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No Harm, No Foul - Why Harmless Error Analysis Should Not Be Used to Review Wrongful Denials of Counsel to Parents in Child Welfare Cases

Vivek Sankaran
University of Michigan Law School

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NO HARM, NO FOUL?
WHY HARMLESS ERROR ANALYSIS SHOULD NOT BE USED TO REVIEW
WRONGFUL DENIALS OF COUNSEL TO PARENTS IN CHILD WELFARE CASES

Vivek S. Sankaran*

I. INTRODUCTION	14
II. THE INTERCONNECTED NATURE OF CHILD PROTECTIVE PROCEEDINGS	18
III. THE CRUCIAL ROLE PARENTS' COUNSEL PLAY IN PREVENTING ERRONEOUS TERMINATIONS OF PARENTAL RIGHTS	24
IV. A HOLLOW RIGHT	28
V. THE APPROPRIATE REMEDY FOR A SYSTEMIC PROBLEM	35
VI. CONCLUSION	41

The application of a harmless error standard by appellate courts reviewing erroneous denials of counsel in child protective cases undermines a critical procedural right that safeguards the interests of parents and children. Case law reveals that trial courts, on numerous occasions, improperly reject valid requests for counsel, forcing parents to navigate the child welfare system without an advocate.¹ Appellate courts excuse these violations by speculating that the denials caused no significant harm to the parents,² which is a conclusion that a court can never reach with any certainty.

The only appropriate remedy for this significant problem is a bright-line rule requiring the automatic reversal of the termination of parental rights (TPR) decision in situations where a parent is denied the assistance of an attorney at critical stages of the case leading up to the TPR hearing. This rule is consistent with the United States Supreme Court's jurisprudence concerning the denial of counsel in criminal cases³ and would, as a matter of policy, lead to better outcomes for children in foster care. It would also help further the appearance of a just decision making process that respects the rights of all parties affected

*Clinical Assistant Professor of Law, University of Michigan Law School.

1. See, e.g., *In re Interest of E.J.C.*, 731 N.W.2d 402, 404 (Iowa Ct. App. 2007) (noting that the district court denied the mother's request for a court-appointed attorney in the termination of parental rights proceeding because the district court deemed the request untimely).

2. See, e.g., *People ex rel. S.D. Dep't of Soc. Servs.*, 691 N.W.2d 586, 592 (S.D. 2004) ("Although the trial court erred by not ensuring representation by counsel at the adjudicatory phase, that error was harmless because it did not taint the disposition of this matter, and remanding for an adjudicatory hearing would accomplish nothing.").

3. See *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

by the child welfare system—an important consideration given the current perceptions of the system.⁴

I. INTRODUCTION

The United States Supreme Court applies a bright-line test when trial courts erroneously deny counsel for indigent defendants in criminal cases at critical stages of the proceedings. When such a deprivation occurs, the Court regards the mistake as a structural error, automatically reversing the conviction without engaging in a fact-specific inquiry about whether the defendant was harmed by the deprivation of counsel.⁵ The Court adopted this approach “because counsel is critical to a fair trial and no one can reliably determine the level of prejudice arising from the denial of a right to counsel.”⁶ The deprivation “affect[s] the framework within which the trial proceeds,”⁷ and in the absence of the right to counsel, a “trial cannot reliably serve its function as a vehicle for determination of guilt or innocence” and the result cannot be viewed as “fundamentally fair.”⁸ As Justice Scalia explained in *United States v. Gonzalez-Lopez*,⁹ where a litigant’s right to counsel has been violated, a harmless error analysis “would be a speculative inquiry into what might have occurred in an alternate universe.”¹⁰

Nearly every appellate court across the country has adopted an identical approach when addressing erroneous denials of counsel in TPR cases, in which a right to counsel exists in most states primarily through state statutes and court rules.¹¹ When that right has been violated at a TPR hearing, courts have automatically reversed the termination decrees.¹² In adopting the standard of

4. See Marcia Lowry, *Derring-Do in the 1980s: Child Welfare Impact Litigation After the Warren Years*, 20 FAM L.Q. 255, 257 (1986) (“Although child welfare services can and should be a critical and constructive point of intervention into the lives of these children and their families . . . child welfare systems often inflict additional harm on already damaged children . . .”).

5. See *Neder*, 527 U.S. at 8 (quoting *Johnson*, 520 U.S. at 468).

6. See *State v. Shirley E. (In re Termination of Parental Rights to Torrance P., Jr.)*, 724 N.W.2d 623, 635 (Wis. 2006) (discussing the Supreme Court’s automatic reversal rule where criminal defendant has been totally deprived of counsel).

7. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

8. *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986)) (internal quotation marks omitted).

9. 548 U.S. 140 (2006).

10. *Id.* at 150.

11. See, e.g., S.C. CODE ANN. § 63-7-2560(a) (2010) (“Parents, guardians, or other persons subject to a termination of parental rights action are entitled to legal counsel. Those persons unable to afford legal representation must be appointed counsel by the family court, unless the defendant is in default.”).

12. See *Smoke v. State, Dep’t of Pensions & Sec.*, 378 So. 2d 1149, 1150 (Ala. Civ. App. 1979); *Daniel Y. v. Ariz. Dep’t of Econ. Sec.*, 77 P.3d 55, 61 (Ariz. Ct. App. 2003); *Imperial Cnty. Dep’t of Soc. Servs. v. Maria F. (In re Michelle C.)*, 32 Cal. Rptr. 3d 125, 140 (Cal. Ct. App. 2005); *J.B. v. Dep’t of Children & Family Servs.*, 703 So. 2d 1208, 1210 (Fla. Dist. Ct. App. 1997); *Wilkins v. Ga. Dep’t of Human Res.*, 337 S.E.2d 20, 24 (Ga. 1985); *In re Interest of J.M.B.*, 676 S.E.2d 9, 13 (Ga. Ct. App. 2009); *State v. Doe (In re Interest of Doe)*, 850 P.2d 211, 216 (Idaho Ct.

automatic reversal, state courts have followed the primary reasoning employed by the Supreme Court in criminal cases, that the level of prejudice cannot be ascertained when counsel has been denied.¹³ For example, in *In re Michelle C.*,¹⁴ the California Court of Appeals noted that “reversal is required regardless of the outcome, because we cannot say that the *proceeding* itself was fair.”¹⁵ Similarly, in *In re Termination of Parental Rights to Torrance P., Jr.*,¹⁶ the Wisconsin Supreme Court, in characterizing the error as structural, observed that a termination proceeding “cannot reliably serve its function” and that the “fairness and integrity of the judicial proceeding . . . [is] placed in doubt” when counsel is wrongly denied.¹⁷ Appellate courts have consistently followed this approach when trial courts erroneously deny counsel to parents at TPR hearings.¹⁸

But, when confronted with the wrongful denial of counsel to parents in the critical hearings leading up to the final TPR hearing, appellate courts have been split on whether to apply a rule of automatic reversal. While a few courts have

App. 1993); *In re Adoption of Sotelo*, 474 N.E.2d 413, 415 (Ill. App. Ct. 1985); *Taylor v. Scott (In re Adoption of Taylor)*, 570 N.E.2d 1333, 1335–36 (Ind. Ct. App. 1991); *In re Interest of E.J.C.*, 731 N.W.2d 402, 404 (Iowa Ct. App. 2007); *A.P. v. Commonwealth*, 270 S.W.3d 418, 422 (Ky. Ct. App. 2008); *In re Adoption of Imelda*, 892 N.E.2d 336, 346–47 (Mass. App. Ct. 2008); *Dep’t of Soc. Servs. v. Dick (In re Keifer)*, 406 N.W.2d 217, 219 (Mich. Ct. App. 1987); *In re Interest of J.S.W.*, 295 S.W.3d 877, 882 (Mo. Ct. App. 2009); *Wilkinson v. Thornton (In re K.L.T.)*, 237 S.W.3d 605, 607 (Mo. Ct. App. 2007); *In re A.S.A.*, 852 P.2d 127, 130 (Mont. 1993); *Little v. Little*, 487 S.E.2d 823, 825 (N.C. Ct. App. 1997); *In re Sheffey*, 854 N.E.2d 508, 513 (Ohio Ct. App. 2006); *Lynda S. v. State (In re Chad S.)*, 580 P.2d 983, 986 (Okla. 1978); *Sweetin v. State (In re S.S.)*, 90 P.3d 571, 577 (Okla. Civ. App. 2004); *In re Adoption of R.I.*, 312 A.2d 601, 603 (Pa. 1973); *In re Valle*, 31 S.W.3d 566, 572–73 (Tenn. Ct. App. 2000); *In re Interest of T.C.B.*, No. 08-02-00515-CV, 2003 WL 21810958, at *2 (Tex. Ct. App. Aug. 7, 2003); *In re Welfare of G.E.*, 65 P.3d 1219, 1226 (Wash. Ct. App. 2003); *In re Lindsey C.*, 473 S.E.2d 110, 125 (W. Va. 1995); *In re Termination of Parental Rights to Torrance P., Jr.*, 724 N.W.2d at 635; *State v. Patti P. (In re Termination of Parental Rights to Phillip E.)*, No. 2007AP324, 2007 WL 2769400, at *4–5 (Wis. Ct. App. Sept. 25, 2007); *see also Williams v. Bentley*, 809 N.Y.S.2d 205, 206 (N.Y. App. Div. 2006) (noting that denial of the right to counsel in a private custody proceeding required reversal “without regard to the merits of the unrepresented party’s position”); *Richard v. Michna*, 431 S.E.2d 485, 488 (N.C. Ct. App. 1993) (reversing the TPR decision because the court failed to appoint a guardian *ad litem* for a mentally disabled mother as required by state law, even though the court believed that the mother was not prejudiced).

13. *See supra* text accompanying notes 5–6.

14. 32 Cal. Rptr. 3d 125 (Ct. App. 2005).

15. *Id.* at 139.

16. 724 N.W.2d 623 (Wis. 2006).

17. *Id.* at 635. *See also In re J.M.B.*, 676 S.E.2d at 12 (“[W]hen the state is terminating a parent’s ‘fundamental and fiercely guarded right’ to his or her child . . . the total and erroneous denial of appointed counsel during the termination hearing is presumptively harmful because it calls into question the very structural integrity of the fact-finding process.” (quoting *Nix v. Dep’t of Human Res.*, 225 S.E.2d 306, 307 (Ga. 1976))).

18. *See cases cited supra* note 12.

automatically reversed TPR decisions on this basis,¹⁹ a larger number of appellate courts have employed a harmless error test and have placed the burden on parents to demonstrate how the earlier appointment of counsel would have changed the outcome in the case.²⁰

Consider the following examples that demonstrate the flux created by these divergent approaches.

