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Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases

William Wesley Patton *

I. INTRODUCTION

John and Nancy Prough entered the courthouse in Urbana, Illinois hoping to walk out with their four children, whom the Illinois Department of Children and Family Services ("DCFS") had taken away.¹ The State prepared an impressive array of evidence indicating that the Proughs had neglected their children and were incapable of improving their parental skills.² John and Nancy, both of whom suffered from mental retardation,³ met their court appointed attorney for the first time on the day of their hearing.⁴ In court, the State moved to have the judge decide the adjudicatory issue (whether the Prough children were

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This article is an update and elaboration of two articles previously written by Professor Patton. For Professor Patton's first article concerning appellate review of denial of counsel in child protection and parental severance cases, see William W. Patton, *It Matters Not What Is But What Might Have Been: The Standard of Appellate Review for Denial of Counsel in Child Dependency & Parental Severance Trials*, 12 WHITTIER L. REV. 537 (1991). For Professor Patton's previous article concerning the right to counsel in child protection and parental severance cases, see William W. Patton, *Forever Torn Asunder: Charting Evidentiary Parameters, The Right to Competent Counsel & The Privilege Against Self-Incrimination in California Child Dependency & Parental Severance Cases*, 27 SANTA CLARA L. REV. 299 (1987). This current article broadens the scope of the previous articles by looking at these issues at a national level, and also takes into account numerous recent changes in the law.

1. The following narrative comes from the facts recorded in *In re Prough*, 376 N.E.2d 1078 (Ill. App. Ct. 1978).

2. An Urbana police officer and a social worker both testified that the Proughs' home was filthy and that the children had suffered from the worst case of neglect they had ever seen. *Id.* at 1080. An official from the housing authority which housed the Proughs, and an agent of DCFS, also testified that the Prough children were neglected by their parents. *Id.* at 1080-81. Local school officials testified that the Prough children often missed school and a pediatrician testified that one of the children had contracted bacterial pneumonia because of exposure. *Id.* at 1081.

3. A doctor testified that John was mentally retarded and Nancy was in the "borderline range" of retardation. *Id.* at 1081.

4. *Id.* at 1079.

neglected) and the dispositional issue (whether John and Nancy's parental rights should be terminated) at the same hearing.⁵ Because neither the Proughs nor their attorney objected to this, the Proughs lost the right to argue on appeal that the judge was in error when he combined these two typically separate proceedings.⁶

In affirming the trial court's decision to terminate the Proughs' parental rights, the appellate court, although it acknowledged that the Proughs' attorney "played essentially a *passive role* in the proceedings,"⁷ found the attorney competent because he acted in a way that "was typical of most attorneys who represent the interests of other children in similar proceedings."⁸

Unfortunately, such instances of ineffective representation are not uncommon in the child abuse and neglect system. In one sense, the Proughs were fortunate to have even a "passive" attorney. Many jurisdictions do not require trial courts to provide indigent parents with representation.⁹

Few individuals in the child protection portion¹⁰ of the nation's juvenile court system really want parents and children to have zealous and competent advocates.¹¹ Even when attorneys are appointed in

5. *Id.* at 1082.

6. *Id.* The appellate court noted that it believed it was better to hold separate proceedings for these two issues, but it held that "the consolidation [of the adjudicatory and dispositional hearings] may be proper where there is no resulting prejudice." *Id.* This result was echoed more recently in *In re Jackson*, 611 N.E.2d 1356 (Ill. App. Ct. 1993).

7. *Prough*, 376 N.E.2d at 1083.

8. *Id.*

9. *See infra* part II.

10. Throughout this article, the term "child protection cases" refers to cases in which juvenile courts attempt to protect children from abuse, neglect, or dependency. These cases are usually divided into two separate proceedings: (1) the adjudicatory hearing, which determines whether the children involved were indeed abused or neglected, and (2) the dispositional hearing (also referred to as "parental severance hearings"), which determines, among other custodial decisions, whether the children's parents' parental rights should be terminated. *See, e.g.*, ILL. COMP. STAT. ANN. ch. 705 § 405/1-3(1), (6) (West 1993) (defining the terms adjudicatory and dispositional hearings).

11. "Despite *Gault*, a continuing judicial hostility to an advocacy role in traditional treatment-oriented courts persists." BARRY C. FELD, *JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS* 29 (1993) (citing *In re Gault*, 387 U.S. 1 (1967)). Government attorneys often argue with duplicity; on the one hand they argue that parents and children lack a constitutional or statutory right to appointed counsel in cases in which counsel is requested, and on the other hand, they argue that if such a right exists it cannot be waived because of the importance of counsel in these actions. *See, e.g.*, *In re Justin L.*, 233 Cal. Rptr. 632, 636-37 (Ct. App. 1987) (holding that parents, like criminal defendants, have a right to waive counsel and represent themselves). Of course there are notable exceptions, such as Judge Leonard P. Edwards, who stated that "[w]hen children have a significant interest in these legal proceedings, they should have

child abuse and neglect cases, the expectations regarding the quality of that advocacy are extremely low; it is as though there is a lesser definition of "competence" when analyzing advocacy for parents and children than for criminal defendants.¹²

This is not to suggest, however, that juvenile courts are hesitant to appoint competent representation because they seek to treat parents unfairly. Put yourself in the judge's chair of a case I litigated in 1983, *In re Jonathan G.*, as part of a UCLA Law School trial advocacy course.¹³ The judge was trapped by a mountain of cases. Giving me time to represent my clients zealously would mean the pile would grow much faster than usual.¹⁴ When I filed my ninety-seven page writ

effective and independent representation to address their legal and nonlegal needs, both inside and outside the courtroom." Leonard P. Edwards, *A Comprehensive Approach to the Representation of Children: The Child Advocacy Coordinating Council*, 27 FAM. L.Q. 417, 417 (1993) [hereinafter Edwards, *Comprehensive Approach*]. There are at least four models of representing children: (1) the "champion," who helps the court reach the best interest for the child; (2) the "advocate," who represents the child just as she would represent an adult client; (3) the "impartial investigator," who investigates all facts and informs the court; and (4) the "law guardian," who is "part advocate and part guardian . . . she has a statutory mandate to represent both a child's interests and wishes." Angela D. Lurie, Note, *Representing The Child-Client: Kids Are People Too: An Analysis of the Role of Legal Counsel to a Minor*, 11 N.Y.L. SCH. J. HUM. RTS. 205, 207-11 (1993). See also Rebecca H. Hertz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 FAM. L.Q. 317, 322 (1993). There is some evidence that truly zealous advocacy is not the most effective lawyering style, at least in juvenile delinquency cases. See FELD, *supra*, at 11.

12. In many systems there is a potential conflict of interest because the court hires and pays the children's attorneys, a practice which the Prado Commission decried in its 1993 report on the appointment of public defenders by the court. Lincoln Caplan, *Unequal Loyalty*, A.B.A. J., July 1995, at 55-57. In Los Angeles County the judges solicit, select, review, and compensate private attorneys in dependency court. See *Los Angeles Superior Court Notice To Attorneys*, L.A. DAILY J. DAILY APPELLATE REP., June 26, 1995, at 8289. "Attorneys are selected by the judicial officers assigned to each juvenile courthouse." *Id.*; see William W. Patton, *Forever Torn Asunder: Charting Evidentiary Parameters, The Right To Competent Counsel And The Privilege Against Self-Incrimination In California Child Dependency And Parental Severance Cases*, 27 SANTA CLARA L. REV. 299, 308-309 & n.48-49 (1987) [hereinafter Patton, *Torn Asunder*].

13. Los Angeles Superior Court Case Numbers A13379 and J921748, and California Court of Appeal Case Number B002238. Since this case involved allegations of child dependency and parental severance, I have redacted any identifying or confidential data.

14. The total number of juvenile dependency hearings in Los Angeles County rose from 19,965 in 1981 to 67,111 in 1992. INTER-AGENCY COUNCIL ON CHILD ABUSE AND NEGLECT: DATA ANALYSIS REPORT FOR 1993, at 110. However, in 1992 there was only "an applied judicial manpower" of 15 judges to handle the 67,111 juvenile hearings. *Id.* at 111. Therefore each judge heard over 4,500 cases in 1992. Assuming that a judge sat in each of the available court rooms for 40 hours a week and for 52 weeks a year, the total judicial hours available per court room is only 2,080. Therefore, the cases must average less than 30 minutes each. In 1983 when there were only 38,700 case referrals, each Los Angeles County dependency judge heard an average of 5 to 10 new cases and as many as 25 reviews of ongoing cases a day. *Child Abuse a Growing Tragedy in L.A.*

along with several other trial motions, the judge was not the only player in the dependency system to cringe. My opponent, a deputy county counsel, immediately moved to have UCLA Law School and myself removed from the case because we were incompetent attorneys, as we had never before litigated a parental severance case.¹⁵ County counsel, no less than the judge, was aggravated that we were litigating this parental severance case with the vigor we would have applied to a major contract or real property dispute among rival giant corporations. When we estimated a three day trial in which we would call expert witnesses, both the judge and county counsel reacted as though we had stolen from them something very precious, and the judge responded by forbidding live testimony on the writ issues.¹⁶

The judge's and county counsel's attitudes, however, should not surprise anyone, because bias against family issues and for commercial concerns is ever present in our courts. Professor Deborah L. Rhode recalls "a judge in the California court system recently describing 10 days spent handling a \$100,000 commercial dispute; during the same period, a judge in a typical domestic relations court in California would be expected to process 1,000 cases involving children."¹⁷

County, L.A. TIMES, Aug. 21, 1983, at 1, col. 2.

15. Reporter's Transcript on Appeal, at 3, Case Number A13379 (Nov. 20, 1984) [hereinafter Transcript, No. A13379] (on file with author). Of course, the court informed county counsel that it did not have jurisdiction to remove the parents' counsel without the parents' waiver. See *Smith v. Superior Court*, 440 P.2d 65, 74-75 (Cal. 1968). This argument was *reductio ad absurdum*: If you are presumed incompetent until you have handled a specific type of case, no one can ever handle such a case because they will lack this "first-time" experience. Fortunately, County Counsel's motion to remove UCLA and myself was denied along with the motion for sanctions. Transcript, No. A13379, *supra*, at 3-8.

16. The judge responded, "I won't receive any live testimony." Transcript, No. A13379, at 9. There is no doubt that providing counsel for children costs money. In denying a law guardian for a child one judge exclaimed, "I have trouble tying up the resources of the court . . ." *In re Audrey "PP,"* 535 N.Y.S.2d 136 (App. Div. 1988). The cost of providing attorneys for children leads to a "search for more cost effective methods . . . such as citizen volunteers." Hertz, *supra* note 11, at 327-28. One drastic measure attempted by the Los Angeles Superior Court in its Juvenile Dependency Court Policy Memorandum was to end representation at an early stage; "attorneys appointed to represent indigent parents are to be relieved following the first review . . . 'unless good cause to the contrary is individually shown by any attorney seeking to remain appointed on the case.'" *In re Tanya H.*, 21 Cal. Rptr. 2d 503, 504 (1993) (citation omitted). The court did note regarding the initial counsel, however, that "the juvenile court's fiscal problems cannot justify an interference with a statutory right to counsel." *Id.* at 507. On July 26, 1995, Wisconsin Governor Tommy Thompson signed AB 150 which stripped parents of their statutory right to appointed counsel in child protection cases. John Franz, *Budget Bill Scraps Constitutional Rights*, WIS. ST. J., Sept. 30, 1995, at 7A (noting that "presumably, this [the abrogation of the statutory right to counsel] was done to save money").

17. James Podgers, *Chasing the Ideal: As More Americans Find Themselves Priced*

The resistance to zealous advocacy in *In re Jonathan G.* is systematically mirrored throughout the child abuse and neglect system.¹⁸ This Article is premised on the assertion that appointing competent counsel for parents and children serves the interests of everyone involved in child protection and parental severance cases.¹⁹ It will analyze how the system's bias has led to inconsistent and unwise decisions regarding the standard of review for allegations of failure to appoint counsel for parents and children and failure of appointed counsel to render effective representation.²⁰ Specifically, this Article asserts that parents and children possess a due process right to a determination of whether they are entitled to counsel.²¹ Next, the analysis discusses various standards of review for the denial of counsel under both statutory and constitutional frameworks.²² This Article also analyzes the standard of review for the lack of effective representation by appointed counsel in child protection cases.²³ Finally, this work proposes two standards for appellate review to serve the best interests of the states, parents, and children.²⁴

Out of the System, the Struggle Goes on to Fulfill the Promise of Equal Justice for All, A.B.A. J., Aug., 1994, at 57.

18. "Children too frequently find themselves before courts without benefit of counsel, despite their constitutional and statutory rights to counsel in many kinds of cases." *America's Children At Risk: A National Agenda for Legal Action, Executive Summary of the American Bar Association Presidential Working Group on the Unmet Legal Needs of Children and Their Families*, 1993, 27 FAM. L.Q. 433, 442 (1993). The common reasons for judges not appointing counsel for children are "the additional costs . . . ; lack of demonstrated competence . . . [and] belief that attorneys for the parents will adequately protect the child's interests. The judge's decision not to appoint an attorney is rarely overturned and then only for an abuse of discretion." Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time Is Now*, 26 FAM. L.Q. 53, 56 (1992). See also Howard Davidson, *The Child's Attorney: Understanding the Role of Zealous Advocate*, 17 FAM. ADVOC. 73, 74 (1995).

