test in determining whether an unenumerated right is protected by the Due Process Clause of the Fourteenth Amendment, devising a balancing test utilizing *Eldridge* factors rather than looking to whether a right to counsel for indigent civil litigants was deeply rooted in our country’s history and tradition.<sup>159</sup> Even under the *Eldridge* factor test, the *Lassiter* Court failed to properly apply all of the factors, resulting in an irrational outcome.<sup>160</sup> *Lassiter*’s tenuous reasoning, unworkable rule, lack of reliance, and egregious error weigh strongly in favor of its overturning.<sup>161</sup>

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<sup>155</sup> See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 32-33 (1981).

<sup>156</sup> See Barton, *supra* note 39, at 1231-32 (“[*Lassiter*] was a brutal defeat for civil *Gideon* because a termination of parental rights case presents the closest possible civil analogy to *Gideon* that does not involve imprisonment, but rather a liberty interest (the right to keep one’s children) that the Court has repeatedly credited as powerful, as well as coercive, state action. . .”).

<sup>157</sup> See *supra* Part II.

<sup>158</sup> See *supra* Section II.A.

<sup>159</sup> See *supra* Section III.B.

<sup>160</sup> See *supra* Section III.C.

<sup>161</sup> See *supra* Section III.D.