On May 16, 2004, the children of Miguel Meza-Cabrera were placed in foster care after the state alleged that his children were living in inadequate conditions and were lacking stability.²¹ Mr. Meza-Cabrera was incarcerated at the time the children were removed and throughout the entirety of the case.²² On May 20, 2004, the trial court, as required by state law, ordered that Mr. Meza-Cabrera be appointed an attorney to represent him.²³ Counsel, however, was not actually provided to him for nearly two years.²⁴ During the time he was without counsel, the court determined that the state's allegations were true, adjudicated the children neglected, placed the children in foster care, and considered, but ultimately denied, moving the children to a relative's home.²⁵ Subsequently, the court terminated Mr. Meza-Cabrera's parental rights.²⁶ He was represented by counsel at that final hearing and for some time before then.²⁷

Mr. Meza-Cabrera's story is comparable to that of Rosa C., who had her two-month-old child, Elijah, removed from her care in June 2005 because of

19. *E.g.*, T.B. v. State Dep't of Health & Rehabilitative Servs. (*In re* Interest of J.B.), 624 So. 2d 792, 792 (Fla. Dist. Ct. App. 1993) (noting that the mother was not advised of her right to counsel at the dependency hearing and consequently reversing the trial court's TPR order).

20. *See* Jefferson v. Ark. Dep't of Human Servs., 158 S.W.3d 129, 136 (Ark. 2004); Briscoe v. State, Dep't of Human Servs., 912 S.W.2d 425, 427 (Ark. 1996); Meza-Cabrera v. Ark. Dep't of Human Servs., No. CA 07-932, 2008 WL 376290, at *4 (Ark. Ct. App. Feb. 13, 2008); Farmer v. Ark. Dep't of Human Servs., No. CA 06-185, 2006 WL 2879454, at *4 (Ark. Ct. App. Oct. 11, 2006); Fresno Cnty. Dep't of Soc. Servs. v. Lucia R. (*In re* Ronald R.), 44 Cal. Rptr. 2d 22, 30-31 (Cal. Ct. App. 1995); Hughes v. Div. of Family Servs., 836 A.2d 498, 512 (Del. 2003); State *ex rel.* T.D. v. R.D., 781 So. 2d 871, 875-76 (La. Ct. App. 2001); Dep't of Human Servs. v. Bryant (*In re* Gentry), No. 287137, 2009 WL 485397, at *2 (Mich. Ct. App. Feb. 26, 2009) (*per curiam*); Dep't of Human Servs. v. Coleman (*In re* Coleman), No. 287191, 2009 WL 456380, at *2 (Mich. Ct. App. Feb. 24, 2009) (*per curiam*); Dep't of Human Servs. v. Shabazz (*In re* Shabazz), No. 286130, 2009 WL 325316, at *1 (Mich. Ct. App. Feb. 10, 2009) (*per curiam*); Dep't of Human Servs. v. Craven (*In re* Perri), No. 280156, 2008 WL 1991736, at *5 (Mich. Ct. App. May 8, 2008) (*per curiam*); Dep't of Soc. Servs. v. Hall (*In re* Hall), 469 N.W.2d 56, 58-59 (Mich. Ct. App. 1991); *In re* Welfare of S.A.W., No. A09-0517, 2009 WL 2998116, at *13 (Minn. Ct. App. Oct. 28, 2009); *In re* D.S., 833 P.2d 1090, 1093 (Mont. 1992); People *ex rel.* S.D. Dep't of Soc. Servs., 691 N.W.2d 586, 592 (S.D. 2004); *In re* Interest of Tiffany Marie S., 470 S.E.2d 177, 186 (W. Va. 1996); MN v. State, Dep't of Family Servs. (*In re* Interest of MN), 78 P.3d 232, 240 (Wyo. 2003).

21. *See* Meza-Cabrera, 2008 WL 376290, at *1.

22. *Id.* at *2.

23. *Id.* at *1.

24. *Id.* at *4.

25. *See id.* at *1.

26. *Id.* at *2.

27. *Id.* at *4.

allegations of physical abuse, among other concerns.²⁸ Immediately upon the child's removal from the home, Rosa was appointed an attorney who represented her until the TPR hearing.²⁹ The attorney advocated for Rosa for over a year, during which time the court adjudicated the child neglected, offered Rosa services, and determined the permanency plan for Elijah.³⁰ During each of these stages, she had the benefit of court-appointed counsel.³¹

In October 2006, the State filed a petition requesting the termination of Rosa's parental rights.³² A court procedure required Rosa to fill out a form to request counsel for the TPR hearing, but Rosa waited until the day before the hearing to complete the form; the trial court denied the request as untimely.³³ She was unrepresented at the TPR hearing, and the court terminated her parental rights.³⁴

These situations, which occur all too frequently in child welfare cases, share important similarities. In both, parents were denied counsel at critical stages of the case.³⁵ Important decisions that permanently altered the parents' relationship with their children were made during the hearings, yet the parent had no advocate.³⁶ And in both situations, the appellate court reviewing the case determined that the trial court committed clear legal error in failing to appoint counsel for the parent.³⁷

Yet, on appeal, the errors committed by the trial court were handled in completely different ways. In Rosa's case, the appellate court summarily reversed the decision to terminate her parental rights after finding legal error; the court did not engage in a fact-based inquiry about the possible effects of the error on the outcome of the case.³⁸ However, in Mr. Meza-Cabrera's case, the appellate court employed a very different approach. The Arkansas Court of Appeals affirmed the termination of his parental rights despite the clear legal error.³⁹ The court held that Mr. Meza-Cabrera had the burden of demonstrating the precise impact of the error on the outcome of his case, and found that because he had failed to do so, the nearly two-year erroneous deprivation of counsel was harmless.⁴⁰

28. *In re Interest of E.J.C.*, 731 N.W.2d 402, 403 (Iowa Ct. App. 2007).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *See supra* text accompanying notes 24–25, 32–34.

36. *See supra* text accompanying notes 24–25, 32–34.

37. *See Meza-Cabrera v. Ark. Dep't of Human Servs.*, No. CA 07-932, 2008 WL 376290, at *4 (Ark. Ct. App. Feb. 13, 2008); *In re Interest of E.J.C.*, 731 N.W.2d at 404.

38. *In re Interest of E.J.C.*, 731 N.W.2d at 404.

39. *Meza-Cabrera*, 2008 WL 376290, at *4.

40. *See id.*

This Article argues that these two scenarios should be treated the same by appellate courts. In both situations, there is no way for reviewing courts to meaningfully ascertain the prejudice created by the trial court's error. Therefore, the erroneous deprivation of counsel at critical stages in child protective cases should always be treated as a structural error requiring automatic reversal of the TPR decision.

Part I of this Article provides a brief overview of the typical child welfare case and demonstrates the myriad of ways in which decisions made during earlier stages of the case impact the final TPR hearing. Part II discusses the parental right to counsel, the basis for this right, and the role that counsel plays in creating the record that is ultimately relied upon by the trial court prior to making a TPR decision. Part III discusses some of the factors that may be causing the erroneous denials of counsel by trial courts across the country, and further explores the inadequacy of the current approach taken by appellate courts to address the violations. Finally, Part IV argues that appellate courts should view inappropriate denials of counsel at all hearings of the child welfare case as structural errors requiring automatic reversal.

Before proceeding with the substantive arguments in this Article, one major limitation applies. This Article sets forth a policy argument regarding the appropriate remedy that appellate courts should apply when trial courts erroneously deny counsel to parents in child protection cases. Unfortunately, in a number of jurisdictions the absolute right to counsel in dependency and TPR proceedings does not exist and thus trial courts, in their discretion, may properly deny parents the assistance of an attorney.⁴¹ Because the deprivation of counsel would not constitute legal error in these states, the policy proposal suggested in this Article—which involves the appropriate remedy for the *erroneous* deprivation of counsel—would not be applicable.

II. THE INTERCONNECTED NATURE OF CHILD PROTECTIVE PROCEEDINGS

Due to the fundamental right at stake—parents' right to direct the upbringing of their child⁴²—child welfare cases are governed by federal and state laws that

41. See Vivek Sankaran, A National Survey on a Parent's Right to Counsel in Termination of Parental Rights and Dependency Cases (unpublished manuscript), *available at* <http://www.law.umich.edu/centersandprograms/ccl/specialprojects/Documents/National%20Survey%20on%20a%20Parent%27s%20Right%20to%20Counsel.pdf> (last visited Oct. 1, 2011) (surveying state statutes and court rules providing for a parent's right to counsel in TPR and dependency hearings).

42. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course . . ."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Stanley v. Illinois*,

mandate strict procedural requirements.⁴³ Cases begin with the filing of a petition containing allegations that a parent abused or neglected a child.⁴⁴ The petition may contain a request that a child be removed immediately, and if removal is requested or has already occurred, a hearing must be held within twenty-four to seventy-two hours to make initial decisions concerning the authorization of the petition, immediate placement of the child, parenting time between the child and the parent, and other issues.⁴⁵ Parents are entitled to a full trial to adjudicate the allegations in the petition against them, which in some states may be before a jury.⁴⁶ If the parent loses the trial or enters into a plea, the court obtains jurisdiction over the child and the case moves to the dispositional phase.⁴⁷

The first hearing after the adjudication trial is the dispositional hearing, at which the court determines the placement of the child and, based on the reasons for the adjudication, orders the parent and agency to comply with a case service plan that outlines the steps required to reunite the family and bring the case to closure.⁴⁸ Subsequent dispositional review hearings are held every three to six months to review the child's placement, assess the parties' compliance with the service plan, and determine whether any changes need to be made.⁴⁹ For example, at each of these hearings, parents may request more extensive visitation with their child, a different placement for their child, or additional services to help them regain custody.⁵⁰ Similarly, the child welfare agency or prosecuting

405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" (alteration in original) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring))); *May v. Anderson*, 345 U.S. 528, 534 (1953) ("[A] mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.").

43. Over the past thirty years, the number of federal and state laws pertaining to the child welfare system has increased significantly. For an overview of federal child welfare policy, see Frank Vandervort, *Federal Child Welfare Legislation*, in *CHILD WELFARE LAW & PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES* 199 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010). State procedures vary considerably. The intent of this Part is to provide a basic summary of the process.

44. See, e.g., *In re Interest of J.M.B.*, 676 S.E.2d 9, 10 (Ga. App. 2009) (noting that the case began with the Department of Family and Children Services filing a petition that alleged the child was deprived).

45. See Sue Badeau et al., *A Child's Journey Through the Child Welfare System*, in *CHILD WELFARE LAW & PRACTICE REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES* 213, 224 (Marvin Ventrell & Donald N. Duquette eds., 2005).

46. E.g., MICH. CT. R. 3.911 (providing parties in a child protective case with the right to a trial by jury); see Badeau et al., *supra* note 45, at 225.

47. See Badeau et al., *supra* note 45, at 226.

48. See *id.* at 226–28 ("The case plan should outline the responsibilities of each party, including what services the agency will provide and what is expected of the parents and child.").

49. *Id.* at 229–30.