19. For a fuller discussion of the need for competent counsel in child protection and parental severance cases, see Patton, *Torn Asunder*, *supra* note 12, at 305-08.

20. Even though the Federal Child Abuse Prevention and Treatment Act of 1974 mandates appointment of a guardian ad litem for children in child dependency cases, "many fail to receive that kind of assistance." Edwards, *supra* note 11, at 418-19.

21. See *infra* part II.A.

22. See *infra* part II.B.

23. See *infra* part III.A. "Implementation of the right to counsel guaranteed to children in delinquency proceedings . . . is rarely realized for children . . . [and] even when children are represented, too often their attorneys lack either the commitment or the knowledge to provide competent, much less zealous, representation." Robert E. Shepherd, Jr., *America's Children at Risk*, 8 CRIM. JUST. 35, 36 (1994).

24. See *infra* part III.B.

II. FAILURE TO APPOINT COUNSEL FOR PARENTS AND CHILDREN IN CHILD PROTECTION AND PARENTAL SEVERANCE HEARINGS

The United States Supreme Court in *Lassiter v. Department of Social Services*²⁵ determined that parents do not necessarily have a due process right to counsel in child dependency or parental severance hearings.²⁶ Because *Lassiter* involved a parental severance case which could have resulted in permanent loss of custody, many state courts have determined that when the threatened loss of custody is only temporary, a federal due process right to counsel does not apply.²⁷ However, the state courts denying parents the right to counsel in child protection or termination cases have failed to recognize that the Court in *Lassiter* held that the facts of each individual case may give rise under *Matthews v. Eldridge*²⁸ to a constitutional right to appointed counsel.²⁹

This Part will discuss the proper scope of the parent's constitutional right to counsel in child protection and parental rights termination cases, addressing the problems that arise when state court judges utilize their discretion in deciding whether to appoint counsel in such cases.³⁰ The Part then discusses the standards of appellate review that courts have applied to the denial of counsel on both statutory³¹ and constitutional³² grounds. Finally, this Part addresses the difficulties in applying harmless error analysis to the denial of counsel when the

25. 452 U.S. 18, 26 (1981) (explaining that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel").

26. Several state courts have held, however, that under independent state constitutional grounds parents have a constitutional right to court appointed counsel. See, e.g., *V.F. v. State*, 666 P.2d 42, 44 (Alaska 1983); *In re Trowbridge*, 401 N.W.2d 65 (Mich. Ct. App. 1986); *In re D.D.F.*, 801 P.2d 703, 706-07 (Okla. 1990), *cert. denied*, 500 U.S. 922 (1991); *In re H. Luscier's Welfare*, 524 P.2d 906, 909 (Wash. 1974).

27. Some "jurisdictions follow a middle road and require appointment of counsel for indigent parents in dependency and neglect proceedings where there is a reasonable possibility that parental rights will be terminated or there will be a prolonged separation between the parent and child." *In re Cooper*, 631 P.2d 632, 639 (Kan. Ct. App. 1981).

28. 424 U.S. 319 (1976).

29. *Lassiter*, 452 U.S. at 31. The United States Supreme Court has not addressed the issue of whether children under certain circumstances also have a due process right to counsel. However, that argument is beginning to find its way in state courts. For instance, in *In re Jamie T.T.*, 599 N.Y.S.2d 892, 894 (N.Y. App. Div. 1993), the court determined under the *Matthews* balancing test that "Jamie had a constitutional as well as a statutory right to legal representation." See *infra* part II.A for an explanation and application of this test.

30. See *infra* part II.A.

31. See *infra* part II.B.1.

32. See *infra* part II.B.2.

termination of the parent-child relationship hangs in the balance,³³ and proposes the burden of proof necessary to prove harmlessness in such instances.³⁴

A. Parents and Children Have a Due Process Right to a Lassiter Hearing to Determine Whether They Are Constitutionally Entitled to Appointed Counsel

In *Matthews v. Eldridge*,³⁵ the United States Supreme Court established a three-prong analysis for determining what due process requires in administrative and court proceedings.³⁶ The three factors the *Matthews* Court held should be weighed in such cases are: (1) the private interest at stake, (2) the governmental interest, and (3) the risk of error or injustice.³⁷ In *Lassiter v. Department of Social Services*,³⁸ the Court applied this test to decide whether an indigent parent had a due process right to counsel when defending her parental rights from termination:

[T]he parent's interest [in retaining her parental rights] is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest [the cost of providing counsel], and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.³⁹

Thus, the Due Process Clause of the Fourteenth Amendment requires that parents receive representation when "the parent's interest [is] at [its] strongest, the State's interests [are] at their weakest, and the risks of error [are] at their peak."⁴⁰

It would seem a relatively simple task on appeal to determine whether under *Lassiter* and *Matthews* parents or children were unconstitutionally denied counsel. However, because almost every state now grants judges the discretion to appoint counsel for parents and

33. See *infra* part II.B.3.

34. See *infra* part II.B.4.

35. 424 U.S. 319 (1976).

36. *Id.* at 335.

37. *Id.*

38. 452 U.S. 18 (1981).

39. *Id.* at 31.

40. *Id.*

children in dependency and termination proceedings,⁴¹ *Lassiter* hearings, in which trial courts put their measurement of the above factors on record, rarely occur.⁴² Therefore, on appeal, when a parent or child alleges the improper denial of counsel under *Lassiter*, the appellate court lacks an evidentiary record upon which to base its determination of the alleged *constitutional* error. This paucity of evidence leads to at least three unfortunate results. First, an appellate court may remand the case to the trial court to hold an evidentiary *Lassiter* hearing, providing one more procedural hurdle before the affected children realize finality and permanence.⁴³ Second, rather than remand the case, the appellate court may attempt to speculate, based upon the existing appellate record, whether the parent or child would have prevailed had a *Lassiter* hearing been granted.⁴⁴ Finally, the appellate

41. See, e.g., CAL. WELF. & INST. CODE §§ 317-18 (West 1993); COLO. REV. STAT. ANN. § 19-1-105(2) (West 1990 & Supp. 1995); IOWA CODE ANN. § 232.89(2) (West 1994 & Supp. 1995); KANSAS STAT. ANN. 38-1505(a) (1993); MISS. CODE ANN. § 43-21-557 (1993); NEB. REV. STAT. § 43-379.01(1)(b) (1993); OHIO REV. CODE ANN. § 2151.352 (Baldwin 1994 & Supp. 1996); TEX. FAM. CODE ANN. §11.10 (a) (West 1993).

42. See, e.g., *Smoke v. State*, 378 So. 2d 1149, 1150 (Ala. Civ. App. 1979) (holding that the trial court committed reversible error in failing to apprise a father, in dependency hearing, of his right to counsel); *In re Burns*, 519 A.2d 638, 644-45 (Del. 1986) (documents drawn up by mother relinquishing custody of son were violative of due process since they were executed in the absence of counsel); *In re N.S.*, 584 So. 2d 651, 651 (Fla. Dist. Ct. App. 1991) (holding that mother had no constitutional right to counsel at dependency hearing where neither permanent termination of parental rights nor criminal charges against mother were at issue); *In re G.Y.*, 486 N.W.2d 288, 289 (Iowa 1992) (trial court not obligated to appoint counsel for child in "child in need of assistance" hearing when guardian ad litem already appointed); *In re J.J.B.*, 818 P.2d 1179, 1183 (Kan. Ct. App. 1991) (explaining that right of indigent parent to be represented by counsel in "child in need of care" hearing was not dependent upon whether request was made by parent but on the nature of the interest affected); *In re Keifer*, 406 N.W.2d 217, 218-19 (Mich. Ct. App. 1987) (holding that the trial court's failure to advise father of right to counsel, and that counsel may be appointed if party is indigent, constitutes reversible error); *In re B.L.E.*, 723 S.W.2d 917, 920 (Mo. Ct. App. 1987) (holding that the trial court committed reversible error in not appointing counsel or obtaining clear waiver in parental termination hearing). But see *In re T.L.C.*, 566 So. 2d 691, 699 (Miss. 1990) (stating that the failure of trial court to inform a father, charged with sexually abusing his child, of right to counsel, is harmless error).

43. For example, in *In re Andrew S.*, 32 Cal. Rptr. 2d 670, 675 (Ct. App. 1994), *cert. denied*, 115 S. Ct. 1826 (1995), the court stated:

We add a final comment about the length of time this case [in which the mother alleged denial of counsel at a parental termination hearing] has taken to get to this point. When the dependency petition was filed, the age range of the children was one and one-half months to four and one-half years. It is now six years to ten and one-half years.

Id.

44. Trying to determine what might have happened if counsel had been appointed is at best speculative; "no appellate court can fairly determine what would have happened at the trial stage had the defendant not been denied his constitutional right to counsel."

court may apply an inappropriate standard of appellate review, which may dilute the appellant's constitutional *Lassiter* right to counsel when judged under a mere abuse of discretion standard.

Concerning this third possibility, if a state adopts a standard less than reversal per se for the denial of counsel in a termination hearing, how will the reviewing court decide the issue of prejudice? "If the preliminary showing [a *Lassiter* hearing] is erroneously dispensed with, it is hardly surprising that the record contains no showing of what independent counsel might have done for the minor. Yet unless there is such a showing, the error is not reversible."⁴⁵ Because one of the prime responsibilities of a zealous advocate is fact investigation, it is impossible to determine what additional evidence might have been presented had counsel been appointed.⁴⁶

Therefore, in order to perfect a parent's or child's potential right to counsel under *Lassiter*, due process should mandate that the court in each child protection and parental rights termination case hold a formal *Lassiter* hearing. A few courts have recognized the right to such a hearing.⁴⁷ In addition to a hearing, however, in order to provide a record for appeal, trial courts should explain their bases for denying representation to an indigent.⁴⁸

Furthermore, zealous counsel in these cases should request a *Lassiter* hearing in every instance, *even when a state statute provides*

Philip J. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 541 (1969).

45. *In re Jacqueline H.*, 156 Cal. Rptr. 765, 768 (Ct. App. 1979). See also *In re Adoption of Jacob C.*, 30 Cal. Rptr. 2d 591, 595-96 (Ct. App. 1994) (holding that trial court's failure to appoint counsel for minor children constituted reversible error since children's rights were prejudiced); *In re Richard E.*, 597 P.2d 495, 499-500 (Cal. 1978) (holding that failure to appoint counsel was not prejudicial error).

46. The California Supreme Court, for example, listed several things that an attorney could have done to uncover additional facts needed for a *Lassiter* decision, including "interviews with other family members, neighbors, or teachers or independent examinations of the minors by qualified psychologists." *In re Melissa S.*, 225 Cal. Rptr. 195, 202 (Ct. App. 1986). CAL. WELF. & INST. CODE § 317 (e) (West 1984 & Supp. 1996) mandates minimal levels of advocacy by children's attorneys including fact investigation, interviewing witnesses, examining and cross-examining witnesses, examining minors, and making recommendations for the minor.

47. See, e.g., *Rhoades v. Penfold*, 694 F.2d 1043, 1050 (5th Cir. 1983) (stating that "[u]nder *Lassiter*, an indigent parent is entitled to a state court determination of right to counsel"); *In re J.J.B.*, 818 P.2d 1179, 1183 (Kan. Ct. App. 1991) (explaining that a court hearing a petition to declare a child "in need of care" must make "an independent determination as to whether the parent should be represented by counsel"); *In re Baby Girl Baxter*, 479 N.E.2d 257, 260-61 (Ohio 1985) (noting that the right to independent counsel might preclude an attorney from serving as both attorney for the parent and guardian ad litem for the child).

48. *In re Grannis*, 680 P.2d 660, 665 (Or. Ct. App. 1984).

counsel. A *Lassiter* hearing assures that an appellate court will apply the proper standard of appellate review⁴⁹ when determining whether error occurred or whether sufficient prejudice has been demonstrated, and eliminates the need for the appellate court to speculate or remand the case to determine the constitutionality of the denial of counsel.

Moreover, as the Kansas Supreme Court suggested in *In re Cooper*,⁵⁰ "[a]t the outset of every deprived child proceeding[,] the court should require the state to make an opening statement outlining the evidence which the state expects to introduce."⁵¹ This preliminary statement by the state would help the trial court apply the *Lassiter* criteria to determine, for instance, whether the issues are complicated, whether expert witnesses will be called, (and if so the level of sophistication of their testimony), whether difficult evidentiary issues are involved, and whether parental termination or criminal consequences are likely to result from the proceeding.⁵²

B. *The Appropriate Standard of Appellate Review for Denial of Constitutionally Mandated Counsel*

The courts disagree on the appropriate standard of review for allegations by parents and children that they were deprived the assistance of counsel in child protection and parental severance hearings. Some of the variables courts have used to determine the method and standards of review include: (1) whether the right to counsel was statutory or constitutional;⁵³ (2) whether the court considers the absence of counsel a "structural defect" in the child protection context;⁵⁴ (3) whether the failure to appoint counsel occurred in a "critical stage" of the proceedings;⁵⁵ and (4) whether the assistance of counsel is an important aspect of fundamental fairness in light of other means for the court to glean facts involving an appellant's case.⁵⁶ Other factors

49. For a discussion of the proper standard of review in these cases, see *infra* part II.B.

50. 631 P.2d 632 (Kan. 1981).

51. *Id.* at 640.

52. See *Lassiter*, 452 U.S. at 27 n.3, 32.

53. See *Cynthia D. v. Superior Court*, 851 P.2d 1307 (Cal. 1993), *cert. denied*, 114 S. Ct. 1221 (1994); *In re Andrew S.*, 32 Cal. Rptr. 2d 670 (Ct. App. 1994), *cert. denied*, 115 S. Ct. 1408 (1995). See also *infra* part II.B.1 (discussing the standards of review applicable to denial of statutorily mandated appointed counsel).

54. See *Andrew S.*, 32 Cal. Rptr. at 670; *Cynthia D.*, 851 P.2d at 1315. See also *infra* part II.B.2 (discussing the standards of review applicable to denial of counsel under *Lassiter*).

55. See *Andrew S.*, 32 Cal. Rptr. at 670; *Cynthia D.*, 851 P.2d at 1315-16.

56. See *supra* notes 45-46 and accompanying text.

courts may have to consider include the difficulty in determining the error's effect and the sufficiency of the evidence. The following discussion analyzes the various standards of review appellate courts employ in these cases.

1. Standards of Review Applicable to Denial of Statutorily Mandated Appointed Counsel

The United States Supreme Court in *Cooper v. California*⁵⁷ freed the states to decide the proper standard of review in determining errors not affecting federal rights.⁵⁸ Five years after *Cooper*, every state had promulgated its own version of harmless error analysis to be applied to violations of rights provided by state law.⁵⁹

Because the Supreme Court allowed the states to fashion their standards of appellate review in these cases, there are a number of different standards for determining whether errors in denying statutorily appointed counsel require reversal. The simplest standard to administer is reversal per se. Under this standard of review, any case in which a parent or child is denied his statutory right to counsel is reversed. Some jurisdictions require "rigid adherence" to the requirements of the juvenile court code as a component for fundamental fairness and automatically reverse if the court violated a statutory mandate to appoint counsel.⁶⁰ Other states have fashioned different variants of the harmless error rule⁶¹ and require a showing of prejudice before reversal will be granted.⁶² In California, for instance, the parent or child has the burden of demonstrating not only that the court abused its discretion but also that the error resulted in a "miscarriage of justice" sufficient to

57. 386 U.S. 58 (1967).

58. *Id.* at 62 (stating that "[t]he State is free, without review by [the United States Supreme Court] to apply its own state harmless-error rule").

59. Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 157 (1991).

60. See *Smoke v. State*, 378 So. 2d 1149, 1150 (Ala. Civ. App. 1979); *In re S.L.*, 599 N.E.2d 227, 229-30 (Ind. Ct. App. 1992) (stating that "[s]tatutory requirements have been held jurisdictional for many years in Indiana . . . [and] must be construed strictly"). The court rejected the State's substantial evidence analysis and held it reversible error for failure to appoint a representative for the minor. *Id.* at 229-30; *In re Keifer*, 406 N.W.2d 217, 219 (Mich. Ct. App. 1987) (noting that "clear legal error" required reversal without considering the sufficiency of the evidence); *In re Richard*, 431 S.E.2d 485, 488 (N.C. Ct. App. 1993) (reversing a judgment in a termination case even though the court did "not believe respondent mother has in any way been prejudiced by this error [denial of counsel]"); *In re Samuel H.*, 618 N.Y.S.2d 42, 43 (N.Y. App. Div. 1994); *In re Audrey "PP,"* 535 N.Y.S.2d 136 (App. Div. 1988).

61. For more on the harmless error rule, see *infra* part II.B.3.

62. CAL. CONST. of 1879, art. VI, § 13 (1993).

warrant reversal.⁶³

Perhaps the greatest problem with appellate review of denial of counsel in states where courts have statutory discretion to appoint counsel is that courts often omit constitutional due process analysis and instead merely determine under state law whether the trial court abused its discretion in denying appointed counsel. The result is not problematic if the court finds sufficient prejudice from the failure to follow the statutory directive. If, however, the court finds that there was no statutory right to counsel and fails to determine whether there was a constitutional right to counsel, the parents and children involved will be denied review of possible *Lassiter* error.⁶⁴ In addition, many courts have held that parents and children have no right to competent counsel if counsel was simply mandated pursuant to a statute rather than by the state constitution.⁶⁵ Other jurisdictions have held that the parents' or children's burden in proving incompetence of counsel is much higher in cases of statutorily appointed counsel than in cases where counsel was required under *Lassiter*.⁶⁶ Therefore, the court must determine before any critical stage of a dependency case whether counsel must be appointed pursuant to *Lassiter* or merely under a state statute; the answer will likely have dramatic collateral consequences on appeal.

63. See CAL. CONST. of 1879, art. VI, § 13 (1993); *In re Richard E.*, 597 P.2d 495, 499 (Cal. 1978) (en banc) (explaining that "[t]he record discloses and Robert suggests nothing which independent counsel for the minor might have done to better protect Richard's interests"); *In re Adoption of Jacob C.*, 30 Cal. Rptr. 2d 591, 596 (Ct. App. 1994) (stating that "error in failing to appoint counsel is not reversible in the absence of a showing of prejudice"); see also *Smith v. Marion County Dep't of Pub. Welf.*, 635 N.E.2d 1144, 1149 (Ind. Ct. App. 1994) (holding that there is no right to court appointed counsel during proceedings that do not result in termination); *In re Donna H.*, 602 A.2d 1382, 1384 (Pa. Super. Ct. 1992) (finding no reversal without a showing of a "gross abuse of discretion").

Courts must be careful not to confuse the federal miscarriage of justice rule with the state rule. "In plain error analysis the phrase 'miscarriage of justice' means 'the conviction of one who but for the error probably would have been acquitted . . .'" Jeffrey L. Lowry, Note, *Plain Error Rule—Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure*, 84 J. CRIM. L. & CRIMINOLOGY 1065, 1079-80 (1994) (quoting *United States v. Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985)). See also *In re Melissa S.*, 225 Cal. Rptr. 195, 201-02 (Ct. App. 1986) (utilizing the miscarriage of justice rule to indicate the gravity of the situation); *In re Hall*, 469 N.W.2d 56, 58-59 (Mich. Ct. App. 1991) (applying the harmless error rule).

64. In *In re Adoption/Guardianship No. A91-71A*, 640 A.2d 1085, 1095 n.6 (Md. Ct. Spec. App. 1994), the court determined that because the child was not provided independent counsel "we need not address the constitutional issue [of the minor's right to counsel]".

65. See *infra* part III.

66. See *infra* part III.

2. Standards of Review Applicable to Denial of Counsel Under *Lassiter*

If a court holds a *Lassiter* hearing and nevertheless denies the parent or child the right to counsel, questions still surround the appropriate standard of appellate review of that decision. In other words, what should an appellate court do if it believes that a trial court has erroneously denied counsel because it misapplied the considerations set down in *Lassiter*?⁶⁷

The answer to this question depends on the status of a *Lassiter* violation. The *Lassiter* Court held that it is a due process violation to deny counsel in a termination hearing when "the parent's interest [is] at [its] strongest, the State's interests [are] at their weakest, and the risks of error [are] at their peak."⁶⁸ Because denial of counsel in such cases is a constitutional violation, appellate courts turn to the Supreme Court decision of *Arizona v. Fulminante*,⁶⁹ which articulated the criteria for determining the standard of review of federal constitutional errors.

As noted above, the reversal per se standard is the simplest to apply.⁷⁰ Under this standard, any child protection or termination case in which a parent is denied his *Lassiter* due process right to counsel would be reversed. *Fulminante*'s narrow prescription for using the reversal per se standard in constitutional violation cases, however, insufferably complicates the issue. The *Fulminante* Court held that a reversal per se standard applies only to errors which are "structural defects in the constitution of the trial mechanism, [which] defy analysis by harmless-error standards."⁷¹ It applies, therefore, only to constitutional deprivations "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."⁷² As the Court maintained, "[s]tructural defects have two essential characteristics. First, it is extremely difficult to determine whether such errors actually prejudiced the defendant. Second, such errors affect the structural integrity of the trial in a systemic manner."⁷³

67. See *supra* note 39 and accompanying text for a listing of these considerations.

68. *Lassiter*, 452 U.S. at 31.

69. 499 U.S. 279 (1991).

70. See *supra* part II.B.1.

71. *Fulminante*, 499 U.S. at 280.

72. *Id.* at 309.

73. Craig Goldblatt, *Disentangling Webb: Governmental Intimidation of Defense Witnesses and Harmless Error Analysis*, 59 U. CHI. L. REV. 1239, 1240 (1992). If "the particular error under consideration is rarely susceptible to harmless error analysis or if the error is rarely harmless, a bright line rule should apply." Ogletree, *supra* note 59, at 164.

Although the Court in *Fulminante* determined that denial of counsel in a criminal case is a structural defect so detrimental to the "constitution of the trial mechanism" that reversal per se is appropriate in every instance,⁷⁴ state courts have had considerable difficulty in deciding whether denial of counsel in child protection and parental severance trials is also a structural defect requiring reversal per se.⁷⁵ Because one of the attributes of structural errors is their "systemic" infection of an entire proceeding, state courts have often combined the questions of whether denial of counsel in child protection cases is a structural error with the question of whether the denial of counsel occurred at a "critical stage" in the proceeding.⁷⁶ In Illinois, for example, appellate courts have held that adjudicatory hearings, in which the issue is whether the child was abused or neglected, are a critical stage where a parent has a constitutional right to counsel, because the evidence presented in an adjudicatory hearing can adversely affect a parent's efforts to defend his parental rights in a subsequent termination proceeding.⁷⁷

The most complicated series of cases has arisen in California because of a radical change in the statutory makeup of dependency hearings and parental severance trials.⁷⁸ Until 1989, California bifurcated the issues of child protection (known as "dependency" in California) and parental severance into two different courts and two independent cases; the juvenile court determined dependency and the superior court determined termination.⁷⁹ Today, however, both actions are consolidated into a series of hearings in the juvenile court.⁸⁰ California courts

74. *Fulminante*, 499 U.S. at 309-10; see Goldblatt, *supra* note 73, at 1240; Ogletree, *supra* note 59, at 160.

75. See, e.g., *In re Andrew S.*, 32 Cal. Rptr. 2d 670 (Ct. App. 1994), *cert. denied*, 115 S. Ct. 1408 (1995).

76. See, e.g., *id.*; Cynthia D. v. Superior Court, 851 P.2d 1307 (Cal. 1993), *cert. denied*, 114 S. Ct. 1221 (1994); White v. Department of Health & Rehabilitative Servs., 483 So. 2d 861 (Fla. Dist. Ct. App. 1986).

77. See, e.g., *In re K.R.K.*, 631 N.E.2d 449 (Ill. App. Ct. 1994).

78. See CAL. WELF. & INST. CODE §§ 361, 366, 366.21-366.26 (West 1995).

79. *In re Jasmon O.*, 878 P.2d 1297, 1302 (Cal. 1994), *cert. denied*, 115 S. Ct. 1826 (1995):

An action pursuant to Civil Code former section 232 [termination of parental rights hearing] is an independent proceeding in the superior court The proceeding has a different purpose than the dependency proceedings. It is intended to pave the way for adoption or other permanent conclusive placement Unlike the statutory scheme applicable in dependencies established after January 1, 1989, the § 232 action does not function as a review of the proceedings in the juvenile court.

Id. (citations omitted).

80. For a lengthy analysis of the new California statutory scheme which unites

have found this procedural distinction significant in determining the extent of due process rights afforded parties in dependency court.⁸¹

For instance, the California Supreme Court in *Cynthia D. v. Superior Court* held that the selection and implementation hearing provided under the new California Welfare & Institutions Code section 366.26, at which the final determination of whether to terminate parental rights occurs, does not require under *Santosky v. Kramer*⁸² a finding of unfitness by clear and convincing evidence.⁸³ In *Santosky*, the United States Supreme Court used the three factors set down in *Matthews v. Eldridge*⁸⁴ to hold that “[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least *clear and convincing evidence*.”⁸⁵ The California Supreme Court, in *Cynthia D.*, reasoned that “[t]he California dependency statutes, by contrast [to the New York statutes reviewed in *Santosky*], provide the parents a much more level playing field.”⁸⁶ Unlike in New York, parents in California retain statutorily appointed counsel who continue to represent them throughout the dependency proceedings even after a court has denied counsel pursuant to a *Lassiter* hearing.⁸⁷ Additionally, parents continue to have access to all relevant records, and are entitled to a series of review hearings within which they can demonstrate their capacity to care for their child.⁸⁸ Recalling the additional protections provided the parent under the California dependency statute, the court in *Cynthia D.* held that “[a]t this *late stage* in the process the evidence of detriment [to the child if it remains with the parent] is already so clear and convincing . . . [that] proof by a preponderance standard is sufficient at this point” to permanently sever

dependency and termination cases into a single sequence of hearings in the same court versus the old two court model, see *Cynthia D. v. Superior Court*, 851 P.2d 1307 (Cal. 1993), *cert. denied*, 114 S. Ct. 1221 (1994). “Senate Bill No. 243 substantially changed the procedure for permanently severing parental rights in cases where the child is a dependent of the court. It eliminated the need to file a separate Civil Code section 232 proceeding and brought termination of parental rights for dependent children within the dependency process” *Id.* at 1309. See CAL. WELF. & INST. CODE §§ 366.21-366.26 (West 1995).