50. See *id.* at 230.

attorney may request that visits be terminated, that children remain in foster care,⁵¹ or that new services not be offered to parents because they are beyond the scope of what the agency is obligated to provide.⁵² Review hearings are continuous in nature in the sense that each builds on decisions made at previous hearings.⁵³

If a child is under the supervision of the state and in foster care, federal law requires a court of competent jurisdiction to convene a permanency planning hearing “no later than 12 months after the date the child is considered to have entered foster care” to determine the future plan for the child.⁵⁴ At this hearing, the court—based on documentary evidence, live testimony, and the arguments of the parties—determines whether reunification remains a viable goal and, if not, establishes an alternate goal which may include adoption, guardianship, or another planned permanent living arrangement.⁵⁵ Typically, the court makes this determination based on the parent’s progress, the needs of the child, and the length of the child’s stay in foster care.⁵⁶ A parent’s failure to comply with the court ordered service plan is the predominant reason for a goal change in the child welfare case, which can then result in the termination of services to reunify the family.⁵⁷ Additionally, if a child has been in foster care for fifteen of the previous twenty-two months, federal law requires that the state file a petition to terminate parental rights, unless one of a number of exceptions applies.⁵⁸

The filing of a TPR petition triggers additional procedural safeguards. The parent is afforded a trial on the petition allegations, and the Constitution mandates that the state prove parental unfitness by clear and convincing evidence

51. *See id.*

52. *See, e.g., In re G.G.*, 667 A.2d 1331, 1132–33, 1338 (D.C. 1995) (ruling that the trial court lacked the authority to order a housing agency to provide immediate housing to parents ahead of those on a waiting list so that a family could reunify).

53. *See, e.g., In re LaFlure*, 210 N.W.2d 482, 488–89 (Mich. Ct. App. 1973) (“The purpose of the review hearings provided for by the statute is to determine whether the parents of a child in the temporary custody of the court have managed to ‘reestablish’ a fit home or are likely to do so within the near future. We do not see how such a determination may be intelligently made unless the court making the determination is fully aware of the circumstances which prompted placing the child in the temporary custody of the court and of all subsequent circumstances, if any, which prompted keeping the child in the temporary custody of the court Therefore, evidence admitted at any one hearing is to be considered evidence in all subsequent hearings.”).

54. 42 U.S.C. § 675(5)(C) (2006).

55. *See Badeau et al.*, *supra* note 45, at 230–31; *see also* MICH. CT. R. 3.976(D) (“At the permanency planning hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value.”).

56. *See Badeu et al.*, *supra* note 45, at 231.

57. *See, e.g.,* MICH. CT. R. 3.976(E) (noting that the “[f]ailure to substantially comply with the case service plan” is evidence that the child may be in harm if returned to the parental home).

58. 42 U.S.C. § 675(5)(E). States may opt not to file a petition to terminate parental rights if the child is in a relative’s care, the agency has documented a compelling reason that the termination of parental rights would not be in the child’s best interests, or if the state has not provided necessary services to the family. *Id.*

prior to permanently severing the parent-child relationship.⁵⁹ Most frequently, the evidence introduced by the state at the TPR hearing consists of historical information detailing the reasons why the child entered the foster care system and the parent's compliance, or lack thereof, with the court ordered service plan.⁶⁰ Orders and findings of fact from each review hearing are submitted into evidence.⁶¹ The overriding determinant in most cases is an assessment of the parent's progress between the adjudication hearing and the TPR hearing.⁶² If parental rights are terminated, the child becomes a permanent ward of the court and "the parent becomes a 'legal stranger to the child.'"⁶³

This cursory overview of the child welfare process demonstrates the intertwined nature of the proceedings. What occurs at one hearing lays the foundation for each subsequent hearing.⁶⁴ The facts proven at the adjudication hearing provide the justification for the case service plan ordered at the dispositional hearing.⁶⁵ Evidence of the parent's and agency's willingness to comply with the terms of the plan, which is reviewed at every hearing, determines whether the child will come home or will enter another permanent living arrangement. The events that occur during the time when the plan is in effect constitute the primary evidence introduced at the TPR hearing.⁶⁶ As the Colorado Court of Appeals aptly observed:

Proceedings in dependency or neglect affect important rights so there must be substantial compliance with statutory requirements for the

59. See *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) ("Before 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.").

60. See *id.* at 762.

61. See *id.*

62. See, e.g., *Barr v. Div. of Family Servs.*, 974 A.2d 88, 97–98 (Del. 2009) (terminating a father's parental rights when evidence demonstrated, among other things, that he failed to comply with his case plan).

63. *Commonwealth v. Fletcher*, 562 S.E.2d 327, 329 (Va. Ct. App. 2002) ("When a court orders termination of parental rights, the ties between the parent and the child are severed forever, and the parent becomes 'a legal stranger to the child.'" (quoting *Lowe v. Dep't of Pub. Welfare of Richmond*, 343 S.E.2d 70, 72 (Va. 1986))), *aff'd*, 581 S.E.2d 213 (Va. 2003). But see *Ex parte M.D.C.*, 39 So. 3d 1117, 1130 (Ala. 2009) (holding that parents can be held liable for child support even after the termination of their parental rights).

64. See *supra* note 53 and accompanying text.

65. See *supra* text accompanying note 48.

66. *Hughes v. Div. of Family Servs.*, 836 A.2d 498, 507 (Del. 2003) ("We have acknowledged that the factual basis for terminating parental rights is often the conduct that occurs during the time frame between the commencement of a dependency and neglect proceeding and a judicial determination that a termination proceeding is in the child's best interest."); *White v. Dep't of Rehab. Servs.*, 483 So. 2d 861, 865 (Fla. Dist. Ct. App. 1986) ("[D]ependency disposition hearings and dependency disposition orders . . . 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.").

conduct of those proceedings. The statutorily prescribed periodic judicial review of an out-of-home placement proceeding is an important proceeding to the parties. This is so because the trial court considers the propriety of continued deprivation of custody, often together with the parties' performance under the provisions of the court approved treatment plan [T]hese proceedings may form a foundation for and presage the filing of a motion for termination of the parent-child legal relationship⁶⁷

Because subsequent orders in the case are built upon earlier decisions, an error that occurs at an early hearing can contaminate the entire case and can lead to an erroneous termination of parental rights. Consider the following example.⁶⁸ A caseworker erroneously denies placement with relatives for a child in foster care because of incorrect information about the relatives' criminal history. The child instead enters the foster care of strangers and remains there for several years. The relatives lack standing in the child protection case to raise their concerns. At the TPR hearing, the parents assert that termination is not warranted because the child could be, and should have been, placed with relatives—an exception to the federal mandate requiring a termination petition when a child has been in foster care for fifteen months.⁶⁹ The court, however,

67. *People in Interest of J.B.*, 702 P.2d 753, 754 (Colo. App. 1985) (citing *People in Interest of A.M.D.*, 648 P.2d 625, 631 (Colo. 1982); *People in Interest of K.L.*, 681 P.2d 535, 536 (Colo. App. 1984)); *see also* *R.V. v. Commonwealth*, 242 S.W.3d 669, 672 (Ky. Ct. App. 2007) ("Clearly, the proceedings in a dependency action greatly affect any subsequent termination proceeding. Indeed, in the case at bar, the cabinet changed its goal from returning A.J.V. to his parents to permanent placement with his foster family. The district court approved that goal change. Although, in theory, the goal could change again, back to reunification, it is clear that a district court's approving adoption as a permanency goal significantly increases the risk that parental ties will be severed."); *In re D.M.K.*, 796 N.W.2d 129, 133 (Mich. Ct. App. 2010) ("These initial hearings allow the parties to become familiar with the parents' abilities and deficits, the child's needs, and the efforts necessary for reunification. In a sense, the initial dispositional hearings form the cornerstones of the succeeding review hearings, the permanency planning phase, and the ultimate decision to terminate parental rights."); *In re J.J.L.*, 223 P.3d 921, 924 (Mont. 2010) ("Adjudication hearings 'must determine the nature of the abuse and neglect and establish facts that resulted in state intervention and upon which disposition, case work, court review, and possible termination are based.'" (quoting MONT. CODE ANN. § 41-3-437(2) (2009))).

68. The following facts are somewhat similar to those in the case of *In re McBride*, in which the Michigan Court of Appeals affirmed the trial court's decision to terminate parental rights even though the incarcerated father was not afforded counsel at the final TPR hearing. No. 282062, 2008 WL 2751233, at *2 (Mich. Ct. App. July 15, 2008) (per curiam). Dissenting from the Michigan Supreme Court's decision not to review the case, Justice Corrigan discussed the trial court's failure to place the children with relatives. *Dep't of Human Servs. v. McBride (In re McBride)*, 766 N.W.2d 857, 858–59, 865 (Mich. 2009) (Corrigan, J., dissenting).

69. Relative placement is of great importance in the TPR process. The federal Adoption and Safe Families Act (ASFA) mandates that states file a TPR petition when a child has been in foster care for fifteen of the most recent twenty-two months. 42 U.S.C. § 675(5)(E) (2006). However, if the state elects to place the child with a relative, the ASFA provides that the state is not required to file a TPR proceeding. *Id.*

rejects the argument stating that the child's best interests are not served by moving her at the current time due to her bond with her foster parents. The parents' rights are subsequently terminated due to the early error committed by the worker. It is too late to right the wrong.

A second example illustrates this point as well.⁷⁰ At a review hearing in the case, the judge inappropriately engages in ex parte communications with a teenager in foster care who tells the judge that she does not want to visit with her mother. During the meeting, the child does not reveal that she is angry with her mother because of her removal from the home. Based on the in camera interview, the judge summarily suspends visitation without making a finding that visitation would harm the child, as required by the statute. No "reasonable efforts"⁷¹ are made to address the child's discomfort with the visits, and the child and parent do not see each other for the entire duration of the case. Frustrated by the fact that she has not seen her child in several years, the mother does not show up to the final TPR hearing.

At the hearing, the court makes a finding that termination is in the child's best interests solely because the child probably wants her mother's rights terminated since they have no relationship.⁷² The court also notes the mother's absence from the hearing in its findings. The erroneous termination of visits, based on the improper conversations between the judge and the child, and the failure to make efforts to maintain the parent-child relationship at the outset of the case, all preordained the findings made by the judge at the final TPR hearing.

These examples are intended to illustrate a very basic point. Errors in child protective proceedings have a compounding effect since all future decisions build upon each finding and order made at prior hearings.⁷³ Errors such as an unnecessary removal, an unexplored relative placement, an inappropriate suspension of visits, or a false allegation of substance abuse or mental illness affect both short and long-term decisions in the case, the parties' involvement in

70. These facts are based on the case of *In re S.L.S.*, in which the Michigan Court of Appeals found that the trial court erred in engaging in ex parte communications with a child subject to the child protective proceeding. No. 294286, 2010 Mich. App. LEXIS 973, at *2–3 (Mich. Ct. App. May 25, 2010).

71. Under the ASFA, state child welfare agencies must make "reasonable efforts" to reunify children with their parents unless specific exceptions apply. § 671(a)(15)(B). The failure to make such efforts can excuse a state from having to file a mandatory petition to terminate parental rights where the child has been in foster care for fifteen months. See § 675(5)(E).

72. *In re S.L.S.*, 2010 Mich. App. LEXIS 973, at *14–16 (Gleicher, J., dissenting).

73. See, e.g., *Dep't of Human Servs. v. Mason (In re Mason)*, 782 N.W.2d 747, 753, 761 (Mich. 2010) (finding that the child welfare agency's errors deprived the father of the right to participate in review hearings and required reversal, noting that "the court and the DHS were ready to move on to the termination hearing" because the father "missed the crucial, year-long review period during which the court was called upon to evaluate the [father's] efforts and decide whether reunification of the children with their parents could be achieved"); *State ex rel. Juvenile Dep't of Multnomah Cnty. v. Grannis (In re Grannis)*, 680 P.2d 660, 665 (Or. Ct. App. 1984) ("There is some possibility that the findings and disposition will affect [the] mother's interests in future proceedings in this case and in ancillary proceedings.").

the case plan, and the relationships between parents and children. If errors are made during earlier hearings, it may be very difficult, if not impossible, to assess the precise impact of an earlier error at the time of the final TPR hearing because that error may have affected the entire direction of the case. Thus, unsurprisingly, state policymakers, courts, and commentators have all emphasized the important role that parents' counsel play, especially early in a child welfare case, to reduce the likelihood that this type of contamination will occur. The next section discusses this role.

III. THE CRUCIAL ROLE PARENTS' COUNSEL PLAY IN PREVENTING ERRONEOUS TERMINATIONS OF PARENTAL RIGHTS

In 1981, the United States Supreme Court, in *Lassiter v. Department of Social Services of Durham County*,⁷⁴ held that the Constitution does not automatically confer the assistance of court appointed counsel to indigent parents facing the termination of their parental rights.⁷⁵ Instead, the Court instructed trial courts to determine, on a case by case basis, whether counsel is constitutionally mandated.⁷⁶ At the end of the opinion, the Court offered this guidance to states:

A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well.⁷⁷

For the most part, states have followed this guidance. The overwhelming majority of states provide indigent parents with the right to appointed counsel either through statute, court rule, or the state's constitution.⁷⁸ At least forty-four states provide parents with an absolute right to counsel in TPR proceedings and at least thirty-eight states offer parents an attorney at public expense whenever the state seeks to remove children from their care.⁷⁹ Best practices would likely

74. 452 U.S. 18 (1981).

75. *Id.* at 32.

76. *Id.*

77. *Id.* at 33–34 (citations omitted).

78. See Sankaran, *supra* note 41.

79. See *id.*; see also Astra Outley, *Representation for Children and Parents in Dependency Proceedings*, THE PEW CHARITABLE TRUSTS, 7 (June 1, 2004), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/Representation\[2\].pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/Representation[2].pdf) (observing that thirty-nine states provide counsel for indigent parents).

support providing parents with counsel immediately after the state files a petition alleging abuse or neglect.⁸⁰

Parents' attorneys play a pivotal role in these cases. Similar to criminal defense attorneys, they protect their clients from unjust accusations, ensure that parents receive due process protections, and help to ensure that the entire judicial process affords families a fair opportunity to take advantage of its protections and services.⁸¹ Like attorneys in other contexts, parents' lawyers assist courts in properly adjudicating historical facts.⁸²

However, unlike lawyers in other contexts, parents' counsel also help to create the record that the court relies upon in making future decisions.⁸³ In situations where temporary removal occurs, advocacy by parents' counsel can expedite the safe reunification of the family by facilitating the prompt delivery of appropriate services to the family, by advocating for extensive visitation between the parent and the child, and by counseling parents about the ramifications of the choices they must make, which may increase compliance with court directives.⁸⁴ Parents' lawyers also participate in administrative meetings with caseworkers, where significant decisions are made about the services offered to parents.⁸⁵ And in situations where the parent is unable to care for the child, the parent's lawyer can serve the client by arranging for another temporary or permanent legal placement, such as a guardianship, which will advance the parent's interests.⁸⁶ In these and other ways, attorneys for parents can dramatically affect the outcome of a child welfare case.

Statistics corroborate the enormous impact parents' attorneys can have in a case. A study conducted by the National Council of Juvenile and Family Court Judges found that improved parent legal representation increased reunifications by over 50%, decreased the rate of termination of parental rights by almost 45%,

80. William G. Jones, *Working with the Courts in Child Protection*, U.S. DEP'T OF HEALTH & HUMAN SERVS., 27 (2006), <http://www.childwelfare.gov/pubs/usermanuals/courts/courts.pdf>. The Detroit Center for Family Advocacy, the Vermont Parent Representation Center, Inc., and the Center for Family Representation, Inc. in New York City are three organizations that provide representation for parents prior to the filing of a petition. See generally *Detroit Center for Family Advocacy*, UNIV. OF MICH. LAW SCH., <http://www.law.umich.edu/centersandprograms/ccl/cfa/Pages/default.aspx> (last visited Sept. 2, 2011); *Why VPRC is Important to Vermont Families*, VT. PARENT REPRESENTATION CTR., INC., <http://www.vtrpc.org/what-we-do> (last visited Sept. 2, 2011); *Bringing Innovative Legal Services to Scale*, THE CTR. FOR FAM. REPRESENTATION, INC., http://www.cfrny.org/new_legal.asp (last visited Sept. 2, 2011).

81. See Richard Cozzola & Andrya Soprych, *Representing Parents in Civil Child Protection Cases*, FAM. ADVOC., Winter 2009, at 22; Frank Vandervort & Vivek Sankaran, Mich. State Court Admin. Office, *Parents' Attorney Protocol*, MICH. COURTS, 2-3 (July 2008), <http://courts.michigan.gov/scao/resources/standards/PAP.pdf>; Vivek S. Sankaran, *Representing Parents in Child Welfare Cases*, in *CHILD WELFARE LAW & PRACTICE*, *supra* note 43, at 579.

82. Cozzola & Soprych, *supra* note 81, at 22.

83. See *id.*

84. See Vandervort & Sankaran, *supra* note 81, at 23-25, 27-28, 45-48 (citations omitted).

85. See *infra* note 149.

86. Vandervort & Sankaran, *supra* note 81, at 3.

and expedited the court process significantly.⁸⁷ Similarly, clients served by the Center for Family Representation in New York City—a groundbreaking nonprofit law and policy organization advocating for parents⁸⁸—reunited with their children in foster care within just over four months, compared to the statewide average of nearly three years.⁸⁹ Therefore, as these statistics demonstrate, strong advocacy on behalf of parents furthers the best interests of children and improves outcomes for both children and their families.⁹⁰

The crucial role that parents' counsel play in all stages of a child welfare case has been well-documented in state and national standards of practice, articles, and court opinions, among other sources. For example, the *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases* adopted by the American Bar Association urge courts to “[e]nsure [that] appointments are made when a case first comes before the court, or before the first hearing, and last until the case has been dismissed from the court’s jurisdiction.”⁹¹ The highly regarded *Resources Guidelines* issued by the National Council of Juvenile and Family Court Judges emphasizes that “[b]ecause of the critical strategic importance of the preliminary protective hearing, it is essential that parents have meaningful legal representation at the hearing.”⁹² And the Pew Commission on Children in Foster Care concludes that “[t]o safeguard children’s best interests . . . children and their parents must have a direct voice in court, effective representation, and the timely input of those who care about them.”⁹³

87. Jason A. Oetjen, Nat’l Council of Juvenile and Family Court Judges, *Improving Parents’ Representation in Dependency Cases: A Washington State Pilot Program Evaluation*, WASH. STATE OFFICE OF PUB. DEF., 6–7 (Aug. 2003), <http://opd.wa.gov/Reports/dependency%20&%20Termination%20Reports/watabriefcolorfinal%5B1%5D.pdf>.

88. See generally CTR. FOR FAMILY REPRESENTATION, INC., <http://www.cfrny.org/> (last visited Sept. 6, 2011).

89. See *2009 Nonprofit Accomplishments*, CTR. FOR FAMILY REPRESENTATION, INC., http://www.cfrny.org/2009_accomp.asp (last visited Sept. 3, 2011).

90. See Bobbe J. Bridge & Joanne I. Moore, *Implementing Equal Justice for Parents in Washington: A Dual Approach*, JUV. & FAM. CT. J., Fall 2002, at 40 (“Improving equal justice for parents serves our judicial system’s value of fairness as well as both the spirit and letter of our dependency and termination laws.”).

91. *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*, A.B.A., 7, <http://www.abanet.org/child/clp/ParentStd.pdf> (last visited Sept. 3, 2011). These standards were promulgated “with the help of a committee of practicing parents’ attorneys and child welfare professionals from different jurisdictions in the country.” *Id.* at 1.

92. PUBL’N DEV. COMM., NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES* 34 (1995).

93. The Pew Comm’n on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care*, THE PEW CHARITABLE TRUSTS, 18 (2004), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/foster_care_final_051804.pdf.

Courts have made similar observations. For example, in *Watson v. Division of Family Services*,⁹⁴ the Delaware Supreme Court acknowledged that “[i]f an attorney is only appointed to represent an indigent parent after the petition to terminate has been filed then the outcome is almost inevitable.”⁹⁵ Similarly, in *R.V. v. Commonwealth Department for Health and Family*,⁹⁶ the Kentucky Court of Appeals observed that the “termination proceeding was incurably tainted by the failure of the district court to provide counsel for the parents at all critical stages of the underlying dependency proceeding.”⁹⁷ And in the case of *In re Hudson*,⁹⁸ in which the Michigan Supreme Court reversed a TPR decision because, among other things, the trial court failed to appoint counsel for the mother in a timely manner,⁹⁹ Justice Maura Corrigan’s concurring opinion articulated the ways in which the earlier appointment of counsel could have affected the case. Justice Corrigan wrote:

[C]ounsel for respondent could have challenged the evidence presented by the DHS and could have called and cross-examined the individuals who prepared the many reports DHS witnesses referenced in their testimony at these hearings. Instead, once these proceedings were set in motion by respondent’s invalid plea, the DHS was allowed to present unchallenged hearsay evidence, including the results of respondent’s drug screenings, psychologists’ reports pertaining to respondent and the children, and statements of respondent’s therapist, through the testimony of DHS workers. Other witnesses did not appear at the hearings. No one was subjected to cross-examination. The DHS built a record of respondent’s failed drug tests and struggles to maintain employment and appropriate housing over the course of more than two years, while respondent never challenged the veracity of that evidence or offered any evidence of her own. By the time counsel was appointed to represent respondent two weeks before the termination trial, the DHS had built an extensive record against respondent, and there was little counsel could do to remedy the harm.¹⁰⁰

94. 813 A.2d 1101 (Del. 2002).

95. *Id.* at 1106; *see also* Fresno Cnty. Dep’t of Soc. Servs. v. Lucia R. (*In re Ronald R.*), 44 Cal. Rptr. 2d 22, 29 (Ct. App. 1995) (“It is at [the permanency hearing], and not at the subsequent section 366.26 hearing, that the critical decision regarding parental rights is made.”).

96. 242 S.W.3d 669 (Ky. Ct. App. 2007).

97. *Id.* at 673.

98. 763 N.W.2d 618 (Mich. 2009).

99. *Id.* at 619.