81. See, e.g., *In re Andrew S.*, 32 Cal. Rptr. 2d 670 (Ct. App. 1994), *cert. denied*, 115 S. Ct. 1408 (1995); *Cynthia D.*, 851 P.2d at 1307.

82. 455 U.S. 745 (1982).

83. *Cynthia D.*, 851 P.2d at 1313.

84. See *supra* note 38 and accompanying text.

85. *Santosky*, 455 U.S. at 768 (emphasis added).

86. *Cynthia D.*, 851 P.2d at 1314; see also *Santosky*, 455 U.S. at 768 (finding the New York statute unconstitutional).

87. *Cynthia D.*, 851 P.2d at 1314.

88. *Id.*

the parental rights.⁸⁹ Thus, the court in *Cynthia D.* justified its application of a lower standard of review because parental severance hearings were not what the court considered to be critical stages in the proceedings.

The *Cynthia D.* "critical stage" analysis was applied to the right of counsel issue at the section 366.26 hearing in *In re Andrew S.*⁹⁰ In *In re Andrew S.*, the mother's counsel requested that he be relieved because the mother was uncooperative.⁹¹ The trial court granted the motion and severed the mother's parental rights, finding that the "mother had purposefully absented herself from the hearing."⁹² On appeal, the court stated that denial of counsel "[o]rdinarily . . . would be what Chief Justice Rehnquist has described as a 'structural defect' in the trial of the case and, as such, reversible per se."⁹³ However, relying on *Cynthia D.*, the court maintained that a section 366.26 hearing is not a critical phase of the dependency proceedings and the right to counsel "is not a right of constitutional dimension."⁹⁴ The court determined that the same appellate standard applicable to abuse of discretion applies to the denial of counsel at the section 366.26 termination hearing: the denial of counsel "must be reviewed under article VI, section 13 of the California Constitution and the error is not reversible unless it is shown to be prejudicial."⁹⁵

The *Cynthia D.* and *Andrew S.* rationale for denying constitutional due process protection to parents in the final section 366.26 termination hearing leads to interesting results when applied to the entire series of California dependency hearings. First, as Justice Kennard

89. *Id.* at 1315 (emphasis added). The court also indicated that in cases where the child is adoptable and reunification services have been provided to the parents, "the decision to terminate parental rights will be relatively automatic." *Id.* at 1311 (quoting SENATE SELECT COMM. ON CHILDREN & YOUTH, SB 1195 TASK FORCE REP. ON CHILD ABUSE REPORTING LAWS, JUVENILE COURT DEPENDENCY STATUTES, AND CHILD WELFARE SERVICES 11 (1988)).

90. 32 Cal. Rptr. 2d 670 (Ct. App. 1994).

91. *Id.* at 673.

92. *Id.*

93. *Id.* at 674.

94. *Id.*

95. *Id.* at 675. The court found that the mother's interests at the § 366.26 hearing were not as strong as the minor's, because all the mother could do was object to adoptive placement or show a change of circumstance enabling the mother to again regain custody. *Id.* The delay in reversing the case for lack of counsel would cause additional delay in a hearing whose purpose is to finalize the long-term placement of the child. *Id.* The court in *In re Marquis D.*, 46 Cal. Rptr. 2d 198 (Ct. App. 1995), held that when determining the initial denial of placement with a noncustodial parent pursuant to CAL. WELF. & INST. CODE § 361.2 (West 1984 & Supp. 1995), the minimal standard of proof is clear and convincing evidence, not a preponderance of the evidence. *Id.* at 208.

noted in her dissenting opinion in *Cynthia D.*, at some point during the entire termination process, *Santosky* and the Due Process Clause require a finding by clear and convincing evidence that parental unfitness necessitates parental termination.⁹⁶ Thus, the real question under *Santosky* is how to define the minimal temporal nexus between a finding of parental unfitness by clear and convincing evidence and the final decision to terminate parental rights. For example, in California there may be a period of approximately twenty-four months between the initial determination that a child was abused or neglected and a subsequent determination that such abuse requires out-of-home placement and parental termination.⁹⁷ Under such circumstances, will a two-year-old clear and convincing finding of parental unfitness survive *Santosky's* concern regarding potentially erroneous fact finding if the basis of the section 366.26 termination is that same two-year-old finding of unfitness?⁹⁸

Not only did the court in *Cynthia D.* underestimate the importance of the assistance of counsel at the section 366.26 hearing, but the court ignored *Lassiter's* concern regarding the interrelationship between dependency and criminal trials based upon the same allegations of child abuse. It is possible that the parent appearing without counsel in the dependency hearing is at risk of damaging his case in a parallel criminal trial. Considering the steady increase in the number of child abuse cases criminally prosecuted in the last decade, this possibility is all the more alarming.⁹⁹

96. *Cynthia D.*, 851 P.2d at 1320 (Kennard, J., dissenting). Justice Kennard also rejected the majority's statement that parents have a "much more level playing field" than under the New York system because, as she pointed out, the State has custody of the child. *Id.* (Kennard, J., dissenting). Further, the "potential for class or cultural bias in a decision that will result in freeing a child for adoption by a family with greater resources than the natural parents is no less acute in California than in New York." *Id.* (Kennard, J., dissenting).

97. See CALIF. WELF. & INST. CODE §§ 366, 366.21-366.26 (West 1995).

98. The California Welfare & Institutions Code § 361(b) provides: "No dependent child shall be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated unless the juvenile court finds clear and convincing evidence" of statutory grounds for separating parent and child. CAL. WELF. & INST. CODE § 361(b) (West 1995). The subsequent six-month reviews are based upon a preponderance of the evidence, not a clear and convincing evidence standard. CAL. WELF. & INST. CODE § 366.21 (West 1995).

99. See William W. Patton, *Child Abuse: The Irreconcilable Differences Between Criminal Prosecution and Informal Dependency Court Mediation*, 31 UNIV. LOUISVILLE J. FAM. L. 37, 39-45 (1992-93) [hereinafter Patton, *Child Abuse*]; William W. Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473, 473 (1990) [hereinafter Patton, *Parallel Lines*].

Similar concerns arise in analyzing the constitutional right to counsel under *Lassiter*. If a parent is not entitled to counsel at the section 366.26 termination hearing, then at what point in the ongoing proceedings must counsel be appointed? In *In re Tanya H.*,¹⁰⁰ the second district of the California appellate court held that it was error to abrogate a parent's statutory right to continued assistance of appointed counsel in all dependency proceedings based upon the system's claim of economic necessity.¹⁰¹ But most importantly, the court in *In re Tanya H.* held that stripping counsel from a parent at any stage of the proceeding would severely undermine the rationale of *Cynthia D.*'s "much more level playing field" model, which justified retrenchment from the prophylactic protection of *Santosky*'s clear and convincing evidence standard.¹⁰² In other words, the state cannot have it both ways; it cannot collapse the old model of separate court trials for dependency and severance proceedings into a single system that eviscerates prior due process protections.¹⁰³

The court's reasoning in *Cynthia D.* simply does not withstand scrutiny when a parent is denied a *Lassiter* right to counsel at any time during the dependency or severance proceedings. For example, the court in *In re Arturo A.*¹⁰⁴ held that parents may have a constitutional right to *competent* counsel in dependency proceedings "which have the potential of terminating reunification services and setting a section 366.26 hearing."¹⁰⁵ Therefore, in those situations where *Lassiter* requires that counsel be appointed, the *Andrew S.* rationale regarding "structural error" is inapplicable and the reversal per se standard of *Fulminante* should apply.¹⁰⁶ Therefore, if parents were denied counsel

100. 21 Cal. Rptr. 2d 503 (Ct. App. 1993).

101. *Id.* at 507. The California Welfare & Institutions Code § 317 (d) provides:

The counsel appointed by the court shall represent the parent, guardian, or minor at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel shall continue to represent the parent or minor unless relieved by the court upon the substitution of other counsel or for cause. The representation shall include representing the parent or the minor in termination proceedings and in those proceedings relating to the institution or setting aside of a legal guardianship.

CAL. WELF. & INST. CODE § 317(d) (West 1995).

102. *In re Tanya H.*, 21 Cal. Rptr. 2d 503, 507-08 (Ct. App. 1993).

103. See *supra* notes 78-95 and accompanying text.

104. 10 Cal. Rptr. 2d 131 (Ct. App. 1992).

105. *Id.* at 136. The *Arturo A.* court stated that a termination of parental rights petition pursuant to § 366.26 is dependent "on the determination that the child should not be returned to the custody of the parent. This latter determination is made not at the section 366.26 hearing but at the prior section 366.21 or 366.22 hearing." *Id.*

106. See *supra* notes 90-95 and accompanying text for a discussion of *Andrew S.*; see also *supra* notes 69-74 and accompanying text for a discussion of the *Fulminante*

or received incompetent counsel in the dependency hearing, appellate counsel should argue for reversal. The finding by a mere preponderance of the evidence violates *Santosky* because the *Cynthia D.* rationale for lowering the burden of proof was predicated in great part on the parent receiving the assistance of counsel to level the playing field against the state's tremendous resources.¹⁰⁷

Other state courts disagree with the *Cynthia D.* conclusion that only some aspects of the dependency proceedings are "critical stages." For instance, in *White v. Department of Health and Rehabilitative Services*,¹⁰⁸ a Florida court described the interrelationships and interdependence of each stage of the dependency proceedings leading to parental termination:

[O]ften, as here, dependency disposition hearings and dependency disposition orders are not final hearings and final orders in the cause but adjudicate dependency, place temporary custody of the child with H.R.S., and order the parents to enter into a performance agreement which, when unperformed, leads directly to, and in combination with the adjudicated facts underlying the original dependency petition and order, is the basis for a later petition for termination of parental rights. In this situation the petition for termination of parental rights is, and is treated as, *but another stage or continuation of the original dependency proceeding rather than as the initiation of a new (permanent termination) proceeding to be procedurally subdivided again into . . . [different stages]. This merging of the original dependency proceeding with the later permanent commitment proceeding, and the merging of the adjudicatory and disposition stages of the permanent commitment proceeding, result in confusion and substantive legal errors.*¹⁰⁹

The *White* court stated somewhat sarcastically that "[t]o be effective, counsel must be afforded at the earliest critical stage of any proceeding There is no need to appoint counsel at the gallows' foot."¹¹⁰ The court held that because the parents did not have counsel when they

reversal per se standard.

107. See *supra* notes 82-85 and accompanying text for a discussion of *Santosky*. See also *supra* notes 82-89 and accompanying text for a discussion of *Cynthia D.*

108. 483 So. 2d 861 (Fla. Dist. Ct. App. 1986).

109. *Id.* at 865 (emphasis added). See also *In re M.D.A.*, 517 So. 2d 711, 712 (Fla. Dist. Ct. App. 1988). The court commented on the problem of timing, finding that "by the time counsel was appointed for the father, any prejudice accruing from the absence of counsel had set in because, of course, the final review at which the termination hearing occurs involves the proceedings that have transpired from the commencement of the matter." *Id.*

110. *White*, 483 So. 2d at 866.

were asked to plead to the dependency allegations which resulted in a finding of wardship and the entering of "a dispositional order requiring the parents to enter into a performance agreement," those uncounseled proceedings should not be used as any part of the proceeding to permanently terminate parental rights.¹¹¹ Thus, the court reversed the trial court and held that the parents were entitled to counsel at every stage of the dependency proceeding which "contributed and led directly to the permanent termination of parental rights."¹¹² Several other jurisdictions agree that judges may not rely upon records of hearings where parents were uncounseled.¹¹³

3. The Speculative Nature of Harmless Error Analysis as Applied to Denial of Counsel

Those courts that have rejected the *Fulminante* analogy, holding that either there is no constitutional right to counsel in dependency cases or that a lesser standard of review is applicable, have frequently turned to variations of the harmless error rule in fashioning a remedy.¹¹⁴ Applying harmless error analysis, however, has severely confused courts: "Chaos surrounds the standard for appellate review Over the past century, courts have employed a variety of rules and presumptions in an effort to find an ordering principle to resolve the harmless error issue."¹¹⁵ The real question is which of the numerous harmless error

111. *Id.*

112. *Id.* at 867. See also *In re J.B.*, 702 P.2d 753 (Colo. Ct. App. 1985), where the court held that review hearings are "an important proceeding to parties . . . [which] may form a foundation for and presage the filing of a motion for termination of the parent-child relationship." *Id.* at 754.

113. In *In re D.S.*, 833 P.2d 1090, 1093 (Mont. 1992), the court held that a trial court could not judicially notice a hearing where the parents did not have counsel. In *In re J.B.*, 624 So. 2d 792, 792 (Fla. Dist. Ct. App. 1993), the court held that it "cannot be deemed harmless error since that dependency adjudication was used as a basis of the adjudication of the permanent termination of appellant's parental rights," even though appellant had not been informed of the right to appointed counsel. But see *In re Grannis*, 680 P.2d 660, 665 (Or. Ct. App. 1984), where the court determined that failure to appoint counsel for the parent was harmless error since the earlier hearings were not critical and she had counsel at critical stages.