100. *Id.* at 625–26 (footnote omitted); *see also In re Welfare of S.A.W.*, No. A09-0517, 2009 WL 2998116, at *14 (Minn. Ct. App. Sept. 22, 2009) (expressing deep concern about parents being “thrown, without representation, into the complex and fast-paced environment of statutes, rules, case plans, and time-critical rehabilitation efforts that are the focus of juvenile-protection proceedings”).

It is evident that best practices in child welfare cases mandate the early appointment of counsel and that, for the most part, states have responded by guaranteeing this right to indigent parents. But, as the next section details, this is not only a key procedural right often violated by trial courts, but appellate courts have consistently excused the violations—thereby encouraging them to occur—by reviewing the error using a harmless error analysis, a nearly insurmountable burden for aggrieved parents to meet.

IV. A HOLLOW RIGHT

One studying state statutes and court rules guaranteeing parents the right to counsel in child welfare cases may optimistically conclude that the right is being adequately implemented. Yet, as is often the case, reality tells a far different story. Despite strong pronouncements about the importance of a parent's right to counsel by state policymakers, jurists, and commentators,¹⁰¹ successful implementation of the procedural right has escaped our reach. Nationally, attorneys representing parents are woefully underpaid and overworked.¹⁰² Systemic inadequacies exemplified by low compensation, high caseloads and poor training have drawn the ire of state and national groups and have been the subject of litigation.¹⁰³ Most recently, the American Bar Association convened a national group to focus on improving the representation of parents in child

101. See *supra* Part III.

102. See CHILDREN'S JUSTICE INITIATIVE PARENT LEGAL REPRESENTATION WORKGROUP, REPORT OF CHILDREN'S JUSTICE INITIATIVE PARENT LEGAL REPRESENTATION WORKGROUP TO MINNESOTA JUDICIAL COUNCIL 2 (2008), available at <http://www.leg.state.mn.us/docs/2009/other/090151.pdf> ("There is no statewide funding and no standards of practice for attorneys representing parents."); Joe Sexton, *As Courts Remove Children, Lawyers for Parents Stumble*, N.Y. TIMES, June 10, 1996, at A1 (describing court appointed lawyers as "overburdened and ill equipped"); Editorial, *Giving Overmatched Parents a Chance*, N.Y. TIMES, June 17, 1996, at A14 ("[P]arents are generally stuck with harried court-appointed lawyers who are juggling many cases, and who often show up unprepared and late for hearings."); Appellate Div. First Dep't Comm. on Representation of the Poor, *Crisis in the Legal Representation of the Poor*, N.Y. STATE UNIFIED COURT SYS. (Mar. 23, 2001), http://www.courts.state.ny.us/press/old_keep/1ad-rep-poor.shtml ("As a result of shamefully low rates of compensation of assigned counsel, lack of resources, support and respect, inadequate funding of institutional providers, combined with ever-increasing caseloads, New York's poor are too often not being afforded the 'meaningful and effective' representation to which they are entitled . . ."); Outley, *supra* note 79, at 8 ("Most attorneys for parents receive either a low hourly rate or a small flat fee per case."); The Spangenberg Group, *Western Massachusetts Child Welfare Cases: The Court-Appointed Counsel System in Crisis*, COMM. FOR PUB. COUNSEL SERVS., 3 (Oct. 20, 2003), http://www.publiccounsel.net/practice_areas/cafl_pages/pdf/cafl_news/executive_summary.pdf ("Low compensation is a primary factor contributing to declining interest in court-appointed work.").

103. See *supra* note 102; see also N.Y. Cnty. Lawyers' Ass'n v. State, 745 N.Y.S.2d 376, 388–89 (N.Y. Sup. Ct. 2002) (granting permanent preliminary injunction raising fees for court-appointed lawyers after concluding that the evidence demonstrated that the low compensation rate resulted in "backlogs," "case overload," and "prolonged delays").

welfare cases.¹⁰⁴ Policymakers, judges, and other interested parties have decried the status quo and have pushed for systemic reforms to address these inadequacies.¹⁰⁵ The deficiency of parents' counsel is certainly a major issue that needs to be addressed.¹⁰⁶

Another serious problem is that frequently, attorneys for parents are simply not present at hearings in which parents are legally entitled to counsel. This is not an isolated phenomenon. Repeatedly, appellate courts have found that trial courts committed legal error by proceeding forward in earlier child protective hearings and termination of parental rights proceedings without affording parents the assistance of counsel.¹⁰⁷

Several factors may explain why this is occurring. Because no absolute federal constitutional or statutory right¹⁰⁸ to counsel exists, the funding decision for parent representation is left entirely to the states. Many states, despite having enacted strong statutes requiring counsel for parents at all stages of the case, pass along the costs for compensating parents' attorneys onto counties.¹⁰⁹ County

104. See *About the Project*, A.B.A., http://www.americanbar.org/groups/child_law/projects_initiatives/parentrepresentation.html (last visited Oct. 1, 2011) ("The National Project to Improve Representation for Parents Involved in the Child Welfare System aims to strengthen representation of parents in the child welfare system.").

105. See, e.g., *In re Welfare of S.A.W.*, No. A09-0517, 2009 WL 2998116, at *14 (Minn. Ct. App. Sept. 22, 2009) (expressing deep concern about a system that leaves parents unrepresented in juvenile-protection proceedings).

106. See, e.g., MUSKIE SCH. OF PUB. SERV. & AM. BAR ASS'N, MICHIGAN COURT IMPROVEMENT PROJECT REASSESSMENT 153 (2005), available at <http://www.courts.michigan.gov/scao/resources/publications/reports/CIPReassessmentReport090605.pdf> (noting that attorneys must maintain high caseload numbers to assure themselves adequate income). The report further states that parents reported that:

Their attorneys do not return phone calls or provide parents with their phone numbers, do not explain what is going on in their cases, do not give parents a chance to tell their side of the story at court hearings, and make deals without consulting with them. Parents describe talking to their attorneys for only a few minutes before their hearings.

Id. at 154.

107. See *supra* notes 12–17 and accompanying text (listing cases in which appellate courts held that trial courts committed legal error by proceeding with a case when the parent was not represented by counsel).

108. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 32 (1981) (holding that the United States Constitution does not afford parents an absolute right to counsel in termination of parental rights cases). But see 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2006) (requiring states to provide children with a guardian ad litem "who may be an attorney" in child abuse or neglect cases if receiving grant aid under this section).

109. See, e.g., CHILDREN'S JUSTICE INITIATIVE PARENT LEGAL REPRESENTATION WORKGROUP, *supra* note 102, at 2 ("There is no statewide funding and no standards of practice for attorneys representing parents. Instead, it is currently left to each county to decide whether they will pay for court-appointed legal representation for parents; what amount to pay attorneys; and what minimal practice standards to impose, if any."); CTR. ON CHILDREN AND THE LAW, AM. BAR ASS'N, LEGAL REPRESENTATION FOR PARENTS IN CHILD WELFARE PROCEEDINGS: A PERFORMANCE-BASED ANALYSIS OF MICHIGAN'S PRACTICE 4 (2009), available at <http://courts.michigan.gov/scao/resources/publications/reports/2009ABAParentRepresentationReport.pdf>

governments have struggled to comply with these unfunded mandates.¹¹⁰ Historically, both state and county governments have not allocated enough funds to ensure that parents receive zealous representation.¹¹¹

Problems associated with the underfunding of the system have manifested themselves in a myriad ways. Some courts have explicitly refused to appoint counsel for parents because of a shortage of money. For example, a trial court in Arkansas explained to a parent that “funding for appointed counsel had been reduced” and told the parent to wait until the next hearing to see whether counsel could be appointed for her.¹¹² Others have simply ignored valid requests made by parents,¹¹³ have denied requests based on parents’ failure to comply with technical requirements, like filling out the right form,¹¹⁴ or have failed to advise parents that the statutory right even exists.¹¹⁵ Presumably, one reason why trial courts may take these procedural shortcuts is to save money.

Even when trial courts are willing to expend the funds to compensate parents’ counsel, they may be unable to locate anyone willing to take the case for

(“Michigan places the burden of funding parent representation on its counties, without structural support from the state.”).

110. *See, e.g.*, CHILDREN’S JUSTICE INITIATIVE PARENT LEGAL REPRESENTATION WORKGROUP, *supra* note 102, at 6–7 (noting the ways that counties have dealt with the payment of court-appointed attorneys and stating that some counties have simply refused to pay for court-appointed attorneys even when ordered to do so).

111. *See, e.g., id.* (noting that since counties have inherited the responsibility of paying for court-appointed lawyers, many of those counties have struggled to find qualified attorneys to represent parents in child protection cases due to funding issues).

112. *Farmer v. Ark. Dep’t of Human Servs.*, No. CA 06-185, 2006 WL 2879454, at *1 (Ark. Ct. App. Oct. 11, 2006); *see also In re Welfare of S.A.W.*, No. A09-0517, 2009 WL 2998116, at *13–14 (Minn. Ct. App. Sept. 22, 2009) (stating that parents were without counsel for three and a half months and noting concern for possible systemic effects that could result from lack of parental representation caused by inadequate funding).

113. *See Wilkinson v. Thornton (In re K.L.T.)*, 237 S.W.3d 605, 606 (Mo. Ct. App. 2007) (*per curiam*) (noting that despite the father’s request the trial court failed to appoint counsel); *In re T.C.B.*, No. 08-02-00515-CV, 2003 WL 21810958, at *1 (Tex. Ct. App. Aug. 7, 2003) (noting that the trial court failed to respond to the father’s request for appointed-counsel).

114. *See In re Interest of E.J.C.*, 731 N.W.2d 402, 404 (Iowa Ct. App. 2007) (stating that the district court denied the mother’s request for a court-appointed attorney because the district court deemed the request untimely); *Juvenile Office of Mo. v. Schmidt (In re N.S.)*, 77 S.W.3d 655, 656–57 (Mo. Ct. App. 2002) (observing that the trial court denied the father’s first request for counsel because father failed to “fill in every blank on the application”); *Little v. Little*, 487 S.E.2d 823, 824 (N.C. Ct. App. 1997) (noting that the trial court found that since the mother “had not filed an answer or any other pleading and had not previously asked for an attorney, she had waived the right to court appointed counsel by her lack of action”).

115. *E.g., T.B. v. State Dep’t of Health & Rehabilitative Servs. (In re Interest of J.B.)*, 624 So. 2d 792, 792 (Fla. Dist. Ct. App. 1993) (noting that the mother was not advised of her right to counsel at the dependency hearing); *In re Christopher C.*, 499 A.2d 163, 164 (Me. 1985) (finding that the mother was never apprised of her right to appointed counsel if indigent); *Dep’t of Soc. Servs. v. Dick (In re Keifer)*, 406 N.W.2d 217, 218 (Mich. Ct. App. 1987) (“The referee did not advise respondent of his right to an attorney and none was appointed.”).

low rates of compensation.¹¹⁶ For example, the *New York Times* observed that “up to 50 parents [were] sent home each week because no lawyer [was] available” in New York City, and that the number of attorneys willing to take these cases was cut in half in a ten year period.¹¹⁷ More recently, in Minnesota, budget cuts to the public defender’s office forced the statewide office to stop representing parents in child welfare proceedings, leaving many parents without legal representation.¹¹⁸ Given the low payment rate, it is unsurprising that few attorneys would choose to do this work.

Locating an attorney willing to take a court appointment is not a guarantee that the attorney will show up at court hearings. Due to the low compensation rates, parents’ attorneys often maintain high caseloads and frequently schedule multiple hearings at the same time.¹¹⁹ When faced with scheduling conflicts, attorneys may try to arrange for substitute counsel to appear on their behalf¹²⁰ and if they cannot find one, they may choose not to attend the hearing.¹²¹ Appellate case law shows many examples of parents who are unrepresented at hearings because their lawyers simply failed to appear.¹²² And due to the demands to proceed expeditiously in child welfare cases, driven by federal and state requirements¹²³ and the scheduling demands of multiple parties, courts

116. See CTR. ON CHILDREN AND THE LAW, *supra* note 109, at 92–95 (detailing compensation rates for parents’ attorneys in Michigan); Carla Crowder, *Exodus of Lawyers for Kids Feared*, THE BIRMINGHAM NEWS, Aug. 21, 2005, at 13A (“Without overhead pay, [court-appointed attorneys] essentially are making \$5 to \$10 an hour on some cases.”).

117. David Rohde, *Critical Shortage of Lawyers for Poor Seen*, N.Y. TIMES, Dec. 12, 1999, § 1, at 59.

118. See CHILDREN’S JUSTICE INITIATIVE PARENT LEGAL REPRESENTATION WORKGROUP, *supra* note 102, at 2 (“As a result of the recent decision of the Board of Public Defense to cease representation of parents . . . there is no longer a statewide process to appoint qualified attorneys to represent parents . . .”); *In re Welfare of S.A.W.*, No. A09-0517, 2009 WL 2998116, at *14 (Minn. Ct. App. Sept. 22, 2009) (observing that parents were without counsel due to a budget crisis).

119. See, e.g., *Sweetin v. State (In re S.S.)*, 90 P.3d 571, 574 (Okla. Civ. App. 2004) (noting that the mother’s attorney had two trials scheduled for the same time and informed the court that the mother’s trial was the “non-priority case”).

120. See, e.g., MUSKIE SCH. OF PUB. SERV. & AM. BAR ASS’N, *supra* note 106, at 153 (noting that attorneys’ high caseloads “contribute to the necessity [for] substitute” counsel to appear on their behalf).

121. See *supra* note 119.

122. See *Dep’t of Human Servs. v. Craven (In re Perri)*, No. 280156, 2008 WL 1991736, at *5 (Mich. Ct. App. May 8, 2008) (per curiam) (stating that “the record reveals no reason for [retained counsel’s] failure to attend” the court hearing); *In re Interest of J.S.W.*, 295 S.W.3d 877, 881 (Mo. Ct. App. 2009) (explaining that even though the mother had court-appointed counsel in the beginning of the proceedings, “[a]t no time did the court make an inquiry or even an entry on the record concerning Mother’s lack of representation at the multiple proceedings that took place subsequent to the initial adjudication”); *In re S.S.*, 90 P.3d at 574 (noting that the mother’s attorney failed to appear at the hearing because she had a jury trial set in another county at the same time).

123. See, e.g., 42 U.S.C. § 675(5)(C) (2006) (requiring the trial court to schedule a permanency planning hearing within twelve months of a child’s entry into foster care). Additionally, under this statute states generally must file a petition to terminate a parent’s rights if a child has been in foster care for fifteen of the last twenty-two months. § 675(5)(E).

often feel pressured to go forward with the case without the presence of the parent's counsel rather than adjourn the hearing to a later date.¹²⁴

Court-appointed counsel may also be missing from the hearings because courts inappropriately discharge them. This often occurs when a parent fails to attend a court hearing or refuses to comply with a case service plan, which some trial courts have interpreted to evince a disinterest in the case.¹²⁵ Again, funding considerations may come into play when these situations arise, as trial courts may feel constrained to save county and state funds whenever possible. A court may believe that a parent who does not appear at a hearing does not deserve a taxpayer-supported lawyer, even though the statute may require otherwise.

These explanations provide a glimpse into some of the reasons why parents' counsel may be absent during critical stages of a child welfare case. Unfortunately, appellate courts, for the most part, have responded by condoning these legal errors.¹²⁶ Reviewing courts have repeatedly excused trial courts of mistakes involving the early appointment of counsel so long as counsel is subsequently appointed to represent the parent at the final TPR hearing.¹²⁷ As

124. *E.g.*, *A.P. v. Commonwealth*, 270 S.W.3d 418, 419 (Ky. Ct. App. 2008) (demonstrating a trial court's decision to go forward on a termination of parental rights hearing even though court-appointed counsel could not be present on the first day due to inclement weather); *In re S.S.*, 90 P.3d at 574 (illustrating a trial court going forward on a TPR hearing even though the mother's attorney had a jury trial scheduled for the same time in a different county).

125. *See Fresno Cnty. Dep't of Soc. Servs. v. Lucia R. (In re Ronald R.)*, 44 Cal. Rptr. 2d 22, 24 (Cal. Ct. App. 1995) (stating that the trial court permitted the attorney to withdraw because the mother was not present at the hearing, and the court did not thereafter appoint substitute counsel); *Dep't of Human Servs. v. Shabazz (In re Shabazz)*, No. 286130, 2009 WL 325316, at *1 (Mich. Ct. App. Feb. 10, 2009) (per curiam) ("It is undisputed that respondent's attorney was discharged without explanation after a dispositional review hearing and that respondent was without an attorney for several months, including at the permanency planning hearing where proofs were taken."); *Dep't of Soc. Servs. v. Hall (In re Hall)*, 469 N.W.2d 56, 57 (Mich. Ct. App. 1991) (explaining that the trial court discharged the attorney because he did not know his client's whereabouts); *State v. R.M. (In re Interest of N.M.)*, 484 N.W.2d 77, 81 (Neb. 1992) (stating that the lower court permitted the appointed attorney to withdraw because the attorney and the client "did not get along generally," and that the court failed to appoint a substitute attorney); *In re Alyssa C.*, 790 N.E.2d 803, 809 (Ohio Ct. App. 2003) (noting that the trial court permitted the attorney to withdraw because the mother had not contacted the lawyer for more than six months); *People ex rel. Dep't of Soc. Servs.*, 691 N.W.2d 586, 588–89 (S.D. 2004) (stating that the trial court failed to appoint new counsel for the parent after allowing the previous attorney to withdraw following conflicts with the parent); *In re Welfare of G.E.*, 65 P.3d 1219, 1222 (Wash. Ct. App. 2003) (noting that the lower court allowed an attorney to withdraw without stating any reasons for the withdrawal); *State v. Shirley E. (In re Termination of Parental Rights to Torrance P., Jr.)*, 724 N.W.2d 623, 627 (Wis. 2006) (noting that the circuit court discharged a court-appointed attorney over the attorney's objection because the client failed to show at court hearings); *State v. Patti P. (In re Termination of Parental Rights to Phillip E.)*, No. 2007AP324, 2007 WL 2769400, at *2 (Wis. Ct. App. Sept. 25, 2007) (explaining that the trial court permitted an attorney to withdraw in the middle of a termination of parental rights hearing because the mother did not appear at the hearing).

126. *See supra* note 20 and accompanying text.

127. *See, e.g.*, *Briscoe v. State, Dep't of Human Servs.*, 912 S.W.2d 425, 427 (Ark. 1996) ("[T]he error of failing to provide counsel in earlier hearings was cured by the provision of counsel in the final hearing . . .").

noted at the outset of this Article, in situations where a parent is erroneously deprived of counsel at the final TPR hearing, appellate courts have been steadfast in automatically reversing the TPR decision regardless of the merits of the case.¹²⁸ The parent's culpability is irrelevant because the erroneous deprivation of counsel at any part of that final hearing undermines the integrity of the entire process. Thus, appellate courts are deprived of any reliable way of assessing the harm caused by the denial of counsel.¹²⁹ Cases involving parents with lengthy periods of incarceration, serious substance abuse issues, and extensive mental health issues have all been overturned because of the trial court's failure to appoint counsel at the TPR hearing.¹³⁰ Factors such as a parent's failure to attend court hearings, refusal to remain in touch with his court-appointed counsel, or repeated requests to fire his attorney have been deemed to be irrelevant to the court's decision to reverse a TPR determination.¹³¹ The

128. See *supra* note 12 and accompanying text.

129. See, e.g., *In re Interest of J.M.B.*, 676 S.E.2d 9, 12 (Ga. Ct. App. 2009) (“[T]he total and erroneous denial of appointed counsel during the termination hearing is presumptively harmful because it calls into question the very structural integrity of the fact-finding process.” (citing *Nix v. Dep’t of Human Res.*, 225 S.E.2d 306, 307–08 (Ga. 1976))); *A.P. v. Commonwealth*, 270 S.W.3d 418, 421 (Ky. Ct. App. 2008) (“We cannot say that the failure of the mother’s counsel to be present on the scheduled day of the trial during the testimony of the first two witnesses made no difference in the family court termination proceeding.”); *In re S.S.*, 90 P.3d at 577 (“We find that parental rights are too precious to be terminated without the full panoply of protections afforded by the Oklahoma Constitution.” (quoting *A.E. v. State*, 743 P.2d 1041, 1048 (Okla. 1987))); *In re Termination of Parental Rights to Torrance P., Jr.*, 724 N.W.2d at 635 (“Depriving a parent of the statutory right to counsel in a termination of parental rights proceeding deprives the parent of a basic protection without which, according to our legislature, a termination of parental rights proceeding cannot reliably serve its function. The fairness and integrity of the judicial proceeding . . . has been placed in doubt when the statutory right to counsel is denied a parent.”).

130. See, e.g., *In re Interest of A.J.*, 604 S.E.2d 635, 636–37 (Ga. Ct. App. 2004) (incarcerated father serving a fifty year sentence in prison for aggravated child molestation); *In re Interest of E.J.C.*, 731 N.W.2d 402, 404 (Iowa Ct. App. 2007) (mother with “borderline intellectual functioning”); *In re Valle*, 31 S.W.3d 566, 568–69, 572 (Tenn. Ct. App. 2000) (evidence demonstrated that mother had mental illness, did not produce any documents that she was under psychiatric care, did not complete parenting training, and did not contribute monetary support for her child); *In re Welfare of G.E.*, 65 P.3d 1219, 1221, 1226 (Wash. Ct. App. 2003) (finding that the father “minimally complied with the court-ordered services” to address problems of substance abuse); *In re Termination of Parental Rights to Torrance P., Jr.*, 724 N.W.2d at 625 (noting that the child was born with “cocaine in his system, to parents who . . . were frequently in trouble with the law and were incarcerated at various times. During the first five years of his life, [the child] was shuttled between relatives, neighbors, and foster care in at least three different states[,] . . . [and he] witnessed his parents abuse each other verbally and physically.”).