114. See, e.g., *Grannis*, 680 P.2d 660.

115. Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973). The area of standards of review continues to become more complicated as the United States Supreme Court continues to articulate different standards for reviewing identical issues dependent on whether they are filed as direct appeals or writs. See, e.g., *Schlup v. Delo*, 115 S. Ct. 851, 867 (1995) (stating that the defendant must demonstrate "that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent'" (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986))); *Lockhart v. Fretwell*, 113 S. Ct. 838, 842-43 n.2 (1993) ("[A]n error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient

standard variants should be applied to denial of counsel in child protection and parental severance hearings.

The typical standard of appellate review consists of two basic components.¹¹⁶ First, it determines which party will carry the burden of persuasion.¹¹⁷ Second, it establishes the degree of proof necessary to obtain judicial relief from alleged error.¹¹⁸ The harmless error rule expands on these two elements and should contain at least four elements:

- (1) who bears the burden of proof to show that the error is or is not harmless; (2) what that burden is; (3) what the requisite standard of 'prejudice' is (i.e., how likely it is that the error did or did not affect the verdict); and (4) what 'approach' the reviewing court must take to evaluate whether prejudice has been demonstrated.¹¹⁹

a. Three Approaches to Harmless Error Analysis

The federal courts have devised three basic tests to determine whether an error is harmless.¹²⁰ Under the first test, set forth by the

performance [by counsel] and (2) prejudice."); *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1714 (1993) (defining the proper standard as "whether the . . . error 'had substantial and injurious effect or influence in determining the jury's verdict'" (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))).

This Article discusses harmless error in relation to direct appeals rather than collateral attacks. Thus, courts' concerns about federalism, comity, state exhaustion, and tardiness will not be discussed. For information on these concerns see *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 512 (1982) ("Federalism concerns and the exceptional need for finality in child-custody disputes argue strongly against the grant of Ms. Lehman's petition."); *Zamora-Trevino v. Barton*, 727 F. Supp. 589, 591-92 (D. Kan. 1989) (finding an exception to *Lehman* in international custody disputes); *Mauro B. v. Superior Court*, 281 Cal. Rptr. 507, 509 (Ct. App. 1991) (stating that writs are disfavored in cases involving the custody of children). *But see Ex Parte James*, 240 P.2d 596, 600 (Cal. 1952) (holding that writ was appropriate to challenge denial of counsel).

116. William W. Patton, *It Matters Not What Is But What Might Have Been: The Standard of Appellate Review for Denial of Counsel in Child Dependency and Parental Severance Trials*, 12 WHITTIER L. REV. 537, 541 (1991) [hereinafter Patton, *Appellate Review*].

117. *Id.* at 541.

118. *Id.* "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Id.* (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

119. John H. Blume & Stephen P. Garvey, *Harmless Error In Federal Habeas Corpus After Brecht v. Abrahamson*, 35 WM. & MARY L. REV. 163, 165-66 (1993). *See also* Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 16 (1976).

120. Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1341-52 (1994). I am deeply indebted to

Supreme Court in *Chapman v. California*,¹²¹ "an error is not harmless if it is likely to have had even a minimal impact on juror deliberations."¹²² Under *Chapman*, "the state must show lack of prejudice by demonstrating that there was no 'reasonable possibility' that the error 'contributed to the verdict.'"¹²³ Because the *Chapman* test has a very narrow factual determination "confined to assessing whether the jury's guilty verdict could not reasonably have been influenced by the error,"¹²⁴ it best supports a model of judicial economy and requires the least investigation by the court.¹²⁵

The second test for harmless error is described in *Harrington v. California*:¹²⁶ "[A]n error is harmless if overwhelming, untainted evidence of guilt exists in the trial record."¹²⁷ The *Harrington* analysis is less circumscribed than *Chapman*.¹²⁸ Under *Harrington*, a court "assesses guilt in general, rather than trying to conclude what effect an error may have had on a jury."¹²⁹ However, a finding of sufficiency of the evidence is *not* sufficient to support a conclusion that the error was harmless.¹³⁰

The Supreme Court articulated the final test in *Delaware v. Van Arsdall*.¹³¹ Under the *Van Arsdall* test, a "court balances the impact of the error against the overwhelmingness of the untainted evidence. The outcome will rely on either the severity of the error or the weight of the untainted evidence"¹³² Unfortunately, however, the *Van Arsdall* Court "failed to specify how slight the impact of the error or how great the untainted evidence must be before error is deemed harmless."¹³³ Nevertheless, the *Van Arsdall* Court delineated several variables which should be calculated in determining harmlessness: (1) the importance

Mr. Mitchell's article for the following discussion of the three variants of the harmless error rule.

121. 386 U.S. 18 (1967).

122. Mitchell, *supra* note 120, at 1339. See *Chapman v. California*, 386 U.S. 18, 34 (1967).

123. Blume & Garvey, *supra* note 119, at 170.

124. Mitchell, *supra* note 120, at 1357.

125. *Id.* at 1357, 1361; see also Mause, *supra* note 44, at 529-30.

126. 395 U.S. 250 (1969).

127. Mitchell, *supra* note 120, at 1339. See *Harrington*, 395 U.S. at 254.

128. Mitchell, *supra* note 120, at 1357.

129. *Id.* *Harrington* thus requires much more court investigation because its "overwhelming-evidence test directs attention away from the error to the weight of the supposedly unaffected evidence." *Id.* at 1361.

130. *Id.* at 1352.

131. 475 U.S. 673 (1986).

132. Mitchell, *supra* note 120, at 1339.

133. *Id.* at 1360.

of a witness' testimony; (2) whether the testimony was cumulative; (3) whether it was corroborating or contradicting evidence; (4) the extent of cross examination; and (5) the overall strength of the case.¹³⁴

Which harmless error test a court applies may be dispositive of the outcome of the case. One study of cases applying harmless error determined that those courts using the *Chapman* harmless error standard found the error harmless in only 5.9% of the cases; however, courts applying the *Harrington* test declared the errors harmless 100% of the time; and courts analyzing the errors under the *Van Arsdall* hybrid test found 70.6% harmless.¹³⁵

b. State Application of Harmless Error Analysis

This brings us to our central question: in jurisdictions that reject *Fulminante*'s reversal per se standard,¹³⁶ which of the several harmless error tests should be adopted in determining the effect of a denial of counsel? State courts have been applying variants of the harmless error tests without analyzing or articulating why they have selected one approach over another.¹³⁷ Furthermore, one of the most troubling aspects of harmless error analysis as applied to dependency cases is that the courts often place the burden on the parent or child to demonstrate that the error was harmful, rather than placing the burden on the state to demonstrate the error was harmless.¹³⁸ This flies in the face of decades of harmless error cases which have found that the burden of proving harmlessness should be on the state.¹³⁹

Indeed, placing the burden of proving harmful error on parents or children works a great inequity.¹⁴⁰ The inequity stretches far beyond

134. *Van Arsdall*, 475 U.S. at 684.

135. Mitchell, *supra* note 120, at 1349-50.

136. See *supra* notes 69-74 and accompanying text for a discussion of the reversal per se standard set forth in *Fulminante*.

137. See Mitchell, *supra* note 120, at 1348-1350 (discussing the difficulty involved even in discovering what harmless error test a state court has employed because state opinions do not often contain clear analysis of this issue).

138. In *In re Christine P.*, 277 Cal. Rptr. 290, 298 (Ct. App.) (holding that "a parent must demonstrate on appeal that the absence of counsel made a 'determinative difference' and 'render[ed] the proceedings fundamentally unfair'") (citing *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 33 (1981)), *vacated*, 808 P.2d 1181 (Cal. 1991). For an extensive discussion of *In re Christine P.*, see Patton, *Appellate Review*, *supra* note 115, at 543-49.

139. Mitchell, *supra* note 119, at 1338 n.22.

140. *In re Richard E.*, 579 P.2d 495, 499 (Cal. Ct. App. 1978). See also *In re Melissa S.*, 225 Cal. Rptr. 195, 203 (Ct. App. 1985) (reversing the lower court for failing to appoint independent counsel for a minor because "[t]here is a reasonable probability a result more favorable to the mother would have been reached absent the error"); *Smith v. Marion County Dep't of Public Welfare*, 635 N.E.2d 1144, 1149 (Ind.

the initial stages of the process.¹⁴¹ First, appellants will have already had to meet the *Lassiter* burden of demonstrating that a constitutional deprivation occurred before the court will even consider whether harmless error analysis is applicable.¹⁴² Second, if the state did not provide counsel at a termination hearing, it is unlikely that they will provide appellate counsel. Therefore, a parent would likely have to prove that appointment of counsel would have changed the outcome of the proceeding without the assistance of counsel. Placing the burden on parents and children is as unfair as forcing them to suffer a dependency trial without counsel:

A reviewing court could obtain the missing information by imposing on a defendant the burden of producing evidence showing how counsel would have made a difference. But this anomalous burden of production would require that an uncounseled defendant articulate how counsel could have helped him when his ignorance of what counsel could have done is the reason for requiring counsel to begin with.¹⁴³

Finally, harmless error analysis has traditionally placed the burden on the party gaining an advantage from the constitutional deprivation:

Ct. App. 1994) (holding that to demonstrate sufficient prejudice from denial of counsel to support reversal, the appellant must prove "the termination hearing would have produced a different result, had she been represented by counsel at the [earlier Child In Need of Service] hearing"); *In re Hall*, 469 N.W.2d 56, 58-59 (Mich. Ct. App. 1991) (stating that the court "fail[ed] to see, and respondent has failed to indicate, how she was prejudiced by the absence of counsel at the earlier review hearing"). But see *In re Richard H.*, 285 Cal. Rptr. 917, 927 (Ct. App. 1991) (rejecting the *In re Melissa S.* standard: "[W]e conclude that the standard of review for the failure to appoint separate counsel for a minor at a disposition hearing should be whether the record reflects a miscarriage of justice."); *In re Patricia E.*, 219 Cal. Rptr. 783, 787 (Ct. App. 1985) (holding that a different standard applies in determining prejudice from a conflict of interest between a child and counsel; noting that reversal is mandated where the record supports "'an informed speculation' that appellant's right to effective representation was prejudicially affected") (quoting *People v. Mroczko*, 197 Cal. Rptr. 52, 63 (1983)).

141. Should parents and children be able to introduce statistics demonstrating that more favorable results generally occur if represented in dependency court? A 1967 study found "[p]arties who were represented by counsel were three times more likely to have their cases dismissed [T]he largest percentage of the dismissals occurred in dependency cases rather than delinquency cases." Marc B. Stahl, *The Impact Of Counsel On Juvenile Delinquency Proceedings*, 84 J. CRIM. L. & CRIMINOLOGY 642, 647-48 n.28 (1993) (reviewing BARRY C. FELD, *JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS* (1993)).

142. See Jonathan H. Levy, *Limiting Victim Impact Evidence and Argument After Payne v. Tennessee*, 45 STAN. L. REV. 1027, 1032 (1993): "Chapman's two-prong approach to claims of constitutional error first determines whether a constitutional violation has taken place. Only if the reviewing court finds such a violation does it ask a second question: Does the violation require reversal?" *Id.*

143. Tom Stacey & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 93 (1988).

Since the appellate court under *Lassiter* will have determined that a parent should have been provided counsel based upon either the parent's mental infirmity, the difficulty of the law or facts involved, or the necessity of skill in examining expert witnesses, it is clear that the state will have benefited from the error and that the trial lacked the necessary component of a fair balance of power.¹⁴⁴

In determining the appropriate standard of review for denial of counsel in child protection cases, few state courts have considered or adopted the *Chapman* variant of harmless error, which holds that "the appropriate standard of prejudice is the harmless beyond a reasonable doubt standard."¹⁴⁵ Instead, many courts have used the quality and sufficiency of evidence presented at the hearing as a dispositive factor and rendered opinions more consistent with the *Harrington* test.¹⁴⁶ For example, in *In the Matter of D.S.*, a Montana court held that even though the trial court erred in taking judicial notice of an earlier dependency hearing where the parent had been denied counsel, the error was not reversible because there was sufficient independent evidence presented.¹⁴⁷ However, the dissent stated that the "[s]ubstantiality of evidence has never been an adequate reason to sustain a violation of an individual's right to counsel."¹⁴⁸ The court in *In the Matter of D.S.* reduced the *Harrington* test from a showing of "overwhelming, untainted evidence" to one of mere "sufficiency of evidence," thus dramatically lowering the state's burden of showing that the error was harmless. However, the Supreme Court has frequently rejected a sufficiency of the evidence standard when applied to constitutional violations.¹⁴⁹

Finally, some courts have applied a test similar to *Van Arsdall*, which balances the weight of untainted evidence and the severity of the

144. Patton, *Appellate Review*, *supra* note 116, at 547.

145. In *In re Laura H.*, the court noted that an ordinary "miscarriage of justice" standard was inappropriate in parental termination cases and stated, without specifically deciding, that the "appropriate standard of prejudice is the harmless beyond a reasonable doubt standard" of *Chapman v. California*, 386 U.S. 18, 24 (1967). *In re Laura H.*, 11 Cal. Rptr. 2d 285, 289 (Ct. App. 1992).