131. See, e.g., *Daniel Y. v. Ariz. Dep’t of Econ. Sec.*, 77 P.3d 55, 56, 60–61 (Ariz. Ct. App. 2003) (reversing a TPR decision due to the lower court’s denial of the right to counsel even though the parent essentially forced his retained attorney and two subsequent court appointed attorneys to withdraw from representation due to irreconcilable differences); *In re Interest of J.S.W.*, 295 S.W.3d 877, 879 (Mo. Ct. App. 2009) (mother had not seen her child in seven months at the time of the TPR hearing); *Little v. Little*, 487 S.E.2d 823, 825 (N.C. Ct. App. 1997) (mother in jail made no effort to contact anyone); *State v. Patti P.* (*In re Termination of Parental Rights to Phillip E.*), No. 2007AP324, 2007 WL 2769400, at *1 (Wis. Ct. App. Sept. 25, 2007) (child born addicted to cocaine and mother incarcerated throughout the entirety of the case).

reasoning of these decisions is clear—because the precise effect of the harm cannot be gleaned, automatic reversal is the only appropriate remedy for such a serious violation.¹³²

Yet, a very different approach is taken when the erroneous deprivation of counsel occurs at an earlier stage of the case as long as counsel is provided to the parent at that final TPR hearing. In these situations, many appellate courts have forced litigants to demonstrate that the specific harm caused the earlier denial of counsel, which is a very difficult burden to sustain.¹³³ The parent must show “what arguments he would have advanced, what evidence he would have produced in his favor, or how he would have been successful had he been represented by counsel.”¹³⁴

This type of harmless error analysis requires appellate courts to delve deeply into the merits of the TPR case. In these cases, appellate courts wrestle with a variety of questions. How strong was the state’s case against the parent? How would the earlier appointment of counsel have changed the course of the case? Was the parent deprived of a defense to the TPR? Would the earlier appointment of counsel have made a determinative difference in the case? To succeed on appeal, the parent must prove that the result of the case would have been different had the court appointed the attorney at the correct stage of the case.¹³⁵ Few parents have been able to meet this insurmountable burden.¹³⁶

132. See, e.g., *In re Termination of Parental Rights to Torrance P., Jr.*, 724 N.W.2d at 635 (“We thus hold that it was prejudicial error per se for the circuit court to dismiss [the parent’s] attorney from the proceedings . . .”).

133. See cases cited *supra* note 20 and accompanying text.

134. See *In re Interest of M.S.*, 630 S.E.2d 856, 862 (Ga. Ct. App. 2006), *disapproved on other grounds*, 676 S.E.2d 9 (Ga. Ct. App. 2009).

135. See *Meza-Cabrera v. Ark. Dep’t of Human Servs.*, No. CA 07-932, 2008 WL 376290, at *4 (Ark. Ct. App. Feb. 13, 2008) (“[H]e has not demonstrated how the termination proceeding would have differed had he had the benefit of counsel . . .”); *Farmer v. Ark. Dep’t of Human Servs.*, No. CA 06-185, 2006 WL 2879454, at *3 (Ark. Ct. App. Oct. 11, 2006) (“[H]er lack of argument as to how she was prejudiced or that the outcome of the case would have been different if counsel had been appointed earlier, make it impossible for this court to reverse the trial court’s decision.”); *Fresno Cnty. Dep’t of Soc. Servs. v. Lucia R. (In re Ronald R.)*, 44 Cal. Rptr. 2d 22, 30 (Cal. Ct. App. 1995) (“[The mother] has not shown that the presence of counsel would have resulted in a different outcome . . .”); *Dep’t of Human Servs. v. Shabazz (In re Shabazz)*, No. 286130, 2009 WL 325316, at *1 (Mich. Ct. App. Feb. 10, 2009) (per curiam) (“Respondent has failed to show that he was harmed by the fact that he was unrepresented prior to the termination hearings.”); *MN v. State Dep’t of Family Servs. (In re Interest of MN)*, 78 P.3d 232, 240 (Wyo. 2003) (“The record does not reflect that Mother was prejudiced or injured by the failure to appoint her counsel at the initial juvenile proceeding.”).

136. See, e.g., *In re Welfare of S.A.W.*, No. A09-0517, 2009 WL 2998116, at *13–14 (Minn. Ct. App. Oct. 28, 2009) (affirming the termination of the parents’ rights because, while the parents’ right to counsel was violated, this error did not prejudice them). The approach taken by the Minnesota court in *In re Welfare of S.A.W.* is illustrative of the difficulties parents have in meeting this standard. In handing down its ruling, the court noted that it was “not holding that [the] appellants would not have benefited from legal representation during the period in question” and that it was “deeply concerned” that parents were being “thrown, without representation, into the complex and fast-paced environment of statutes, rules, case plans, and time-critical rehabilitation

Given the interconnected nature of child welfare proceedings—in which what occurs in prior proceedings lays the foundation for future decisions¹³⁷—this two-tiered approach of appellate review makes little sense. The inconsistent standards display a fundamental misunderstanding of the role that attorneys play at earlier hearings to create the evidence that is subsequently at issue during a TPR hearing and the defense available to parents.¹³⁸

V. THE APPROPRIATE REMEDY FOR A SYSTEMIC PROBLEM

The fundamental flaw in applying a harmless error analysis when evaluating erroneous deprivations of counsel in child welfare cases is that litigants will never be able to show the precise harm caused by the trial court's error. This is so because the failure to appoint counsel when legally required contaminates the entire record in a way that precludes meaningful appellate review. No reliable method of ascertaining harm exists.

The United States Supreme Court has recognized the inappropriateness of employing a harmless error analysis when confronted with a denial of the right to counsel in criminal cases.¹³⁹ The Court has regarded the error as a structural one because “a pervasive denial of counsel casts such doubt on the fairness of the trial process, that it can *never* be considered harmless error.”¹⁴⁰ The deprivation “affect[s] the framework within which the trial proceeds,”¹⁴¹ and in the absence of basic due process protections, such as the right to counsel, a “trial cannot reliably serve its function as a vehicle for determination of guilt or innocence” and the result cannot be viewed “as fundamentally fair.”¹⁴²

The rationale supporting an automatic reversal rule for the denial of counsel is even stronger in the context of child welfare proceedings where attorneys play

efforts that are the focus of juvenile-protection proceedings.” *Id.* The court further noted that “the aggregate effect of a systemic failure to provide counsel to parents like appellants threatens to seriously impair the rights of parents, the rights of children, and, in the unfortunate cases where those rights conflict, the legal system’s ability to strike a just balance between those rights.” *Id.* at *14. Yet, despite these pronouncements, the court still affirmed the termination of the parents’ rights. *Id.*

137. See *supra* text accompanying note 53.

138. See *supra* text accompanying notes 83–84.

139. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

140. *Penson v. Ohio*, 488 U.S. 75, 88 (1988) (emphasis added) (citing *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988)); see also *Imperial Cnty. Dep’t of Soc. Servs. v. Maria F. (In re Michelle C.)*, 32 Cal. Rptr. 3d 125, 138–39 (Cal. Ct. App. 2005) (“[T]here are some errors that go to the fundamental fairness of the underlying process and which, by their very nature, undermine the safeguards otherwise presumed to exist in our judicial system. When such an error occurs, reversal is required regardless of the outcome, because we cannot say that the *proceeding* itself was fair.”); *State v. Shirley E. (In re Termination of Parental Rights to Torrance P., Jr.)*, 724 N.W.2d 623, 635 (Wis. 2006) (“A harmless error analysis is not applied in a criminal case because counsel is critical to a fair trial and no one can reliably determine the level of prejudice arising from the denial of a right to counsel.”).

141. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

142. *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986)).

a critical role in not only challenging the state's evidence at the TPR hearing, but also in helping to create and shape that evidence during the many hearings that occur prior to that final hearing. During the earlier hearings, attorneys challenge the state's evidence, introduce documents and testimony supporting their case, and argue to the court about interim orders that should be issued.¹⁴³ At each of these hearings, courts make important decisions about parenting time, placement, services, and ultimately, the permanency goal in the case.¹⁴⁴ By the time of the final TPR hearing, the record in the case is already shaped by what occurred at the preceding review hearings.¹⁴⁵ In many ways, the final TPR hearing is akin to the concluding paragraph of a lengthy article in which the main arguments are summarized. To conclude that this "final paragraph" is the most important part of the child welfare case would be to misunderstand the nature of the proceedings.¹⁴⁶

Within this construct, where attorneys play an important role in creating the record that the court then relies upon to base its TPR decision, simply providing an attorney for a parent at the final TPR hearing is not an adequate remedy for the months, if not years, during which the record in the case was being created by the other parties.¹⁴⁷ The late arriving parent's attorney has no opportunity to shape the case or undo past mistakes—the attorney's role is limited to challenging what has already been done.¹⁴⁸ The attorney also has no chance to engage in important advocacy outside of court, where negotiations regarding key issues typically occur.¹⁴⁹ These omissions render the record at the time of the TPR hearing materially incomplete.

The incompleteness in the record created by the trial court's failure to appoint counsel at the right time makes it impossible for an appellate court to gauge the precise harm to the litigant caused by the mistake. To place the burden on parents to go back in time and re-create, with certainty, what the case

143. See *supra* Part III.

144. See Badeau et al., *supra* note 45, at 230.

145. See Fresno Cnty. Dep't of Soc. Servs. v. Lucia R. (*In re Ronald R.*), 44 Cal. Rptr. 2d 22, 29 (Cal. Ct. App. 1995).

146. See, e.g., *id.* (explaining that the permanency planning hearing is the "critical juncture in the dependency proceedings. . . . It is at this juncture, and not at the subsequent . . . hearing, that the critical decision regarding parental rights is made.").

147. Yet, this is exactly how appellate courts have justified finding that no harm occurred by the prior deprivation of counsel. See, e.g., *Briscoe v. State Dep't of Human Servs.*, 912 S.W.2d 425, 427 (Ark. 1996) ("Ms. Briscoe was represented in the termination hearing and given an opportunity [at the final hearing] to challenge the evidence against her and to present evidence on her own behalf with the full assistance of counsel."); *Farmer v. Ark. Dep't of Human Servs.*, No. CA 06-185, 2006 WL 2879454, at *4 (Ark. Ct. App. Oct. 11, 2006) ("In that hearing, all the evidence leading up to termination was revisited.").

148. See *Briscoe*, 912 S.W.2d at 427.

149. See, e.g., Jillian Cohen & Michele Cortese, *Cornerstone Advocacy in the First 60 Days: Achieving Safe and Lasting Reunification for Families*, 28 A.B.A. CHILD L. PRAC. 33, 41 (2009) ("Much decision making occurs outside court. Often, the traditional 'social work/child welfare' sphere, where concrete planning takes place, and the 'legal' sphere, where legally binding decisions about a family are made, do not connect.").

would have looked like had they been represented by counsel earlier is precisely the type of “speculative inquiry” that Justice Scalia cautioned against.¹⁵⁰ There is no way for a parent to demonstrate what would have happened had the earlier appointment been made.¹⁵¹ The revealing lens provided to Jimmy Stewart in “It’s a Wonderful Life”¹⁵² has no real world companion.