146. However, some courts have found it "inappropriate to address the issues of whether sufficient evidence was introduced to support the order terminating respondent's rights or whether adequate factual findings were placed on the record." *In re Keifer*, 406 N.W.2d 217, 219 (Mich. Ct. App. 1987).

147. *In re D.S.*, 833 P.2d 1090 (Mont. 1992).

148. *Id.* at 1094 (Hunt, J., dissenting).

149. Mitchell, *supra* note 120, at 1359-60 n.139; *see also* *United States v. Lane*, 474 U.S. 438, 477-78 (1986) (Stevens, J., concurring and dissenting) (distinguishing the sufficiency of the evidence standard from the harmless error standard).

error. In *In re J.J.B.*,¹⁵⁰ a Kansas court surveyed the quality of evidence presented in a case where parents were not granted appointed counsel. Although the court determined "significant substantial evidence was presented in support of the severance petition," it reversed and remanded the case after balancing the seriousness of the deprivation of counsel.¹⁵¹ "Balanced against [the quality of evidence presented] is the difficulty in calculating the prejudice caused by the lack of counsel [D]uring this time the rights of the parents were not being safeguarded by counsel, with unknown and unknowable ramifications."¹⁵² However, a California court in *In re Richard E.*,¹⁵³ applied a *Van Arsdall*-like test with different results. After finding "substantial evidence" to support parental termination, the court determined that the denial of appointment of individual counsel was harmless because the appellant did not suggest how separate counsel would have provided more due process.¹⁵⁴

Even though state courts are applying harmless error tests similar to *Chapman*, *Van Arsdall*, and *Harrington*, they have been doing so without thoroughly analyzing the strengths and weaknesses of each of the tests in relation to child abuse and neglect cases. For several reasons the *Harrington* standard is the worst test for judging whether denial of counsel in those cases should be held reversible error. First, denial of counsel is a structural error infecting the entire proceeding, the scope and effect of which is almost incalculable; "[t]he impact of a structural error . . . cannot be so readily isolated or confidently assessed."¹⁵⁵ Moreover, the *Harrington* test focuses almost exclusively

150. 818 P.2d 1179 (Kan. Ct. App. 1991).

151. *Id.* at 1184.

152. *Id.*

153. 579 P.2d 495 (Cal. 1978).

154. *Id.* at 499. *Richard E.* involved a slightly different procedural context in that the alleged error was failure to appoint separate counsel for the minor in the termination hearing pursuant to CAL. CIV. CODE § 237.5 (West 1976), which provided discretionary appointment of separate counsel for minors. Failure to appoint separate counsel fits conceptually between two other due process models: (1) failure to appoint counsel at all; and (2) appointment of incompetent counsel. Depending on the facts of the case, failure to appoint independent counsel is worse than having no counsel at all because the court will assume that counsel represents the interests of the minor, even though an inherent conflict of interest prevents counsel from arguing zealously the minor's case. Failure to appoint independent counsel is sometimes like incompetence of counsel if counsel fails to present all the relevant evidence and defenses for all the clients the lawyer is attempting to represent. If the conflict of interest is significant, the prejudice to the misrepresented client may be as great as having a case heard by a biased judge, a structural error recognized in a dissent by *Fulminante* as requiring reversal per se. *Arizona v. Fulminante*, 499 U.S. 279, 290 (1991) (White, J., dissenting).

155. Blume & Garvey, *supra* note 119, at 185.

upon the strength of the evidence rather than the egregiousness of the violation in denying counsel and fails to properly account for the effect of that error. *Harrington* devalues the creativity of counsel in fact investigation, direct and cross examination, and advocacy skills.¹⁵⁶ Further, if a court adopting a *Harrington* test also shifts the burden to the parent or child to prove harm, a draconian standard evolves. Proving prejudice from structural error places "an insurmountable burden on a lay parent to provide the court with not only the different methods of representation that counsel would have provided," but also frequently requires the parent to demonstrate the reasonable probability that a different result would have occurred if counsel had been appointed.¹⁵⁷ Finally, the *Harrington* test should be rejected because it devalues the nature of the right to counsel and ameliorates and mollifies the state's egregious conduct; it does not look at the state's violation of a child's or parent's rights so much as the degree of proof presented. Underlying this shift of emphasis from *Chapman's* concern regarding the constitutional violation to *Harrington's* focus on the strength of evidence presented is a systemic bias indicating that it is more important to have finality for children than to be sure that the findings supporting that finality were accurate and based upon a complete record. However, "[c]an it be said that it is in the best interest of a child to be taken from the accustomed custody and control of his or her parents when there has not been a fair hearing related to the need for such intervention?"¹⁵⁸

The *Van Arsdall* approach, although not as unfair as the *Harrington* test, is also an unwise choice in dependency cases because it substantially burdens the appellate court in conducting extensive fact investigation. "The *Chapman* test generally requires less investigation than the *Harrington* test, which in turn generally requires less investigation than the *Van Arsdall* test."¹⁵⁹ For two reasons, the extensive fact investigation inherent in the *Van Arsdall* test will lead to longer delays in reaching certainty and finality in dependency cases.¹⁶⁰ First,

156. See Saltzburg, *supra* note 115, at 990. Saltzburg notes that "[o]ne reason it is so difficult to judge accurately the impact of error is that little empirical data is available about trial strategy." *Id.* In recent years authors have analyzed the creativity and sophistication of fact investigation, and entire conceptual systems have been developed which dwarf court's conceptions of the role of counsel in investigating and representing clients. See DAVID BINDER & PAUL BERGMAN, FACT INVESTIGATION FROM HYPOTHESIS TO PROOF 28 (1984).

157. Patton, *Appellate Review*, *supra* note 116, at 545.

158. *In re Emilye A.*, 12 Cal. Rptr. 2d 294, 301 n.9 (Ct. App. 1992).

159. Mitchell, *supra* note 120, at 1361.

160. Jeffrey Butts and Gregory Halemba have observed that delays in processing dispositions in juvenile delinquency cases adversely affect adolescents because they "are

the already overburdened appellate courts will find it difficult to find time to expedite review if they have to focus so closely on an analysis of all the facts.¹⁶¹ Second, since the review will involve a great deal of speculation regarding what appointed counsel might have done, appellate counsel will invariably need to file writs in order to bring evidence which is not part of the record below before the court, thus dramatically increasing the costs of appellate services. For instance, appellate counsel may need to depose dependency experts regarding additional motions, theories, or arguments which might have been presented. Appellate counsel may also conduct new fact investigation such as interviewing witnesses who were not called in the original dependency hearing to demonstrate that with counsel the parent or child could have presented critically relevant evidence which may have affected the court's decision. The time demands and expense of the *Van Arsdall* approach outweigh any benefits of its balancing test.

The *Fulminante* reversal per se standard is obviously the least expensive to administer: "A bright line rule of automatic reversal . . . is preferable because the costs of judicial inquiry [of harmless error analysis] are more substantial"¹⁶² However, in those jurisdictions which reject the *Fulminante* reversal per se standard in dependency reviews, the second best choice is the *Chapman* standard. It is quick and inexpensive, does not require writs to supplement the record, properly places the burden on the party benefiting from the error, and

less capable than adults of anticipating the future consequences of their behavior" and because "every day a juvenile disposition is delayed means one less day the juvenile justice system has to work with the youth." Jeffrey A. Butts & Gregory Halemba, *Delays in Juvenile Justice: Findings from a National Survey*, 45 JUV. & FAM. CT. J. 31, 32-33 (1994). The same can be said of delays in dependency court. Children need finality in order to have psychological closure; the juvenile court needs to conserve its meager resources to promote family reunification if possible, and if not, to provide permanent stability for the children under its jurisdiction. Lengthy appeals will only strain the rehabilitative funds and frustrate finality.

161. Henry P. Monaghan, *Taking the Courts of Appeals Seriously*, PROCEEDINGS OF THE FORTY-SEVENTH ANNUAL JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA CIRCUIT, reprinted in 114 F.R.D. 419, 576, 582 (1986) (finding that a backlog of cases may lead to a decline in the quality of appellate decisions). Of course, the appellate court case backlog is only half the story. If the appellate court decides to remand the case, it will again enter a terribly overcrowded trial court system. For instance, in Los Angeles "[a]bout 75,000 civil cases are filed . . . each year." Stephanie Simon, *Civil Courts Also Feel Squeeze of '3 Strikes' Cases*, L.A. TIMES, Aug. 13, 1995, at A1. There are currently so many criminal court filings that the civil judges "have had to scrap civil cases midstream and declare mistrials to make room for urgent criminal matters." *Id.* at A24. The civil justice system is experiencing a double explosion. In Los Angeles in 1994 civil judges had to handle 800 criminal trials, while civil case filings such as domestic violence cases increased by 60% in one year. *Id.*

162. Ogletree, *supra* note 59, at 167.

does not involve the speculation required of *Harrington* and *Van Arsdall* regarding the effect of a denial of counsel.

4. The Degree of Proof Required

The proponents of a lesser burden of proof to demonstrate harmlessness are beginning to debate again an idea I rejected in 1991. The proponents argue that since denial of counsel in dependency cases is not as egregious as Sixth Amendment denial of counsel in criminal cases, the burden of proof to demonstrate harmlessness should be clear and convincing evidence, not proof beyond a reasonable doubt.¹⁶³ As I earlier argued:

Much of the *Santosky* rationale for requiring only a clear and convincing standard for the parental termination hearing was based upon the Court's recognition that the adversarial process pitted equally represented parties. The Court noted that "parents have a statutory right to the assistance of counsel" and further noted that in the "adversary contest . . . [t]he State, the parents, and the child are all represented by counsel." [T]herefore, where the parent is not represented by counsel and the appellate court finds *Lassiter* error, the argument set out in *Santosky* for a standard less stringent than proof beyond a reasonable doubt loses its underpinnings.¹⁶⁴

Maintaining the requirement of proving harmlessness beyond a reasonable doubt will not impose "substantial fiscal burdens on the state" and will provide parties, the court, and the public with confidence that the dependency judgment was not based upon factual error, undiscovered evidence, or an adversarial advantage by the state over an indigent uncounseled parent.

163. Patton, *Appellate Review*, *supra* note 116, at 548-49. Gary Seiser, Deputy Counsel for the County of San Diego, argues that the burden in dependency cases should depend on the nature of the denial of counsel; in some circumstances "it may well be that even a violation of the constitutional right to competent counsel should be measured by a preponderance of the evidence harmless error standard." Gary Seiser, *Legal Developments in Children's Emerging Trends and Issues*, Spring 1995, at 28 (handout prepared for Center for Judicial Education and Research Conference; copy on file at Whittier Law Library).

164. Patton, *Appellate Review*, *supra* note 116, at 548 (citing *Santosky v. Kramer*, 455 U.S. 745, 749 (1982)). Note that most modern courts' interpretations of entire dependency statutory schemes have been skewed by the notion that parents will have counsel. For instance, the California Supreme Court in *Cynthia D.* permitted a finding by a preponderance because counsel provided parents a more level playing field. *Cynthia D. v. Superior Ct.*, 851 P.2d 1307, 1320-21 (Cal. 1993), *cert. denied*, 114 S. Ct. 1221 (1994). Without counsel the balance substantially shifts to the state and fact finding becomes much less complete and accurate. A higher standard of proof is therefore needed to ensure fairness and accuracy.

III. REVIEWING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN DEPENDENCY AND TERMINATION TRIALS

Consider for a moment the effectiveness of counsel like that appointed to represent the parents in *In re Prough* in the introduction.¹⁶⁵ The Proughs' attorney was so passive that they may have been better off representing themselves. For the right to counsel to have substance, the right must necessarily include a guarantee of competent assistance. This Part will address how various courts have handled the claims of ineffective assistance of counsel, first discussing how systemic bias has led courts to resist such claims. Then this Part will determine the scope of the right to effective assistance of counsel. Finally, the Part proposes a method for reviewing ineffective assistance of counsel claims.

However unfortunate, courts' resistance to claims of ineffective assistance of counsel are not surprising. Because judges are also lawyers, they empathize with the alleged incompetent attorney for a number of reasons. First, they are part of the same professional organization; the client crying "incompetent" is an outsider attacking not only the individual lawyer, but also the profession. Second, although judges see their share of very poor lawyering, they also realize that client's expectations are often unreasonably high and supported by hyperbolic passion rather than analytical rigor. Because judges probably still remember the realities of practice, they may also be musing, "there but for the grace of God go I." Some judges might consider these clients ungrateful; they received court compensated attorneys and were lucky they did not have to represent themselves *in propria persona* like most other litigants in the civil system.¹⁶⁶ But no matter what the cause, many judges view claims of ineffective assistance of counsel with suspicion.

Judges' biases against the concept of incompetence of counsel in child protection cases need to be mollified because they are based on faulty analogies to other areas of the legal system. Currently there are very few attorneys in America truly qualified to represent parents or children in child protection cases. In fact, many of these attorneys are appointed "without any prerequisite education in the special knowledge and skills needed by those who represent children. Most states lack any statewide effort to support, or upgrade the competency of, court

165. 376 N.E.2d 1078, 1083 (Ill. App. Ct. 1978). See *supra* notes 1-8 and accompanying text.

166. Elrod, *supra* note 18, at 56.

appointed attorneys for children.”¹⁶⁷ In fact, California, the state with the most annual child dependency trials, appointed thousands of attorneys for decades to represent parents and children without significant guidelines for defining or training competent dependency counsel.¹⁶⁸

A great deal of marginal lawyering takes place in child protection court for a variety of reasons.¹⁶⁹ First, the youngest and least experienced attorneys often begin practice in child abuse cases,¹⁷⁰ where the newest judges with least experience often shepherd those trials.¹⁷¹ Second, juvenile lawyers and some juvenile court judges are very poorly paid in relation to their peers.¹⁷² Finally, representing children adequately in dependency proceedings requires interdisciplinary training, which is often difficult and expensive to obtain.¹⁷³

A. *Is There a Right to Competent Counsel
in Child Dependency Cases?*

The same questions visited in relation to the existence of a right to counsel in protection cases¹⁷⁴ arise when determining whether there is the additional right to competent counsel. So much depends upon the jurisdiction's analysis of the analogy between criminal and dependency cases. For example, until recently, Wisconsin courts rejected the right to competent counsel in child protection cases because “[t]he sixth

167. Judge Leonard P. Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases*, 27 SANTA CLARA L. REV. 201, 259-60 (1987).

168. Finally in 1994, operative on or before January 1, 1996, the Judicial Counsel promulgated guidelines for “screening and appointment of competent counsel,” and “establishing minimum standards of experience and education necessary to qualify as competent counsel.” CAL. WELF. & INST. CODE § 317.6 (West 1984 & Supp. 1995).

169. In a survey of dependency counsel in Los Angeles I conducted in 1992, approximately 50% failed to inform their clients that “data and counts stricken from the dependency petition as part of the plea agreement could be used against them at the subsequent disposition hearing or at future dependency review hearings.” Patton, *Child Abuse*, *supra* note 99, at 59.

170. Edwards, *Comprehensive Approach*, *supra* note 11, at 420.

171. Judge Leonard Edwards, *Fulfilling the Expectations For the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 33, 34-35 (1992) [hereinafter Edwards, *Fulfilling Expectations*].

172. *Id.* at 33-36. See Hunter Hurst, *Judicial Rotation in Juvenile and Family Courts: A View From the Judiciary*, 42 JUV. & FAM. CT. J. 13 (1991).

173. ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* (1993); William W. Patton, *Law Schools' Duty to Train Children's Advocates: Blueprint for an Inexpensive Experientially Based Juvenile Justice Course*, 45 JUV. & FAM. CT. J. 3 (1994). Robert Shepherd notes that the quality of representation for children in delinquency cases is much lower than for adult criminal defendants and that, “even when children are represented too often their attorneys lack either the commitment or the knowledge to provide competent, much less zealous, representation.” Shepherd, *supra* note 23, at 35.

174. See *supra* part II.

amendment, by its own terms, is applicable only to criminal cases . . . a claim for ineffective assistance of counsel is not available in a civil case."¹⁷⁵ Other courts, such as the California Supreme Court, have rejected the right to competent counsel in proceedings where permanent termination of parental rights, as opposed to temporary loss of child custody, is not possible.¹⁷⁶ Still other courts have made a distinction between a constitutional right and a statutory right to competent counsel.¹⁷⁷

Generally, the jurisdictions agree regarding the standard of review for incompetency of counsel claims where the court found a parent or child had a constitutional right to appointed counsel either under *Lassiter* or pursuant to independent state constitutional grounds.¹⁷⁸

175. *In re S.S.K.*, 422 N.W.2d 450, 453 (Wis. 1988), *overruled by In re M.D.S.*, 485 N.W.2d 52, 55 (Wis. 1992). The strict rule denying competent counsel in dependency cases slowly gave way to a case by case determination of whether the parent or child was constitutionally entitled under *Lassiter* to court appointed counsel. If the answer was yes, the client also was constitutionally entitled to competent counsel. *In re M.D.S.*, 472 N.W.2d 819, 823-24 (Wis. 1991), *overruled by In re M.D.S.*, 485 N.W.2d 52, 55 (Wis. 1992). Those two cases were overruled by *In re M.D.S.*, which held "[w]e conclude that when the legislature provided the right to be 'represented by counsel' or represented by 'appointed counsel' the legislature intended that right to include the effective assistance of counsel." *Id.* The court in *In re D.B.*, 615 N.E.2d 1336 (Ill. App. Ct. 1993), refused to find a right to competent counsel in a termination case because the counsel was retained, not appointed, and in part because "this is a civil matter." *Id.* at 1342.

176. *In re Malinda S.*, 795 P.2d 1244, 1252-53 (Cal. 1990) (en banc). However, the vitality of *Malinda S.* is subject to considerable doubt because it did not involve the radically altered California child dependency scheme, which has unified the dependency and parental termination cases into a single court. *See, e.g., In re Arturo A.*, 10 Cal. Rptr. 2d 131, 136 (Ct. App. 1992) (expanding the constitutional right to counsel beyond the final termination hearing); *In re Emily A.*, 12 Cal. Rptr. 2d 294, 301-04 (Ct. App. 1992) (extending a potential due process right to counsel under *Lassiter* to non-termination hearings). *But see In re Andrew S.*, 32 Cal. Rptr. 2d 670, 674-75 (Ct. App. 1994) (limiting the constitutional right to counsel to specific hearings), *cert. denied*, 115 S. Ct 1408 (1995).

177. *See In re Geist*, 775 P.2d 843, 847 (Ore. 1989) (stating that *Lassiter* does not control the question of whether parents have a right to competent counsel). Although the court in *Geist* recognized a constitutional right in a narrow set of circumstances, it held that the issue could not be raised on direct appeal. *Id.* *But see In re Austin*, 810 P.2d 389, 392 (Ore. 1991) (in a dependency case the issue of incompetence of counsel could be raised on direct appeal). In *Grove v. State*, 897 P.2d 1252 (Wash. 1995), the court stated that parents in dependency cases also have a right to effective appellate counsel even if the original appointment of counsel at the trial was not constitutionally mandated. *Id.* at 1259.

178. For instance, in *Arturo A.*, 10 Cal. Rptr. 2d at 131, 135, the court stated:

While some doubt remains, we believe it is reasonably well established that reversal based on ineffective assistance of counsel is not available when the right to counsel was only statutory. Where, however, the right is of constitutional dimension, the client is entitled not only to counsel but to

Most jurisdictions have adopted the criminal standard of review for incompetence of counsel articulated by the United States Supreme Court in *Strickland v. Washington*.¹⁷⁹ "First, the defendant [or parent or child] must show that counsel's performance was deficient Second, the defendant must show the deficient performance prejudiced the defense."¹⁸⁰

Considerable differences, however, have arisen among the jurisdictions regarding the nature of a statutory right to competent counsel in dependency and termination cases. The richest discussion is contained in *In re Adoption of T.M.F.*,¹⁸¹ a Pennsylvania case where parents alleged that they were denied the effective assistance of counsel in a parental termination hearing that resulted in the placement of their child "in foster care with plans for adoption at a later date."¹⁸² The majority, in an extremely acerbic opinion, debunked the notion that termination proceedings are similar enough to criminal proceedings as to require identical or even similar procedures for analyzing allegations of incompetency of counsel.¹⁸³ The court held that "[t]he procedural rules, appellate posture and nature of the two classes of cases are so disparate that to apply the criminal doctrine to these cases would result in confusion, delays and the necessity for creation of rules of post-trial procedures, review and rehearings that are inappropriate in such matters."¹⁸⁴ The court also rejected the due process analogy between a criminal defendant's loss of liberty and the loss of a fundamental right

competent assistance of counsel.

Id.

179. 466 U.S. 668 (1984).

180. *Id.* at 687. See Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W. VA. L. REV. 1, 2 (1994). The reasons prejudice must be proven for incompetency of counsel rather than for denial of counsel are:

(1) the government is not responsible for and hence not able to prevent attorney errors; (2) attorney errors come in an infinite variety and are just as likely to be harmless as prejudicial; and (3) representation is an art, and an act or omission that is considered unprofessional in one setting may be "sound or even brilliant" in another.

Id. at 12. See also *V.F. v. State*, 666 P.2d 42, 46 (Alaska 1983); *In re James S.*, 278 Cal. Rptr. 295, 300 (Ct. App. 1993); *In re Prough*, 376 N.E.2d 1078, 1084 (Ill. App. Ct. 1978); *In re D.T.*, 547 N.E.2d 278, 282 (Ind. Ct. App. 1989); *In re Jamie TT*, 599 N.Y.S.2d 892, 895 (App. Div. 1993); *In re Pieper Children*, 600 N.E.2d 317, 325 (Ohio Ct. App. 1991); *In re D.D.F.*, 801 P.2d 703, 707 (Okla. 1990), *cert. denied*, 500 U.S. 922 (1991).

181. 573 A.2d 1035 (Pa. Super. Ct. 1990).

182. *Id.* at 1037.

183. *Id.* at 1041.

184. *Id.*

of family association.¹⁸⁵ But perhaps the most controversial reason for rejecting the criminal law analogy is that the court determined that the role of counsel in termination cases is much less important than in criminal trials:

[B]ecause of the doctrine of *Parens Patriae* and the need to focus on the best interest of the child, the trial judge, who is the fact finder, is required to be an attentive and involved participant in the process Under the aegis of the court, the role of the lawyer, while important, does not carry the deleterious impact of ineffectiveness that may occur in criminal proceedings.¹⁸⁶

Finally, the court distinguished criminal cases where collateral attack based on incompetency of counsel will not prejudice the defendant, with the effect of delay in termination cases which "may do incalculable damage to the child with only marginal or questionable benefit to the parent."¹⁸⁷

185. *Id.* at 1041-42.

186. *Id.* at 1042. The *T.M.F.* court's faith in the trial judge is subject to attack for at least two reasons. Trial judges in the dependency system are overloaded with cases and cannot physically give cases more than a few moments of their attention. In his concurring and dissenting opinion in *T.M.F.*, Justice Montemuro gave a vivid description of juvenile court judges:

Harried judges, case-laden by the demands of populous judicial districts, or in some instances bearing the entire judicial burden of the areas they serve, may, despite a full measure of dedication, simply lack the time to perform the role of *parens patriae* in any meaningful way Under our system of jurisprudence there is no substitute for competent legal counsel whose primary responsibility it has always been to ferret out all facts of a case and bring them to the attention of the trial judge.

Id. at 1047 (Montemuro, J., concurring in part and dissenting in part). The court's vision of a divine shepherd looking after the flock of cases and having time to minister to individual children with painstaking care is a false concept.

The *T.M.F.* court did not acknowledge the institutional and idiosyncratic bias inherent in the nature of dependency and termination cases. Although judges may be better able to "avoid intellectual errors or to trace a chain of inferences, the presumption that they can disregard inappropriate prejudicial data is overbroad." William W. Patton, *Evolution In Child Abuse Litigation: The Theoretical Void Where Evidentiary And Procedural Worlds Collide*, 25 LOY. L.A. L. REV. 1009, 1012 (1992) [hereinafter Patton, *Evolution*]. Even psychological professionals have "an almost universal negative reaction and indeed, revulsion towards the child molester." Arlyne M. Diamond, *The Child Molester and the Legal Process* 6 (1984) (unpublished Ph.D. dissertation, Pacific Graduate School of Psychology). Also, the often amorphous legal standards in dependency cases "promote normative decision-making strongly influenced by individual judges' attitudes, beliefs and values." Patton, *Evolution, supra*, at 1013. Finally, those normative decisions are "exacerbated perhaps to an even greater degree by the cultural biases of trial judges. Juvenile court judges come from a very narrow segment of society; over ninety percent are white, married males with an average age of about fifty-three years." *Id.* at 1014 (citing 1974 statistics).

187. *T.M.F.*, 573 A.2d at 1043.

Nonetheless, the *T.M.F.* majority determined that in certain circumstances, allegations of incompetence of counsel would be considered on direct appeal of a termination order, but not on collateral attack.¹⁸⁸ However, the majority rejected the criminal standard of review set out by the Supreme Court in *Strickland*, and instead adopted the following standard:

[A]n allegation of ineffectiveness of counsel on appeal would result in a review by this Court of the total record with a determination to be made whether on the whole, the parties received a fair hearing, the proof supports the decree by the standard of clear and convincing evidence, and upon review of counsel's alleged ineffectiveness, any failure of his stewardship was the cause of a decree of termination.¹⁸⁹

Other states have determined that the *Strickland* standard for judging effectiveness of counsel in criminal cases should be used in determining whether statutorily appointed counsel in child dependency cases was competent: "A right to counsel is of little value unless there is an expectation that counsel's assistance will be effective. Accordingly, we conclude that parents [who are appointed counsel pursuant to Massachusetts statutes] are entitled to the effective assistance of counsel" ¹⁹⁰

California has witnessed the greatest number of inconsistent appellate court decisions regarding the issue of effectiveness of counsel in child dependency trials. In 1981, the court in *In re Michael S.*¹⁹¹ held that parents with counsel appointed pursuant to statute have no right to competent court appointed counsel because dependency proceedings are civil, not criminal.¹⁹² A few years later the court in *In re Christina H.*¹⁹³ held that parents entitled to appointment of counsel under *Lassiter* are also entitled to effective assistance of counsel if they

188. *Id.*

189. *Id.* at 1044. Judge Beck, concurring, suggested that parents should have to meet a higher burden than criminal defendants in demonstrating that ineffectiveness of counsel warrants reversal. *Id.* at 1055 (Beck, J., concurring). Instead of having to prove a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different," *id.* at 1055 n.7 (Beck, J., concurring), he argues that "[t]he parent should come forward with evidence that indicates that a high degree of likelihood exists that but for an unprofessional error on counsel's part, parental rights would not have been terminated." *Id.* at 1055 (Beck, J., concurring).

190. *In re Stephen*, 514 N.E.2d 1087, 1090-91 (Mass. 1987). See also *In re D.P.*, 465 N.W.2d 313, 316 (Iowa Ct. App. 1990).

191. 179 Cal. Rptr. 546 (Ct. App. 1981).

192. *Id.* at 554. See Patton, *Torn Asunder*, *supra* note 12, at 308-20.

193. 227 Cal. Rptr. 41 (Ct. App. 1986).

face the likelihood of permanent termination of parental rights.¹⁹⁴ At about that same time, the court in *In re Patricia E.*¹⁹⁵ held that "[t]he minor has a statutory right to appointment of counsel. That right necessarily entails a right to effective assistance of the counsel appointed."¹⁹⁶ This California case law which developed in the 1980s remained settled until the legislature rewrote the dependency and termination laws to unify both actions in juvenile court.¹⁹⁷

Since 1992, a series of inconsistent California appellate court decisions have attempted to articulate the nature of the right to competent counsel under the new statutory scheme [hereinafter pre-S.B. 243].¹⁹⁸ In *In re Arturo A.*,¹⁹⁹ the court continued the dichotomy between a constitutional and a statutory right to counsel in holding that:

While some doubt remains, we believe it is reasonably well established that reversal based on ineffective assistance of counsel is not available when the right to counsel was only statutory. Where, however, the right is of constitutional dimension, the client is entitled not only to counsel but to competent assistance of counsel.²⁰⁰

The court noted that reliance on pre-S.B. 243 cases may be misguided because those cases not only distinguished between statutory versus constitutional rights to counsel, but also between the nature of the proceeding; in dependency cases there was no right to competent counsel, while, in termination cases, there was.²⁰¹ For the *Arturo A.* court, the dispositive variable was not the label of the hearing, but rather whether the hearings have the "potential of termination of parental rights."²⁰² If the potential for termination of parental rights exists, then there is a constitutional right to competent counsel; however, "[p]resumably those hearings which do not directly threaten permanent separation of child from parent do not implicate due process rights and hence cannot be productive of error by reason of ineffective assistance of counsel."²⁰³ *Arturo A.* extended the right to competent counsel to

194. *Id.* at 43. See also *In re Christina P.*, 220 Cal. Rptr. 525, 532 (Ct. App. 1985). But see *In re Ammanda G.*, 231 Cal. Rptr. 372, 373 (Ct. App. 1986).

195. 219 Cal. Rptr. 783 (Ct. App. 1985).

196. *Id.* at 787-88.

197. For a description of the changes in the dependency and termination laws in California, see *supra* notes 78-81 and accompanying text.

198. For a discussion of some of the different appellate arguments regarding ineffectiveness of counsel, see Seiser, *supra* note 163.

199. 10 Cal. Rptr. 2d 131 (Cal. Ct. App. 1992).

200. *Id.* at 135.

201. *Id.* at 136.

202. *Id.*

203. *Id.* The court noted that this was consistent with pre-S.B. 243 law as stated in *In*

hearings which involve a referral to the termination hearing since they have the "potential of terminating reunification services and setting a [termination] hearing."²⁰⁴

The next California court to address the scope of the right to competent counsel, *In re Emilye A.*,²⁰⁵ used a *Lassiter/Matthews* test²⁰⁶ in determining whether a parent has a constitutional right to counsel as well.²⁰⁷ The *Emilye A.* court stated that "[l]ike termination proceedings, dependency proceedings may work a unique kind of deprivation. Indeed, they are frequently the first step on the road to permanent severance of parental ties."²⁰⁸ The court therefore held that "where a parent has established a constitutional right to counsel, whether appointed or retained, in a dependency proceeding, she or he is entitled to effective assistance of counsel."²⁰⁹ The court in *In re Emilye A.* thus approved a test much broader than used in *In re Arturo A.*, because the nature of the hearing in *Emilye A.* is not dispositive, but rather just one variable to consider in the *Lassiter/Matthews* balancing test.²¹⁰ Although the California courts appear to have determined that there is no right to effective assistance of counsel for statutorily appointed attorneys, the legislature has recently provided that right: "All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel."²¹¹

B. Proposed Standards of Appellate Review for Ineffective Assistance of Counsel

Whether California will establish different standards of review for statutory as opposed to constitutional rights to competent counsel remains uncertain. *Emilye A.* adopted the *Strickland* standard for inef-

re Malinda S., 795 P.2d 1244, 1262-63 (Cal. Ct. App. 1990). *Id.*

204. *Id.*

205. 12 Cal. Rptr. 294 (Ct. App. 1992).

206. See *supra* part II for a discussion of these tests.

207. *Emilye A.*, 12 Cal Rptr. at 300-03.

208. *Id.* at 301.

209. *Id.* The court relied, in part, on the *Lassiter* concern about possible criminal charges in determining that the father had a constitutional right to appointed counsel. *Id.*

210. Seiser, *supra* note 163, at 19: "Thus under the *Emilye A.* decision the claim of ineffective assistance of counsel can arguably be raised at any dependency hearing." But see *In re Andrew S.*, 32 Cal. Rptr. 2d 670, 674-75 (1994), *cert. denied*, 115 S. Ct. 1408 (1995) (finding no constitutional right to counsel at a CAL. WELF. & INST. CODE § 366.26 hearing).

211. CAL. WELF. & INST. CODE § 317.5 (a) (West 1996). Section 317.5 (b) also provides that "[e]ach minor who is the subject of a dependency proceeding is a party to that proceeding." CAL. WELF. & INST. CODE § 317.5 (b) (West 1996).

factive assistance of counsel in dependency proceedings.²¹² However, *Arturo A.* added a decisive layer to the *Strickland* test. Not only must the parent “show negligence on the part of her attorney but also that the negligence resulted in prejudice. In order to show prejudice it would be necessary to show that a different result would be obtained were the [finding of termination] reversed and a new hearing ordered.”²¹³ *Arturo A.* thus requires the parent to demonstrate that *now* rather than at the time of the alleged incompetence, the parents would be able to retain or regain custody of their child. As the *Arturo A.* court stated, “[t]he new hearing would entail not only the facts and evidence brought forth at the original hearing, but of necessity would require evidence as to the current status of the child.”²¹⁴ The court will require evidence on “what has happened to the child since the hearing that is being reversed. Has the child been placed with its adopting parents? Is the child doing well? Has the child bonded to new foster-adoptive parents? If the child two years ago knew his parent, does he still remember her?”²¹⁵ The *Arturo A.* standard of prejudice is so bizarre that not even the court itself could posit it with a straight face: “What we are discussing is, in reality, the appellate court’s holding an updated review hearing in the guise of determination of prejudice. Should appellate courts do this? Probably not.”²¹⁶

Although I laud the *Arturo A.* court’s attempt to consider the best interests of the child in assuring a stable placement, the proposed appellate remedy is problematic for several reasons. First, placing the burden on the non-custodial parent to present the appellate court with sufficient evidence of the child’s current status is unfair because the parent will not have access to much of the custody and maturation data; the county and the foster/prospective adoptive parents are holders of most of that data.²¹⁷ Second, the parent or the parent’s counsel will be required to investigate and interview dozens of witnesses such as care givers, teachers, religious leaders, relatives, and social workers in order to gather sufficient data to present to the court in a writ regarding the likelihood of regaining custody at a termination hearing based upon the “now existing” status of the child. Such fact investigation will not

212. *Emilye A.*, 12 Cal. Rptr. at 304.

213. *Arturo A.*, 10 Cal. Rptr. 2d at 139.

214. *Id.* at 140 (emphasis added).

215. *Id.* at 140-41.

216. *Id.* at 141.

217. *Id.* The court refused to remand the case because it had been presented with insufficient evidence regarding the present status of the child. *Id.* Therefore, this evidentiary burden may very well be dispositive on the issue of prejudice caused by incompetence of counsel. *Id.*

only cost a great deal of money, but it will also take considerable time. Finally, the parent will be prejudiced by this allocation of burden because, as the *Arturo A.* court noted, the longer the review takes, the less likely the return of the child would be at a new section 366.26 hearing because the child may have bonded with alternative care takers.

A fairer and more cost efficient procedure would be to require the parent to demonstrate prejudice under *Strickland* regarding the hearing in which counsel was alleged to have been incompetent. The state would then assume the burden to demonstrate that, under current facts, the earlier incompetence of counsel is harmless because of the current status of the child. Shifting to the state the burden of showing the harmlessness of counsel's incompetence would decrease the speculative fact investigation that parents would need to use because parents would then merely have to rebut the state's arguments regarding the harmlessness of the error rather than fashion their own.

Arturo A. indicated that "[i]f and when a proper case arises, and a prima facie showing of probable prejudice is made before the appellate court, we will probably remand the case to the trial court for the evidentiary hearing as to prejudice."²¹⁸ This will again extend uncertainty, frustrate finality, and substantially increase the parent's burden, because the longer the child is separated, the more difficult it will be to demonstrate the child should be returned. But what alternatives exist? There are at least two. First, as courts have often noted, cases concerning termination of parental rights are very different than most cases; for the past two decades courts and legislatures have crafted novel and prophylactic rules in these delicate cases.²¹⁹ One approach is to have the appellate court sit as the finder of fact and decide whether the denial of competent counsel warrants a new protection or termination hearing in the trial court based upon a finding that denial of competent appointed counsel was sufficiently prejudicial. Those arguments against courts acting as fact finders in criminal cases do not apply in termination cases because there is no jury and the trial court already makes all determinations of fact.²²⁰ Having the appellate court decide the incompetence issue will obviate two extra procedural hearings required by the *Arturo A.* approach: there will be no remand on

218. *Id.*

219. For discussions of the many specialized rules of court and evidence code modifications regarding dependency and termination cases, see Patton, *Evolution*, *supra* note 186, at 1016-23; Patton, *Appellate Review*, *supra* note 116, at 542.

220. See George C. Christie, *Judicial Review Of Findings Of Fact*, 87 NW. U. L. REV. 14, 52-56 (1992).

the question of prejudice and only a writ or review to the Supreme Court will remain, thus shortening the appellate process.²²¹

A second, yet less attractive approach, is to require the parent to prove *Strickland* prejudice in the appellate court regarding the effect of alleged denial of counsel in the hearing in which it occurred. If the parent demonstrates such prejudice, the appellate court would remand to the trial court to determine whether under the child's current status the denial of competent counsel in the earlier hearing still requires a new child protection or termination hearing. If the answer is "no," then the parents can appeal that order. If the answer is "yes," then a new hearing in the trial court should be held immediately to determine the proper disposition of the case pursuant to the laws governing the adjudicatory or termination hearings. Both of these approaches provide a much speedier procedure for determining finality than the *Arturo A.* approach and place the burden of demonstrating prejudice more fairly on the parties best able to prove the effect of the incompetence of counsel.

IV. CONCLUSION

States have tremendous power to determine the continuing existence of family units. The procedures employed to decide whether the government will subject mothers, fathers, and children to involuntary state intervention into their family affairs will often be dispositive and outcome determinative. All empirical evidence suggests that parents and children without attorneys fair much poorer in protection and termination cases than those who are represented. This Article has suggested that not applying the *Fulminante* reversal per se standard to cases of denial of counsel in these fundamental rights hearings will lead to results which are not in the best interests of families or states. However, if a jurisdiction rejects *Fulminante*, the best alternative is the *Chapman* standard of review, which properly places the burden on the state to demonstrate beyond a reasonable doubt that the denial of counsel was harmless. Although states are beginning to experiment with standards lesser than those required under *Strickland* when determining the prejudice from appointment of incompetent counsel,

221. Of course, the parents can still file a writ or review in the California Supreme Court, but it does at least accelerate finality of appellate review. Some may believe that parents' appellate rights will be eviscerated by losing a review by the intermediate court of appeal. But the judgment on the issue of prejudice in the court of appeal is less likely to be subject to the predilections and normative biases of a ruling by a single superior court judge; the parents therefore gain more in fairness and accuracy of decision and in an expedited review than they lose in forfeiting an automatic review in the court of appeal.

those experiments are not in the state's or family's best interests. There is no evidence that changing the standard will reduce the cost of the appellate process or delimit the extensive duration from initial juvenile court jurisdiction to parental termination or eventual family reunification and dismissal of the wardship. Since the state, as much as the family, has a compelling state interest in the accuracy and completeness of the hearings, states should not pose unreasonable and often impossible burdens on parents or children who allege that they were denied effective counsel. By shifting the burden to parents to demonstrate prejudice not only from the denial of competence of counsel but also to demonstrate that under current facts they would likely regain custody of their child will delay certainty, reduce accuracy, and delay finality. The very least a state can do is assure that parents will not permanently lose their children based upon the incompetent representation of court appointed counsel.