Take, for example, the case described at the outset of this Article, *Meza-Cabrera v. Arkansas Department of Human Services*.¹⁵³ In that case, an incarcerated parent was deprived of the right to a court-appointed attorney for years prior to the final TPR hearing, but was subsequently provided a lawyer at the final stages of the case.¹⁵⁴ At the final hearing, the case against Mr. Meza-Cabrera was overwhelming.¹⁵⁵ He was serving a very lengthy prison sentence for the sexual assault of a child, and his children had been residing in foster care for over three years.¹⁵⁶ There was very little his court-appointed attorney could have done to prevent the termination of his parental rights. Not surprisingly, with the record before it, the Arkansas Court of Appeals, applying a harmless error standard, concluded that “[Mr. Meza-Cabrera] has not demonstrated how the termination proceeding *would* have differed had he had the benefit of counsel before February 2006.”¹⁵⁷

There is no way of knowing with any certainty that the outcome in Mr. Meza-Cabrera’s case “would have differed”¹⁵⁸ had he been appointed an attorney at the outset of the case when he was legally entitled to receive one.¹⁵⁹ But, one can certainly imagine that it “could” have differed. The record indicates that Mr. Meza-Cabrera’s sister and brother-in-law expressed interest in caring for his children immediately after the children entered foster care and they actually took the step of filing a motion with the court requesting a change of custody.¹⁶⁰ The court delayed the consideration of the motion for nearly six months and ultimately rejected the request.¹⁶¹ The only reason proffered by the case worker for why she thought placement should be denied was that she “was concerned

150. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

151. Cf. *id.* (“It is impossible to know what different choices . . . would have [been] made, and then to quantify the impact of those different choices on the outcome of the proceedings.”).

152. *IT’S A WONDERFUL LIFE* (Liberty Films 1946). In the film, the lead character George Bailey is given the opportunity to see what the town where he lived would have been like had he never existed. *Id.* Appellate courts, faced with an inappropriate denial of counsel, speculate about the opposite—how a case would have proceeded had counsel been present.

153. No. CA 07-932, 2008 WL 376290 (Ark. Ct. App. Feb. 13, 2008).

154. See *id.* at *4.

155. See *id.* at *1–2.

156. See *id.*

157. *Id.* at *4 (emphasis added).

158. *Id.*

159. See *id.*

160. *Id.* at *1.

161. *Id.*

[that] [the relatives] did not believe [Mr. Meza-Cabrera] had done anything wrong.”¹⁶²

Timely appointment of counsel for Mr. Meza-Cabrera could have ensured that this issue of placing the children with relatives was fully presented to the court in an expedited manner. Presenting this issue to the court at the outset of the case—as opposed to two years after the children had entered foster care—would have raised completely different issues, as the factor of the children’s bond with their current foster parents¹⁶³ would have been irrelevant since no such bond would have existed. If the trial court was persuaded by counsel’s argument and the placement with the relatives had been made, then Mr. Meza-Cabrera would have had a clear defense to the termination of his parental rights. Federal law does not require the filing of a TPR petition if a child is living with relatives,¹⁶⁴ and Arkansas specifically lists a permanent relative placement as a potential permanency option in a child welfare proceeding.¹⁶⁵

Would this argument have succeeded? There is no way of knowing the answer to this question in hindsight, four years after the argument should have been made by the attorney who should have appeared in the case. What is certain, however, is that it is entirely possible that the argument could have succeeded, and if successful, would have dramatically altered the posture of the case. This possibility exists in nearly every case in which counsel is erroneously denied as overwhelmed courts and child welfare agencies¹⁶⁶ routinely make factual and legal mistakes, rely on inaccurate information, overlook key pieces of

162. See *id.* at *2.

163. See *id.* at *1.

164. 42 U.S.C. § 675(5)(E)(i) (2006) (listing permanent placement with relative as a valid permanency option).

165. ARK. CODE ANN. § 9-27-338(c)(5) (West 2009).

166. Courts and child welfare agencies are overwhelmed. See, e.g., Sewell Chan, *Child Welfare Cases Overwhelm Family Court, Report Finds*, N.Y. TIMES CITY ROOM BLOG (Jan. 10, 2008, 4:29 PM), <http://cityroom.blogs.nytimes.com/2008/01/10/child-welfare-cases-overwhelm-family-court-report-finds/> (noting that over a two year period “the average annual caseload for a city judge rose 56 percent—to about 2,200 from about 1,400—while the number of Family Court judges stayed the same”); Kim Kozlowski, *Overloaded System Endangers Foster Kids*, THE DETROIT NEWS, Nov. 21, 2006, at 1A (“Michigan’s growing foster care caseload, lack of foster families and cuts to abuse prevention programs have prompted critics to charge that the system . . . is stressed and flawed.”). Turnover of caseworkers handling child welfare cases is extremely high, which results in inadequate care for children. See Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 FUTURE OF CHILD. 75, 83 (2004). Caseworkers burn out and leave the profession in very high numbers. See *id.* Ninety percent of state child welfare agencies report difficulty in recruiting and retaining workers. *Id.* The annual turnover rate in the child welfare workforce is 20% for public agencies and 40% for private agencies. THE ANNIE E. CASEY FOUND., THE UNSOLVED CHALLENGE OF SYSTEM REFORM: THE CONDITION OF THE FRONTLINE HUMAN SERVICES WORKFORCE 41 (2003), available at <http://www.aecf.org/upload/publicationfiles/the%20unsolved%20challenge.pdf>. At least fourteen jurisdictions have been, or currently are under, federal court supervision for their failure to meet the basic needs of foster children. See *Class Actions*, CHILD. RIGHTS, <http://www.childrensrights.org/reform-campaigns/legal-cases/> (last visited Sept. 5, 2011).

information, and rely on incorrect statements of law.¹⁶⁷ Appellate courts are in no position to engage in anything but a speculative inquiry when trying to ascertain the precise impact of an unlawful and prolonged deprivation of counsel.¹⁶⁸ The effects of the deprivation are “unknown and unknowable.”¹⁶⁹

Considering that this type of violation affects the entire framework of the decision making process and its precise impact cannot be measured in any reliable way, the only suitable remedy for these errors would be to deem them “structural errors,” requiring automatic reversal of the TPR decision.¹⁷⁰ This is precisely what the United States Supreme Court has sanctioned in criminal cases,¹⁷¹ and the logic underlying its holdings is equally applicable if not stronger in child welfare proceedings, where the error has a high likelihood of infecting the entire case.¹⁷²

An automatic reversal rule has other benefits. It would send a clear message to trial courts about the importance of appointing counsel for parents in a timely manner, as state statutes require.¹⁷³ Case law and practice both reveal ambivalence on the part of many trial courts towards this right;¹⁷⁴ and the

167. *See, e.g.*, *R.V. v. Commonwealth*, 242 S.W.3d 669, 673 (Ky. Ct. App. 2007) (noting that the trial court erroneously found that a child had been living in foster care for fifteen of the preceding twenty-two months, an error “that was directly significant to the later termination of [the parents’] parental rights”); *Dep’t of Human Servs. v. Mason (In re Mason)*, 782 N.W.2d 747, 757 n.15 (Mich. 2010) (“[T]he court made several factual errors when it considered the length of the child protective proceedings.”).

168. *See, e.g.*, *In re Christopher C.*, 499 A.2d 163, 165 (Me. 1985) (“We cannot determine, in the instant case, the effect the testimony given at the preliminary hearing had on the court’s final order relating to the custody of the minor children.”).

169. *See In re Interest of J.J.B.*, 818 P.2d 1179, 1184 (Kan. Ct. App. 1991) (reversing a TPR decision because the trial court denied counsel to the parents during the adjudicative and review stages of the case).

170. Appellate courts in California have applied differing standards of appellate review depending on whether the deprivation of counsel is a constitutional or statutory violation. For a constitutional violation, they have applied a structural error standard, whereas for a statutory violation, they have forced parents to demonstrate the harm of the error. *See, e.g.*, *L.A. Cnty. Dep’t of Children’s Servs. v. Paul S. (In re Andrew S.)*, 32 Cal. Rptr. 2d 670, 674–75 (Cal. Ct. App. 1994). This approach, however, makes little sense because the primary justification for an automatic reversal rule is not related to the type of right that was violated, but instead to the impossibility of conducting meaningful appellate review when counsel is completely denied to a parent.

171. *See supra* text accompanying note 5.

172. *See White v. Dep’t of Health & Rehab. Servs.*, 483 So. 2d 861, 866 (Fla. Dist. Ct. App. 1986) (“The situation is similar to that relating to counsel for a defendant charged with a misdemeanor . . . [I]f dependency proceedings are to be part of a later proceeding resulting in permanent loss of parental custody, the parents should have, or knowingly waive, counsel.” (citing *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972))).

173. *See, e.g.*, FLA. STAT. ANN. § 39.807(1)(a) (West 2003) (requiring the court to advise parents of their right to counsel at each stage of a termination of parental rights proceeding and to appoint counsel for indigent parents).

174. *See, e.g.*, *Meza-Cabrera v. Ark. Dep’t of Human Servs.*, No. CA 07-932, 2008 WL 376290, at *1, *2 (Ark. Ct. App. Feb. 13, 2008) (noting that the trial court allowed several orders to

harmless error standard only strengthens this ambivalence by permitting courts to deprive the right to those appearing “too guilty” to deserve a lawyer—that is, those most likely to be unable to demonstrate clear harm. An automatic reversal rule would put trial courts on notice that conducting any child welfare proceeding in the absence of parent’s counsel would result in the automatic reversal of any subsequent TPR decision. Few trial courts would wish to assume this risk.

In turn, ensuring that parents are provided counsel at every hearing would yield benefits for children. Recent evidence reveals that strong parent representation significantly improves the likelihood and speed of reunification, reduces delays in the case, and lowers the chance that a parent’s rights will be terminated.¹⁷⁵ Data also suggest that these positive outcomes for children could potentially save child welfare systems millions of dollars since a child’s length of stay in foster care could be drastically reduced.¹⁷⁶ By ensuring the timely appointment of parent’s counsel, the automatic reversal standard would serve as a valuable tool to safeguard this key procedural right.

Finally, the clear standard would expedite the consideration of this issue on appeal. No longer would appellate courts be forced to engage in a fact-intensive “speculative inquiry” to ascertain the specific harm of an error that occurred years ago.¹⁷⁷ Instead, when confronted with a violation of a parent’s right to counsel, their response would be straightforward—the TPR decision would be automatically reversed without looking at the merits of the case. This is precisely the approach appellate courts have adopted when counsel is deprived at the final TPR hearing.¹⁷⁸ By applying a consistent approach to denials of counsel, appellate review of this issue would be more efficient, straightforward and timely. And again, all parties and actors in the child welfare system would have explicit notice of what is required as it relates to the provision of counsel for parents. Instead of adhering to a “no harm, no foul” rule, trial courts would be governed by a “no lawyer, no TPR” policy.

be entered into the record at the TPR proceeding even though the parent was not represented by counsel at those earlier hearings).

175. See *supra* text accompanying note 87. See also *In re D.M.K.*, 796 N.W.2d 129, 133 (Mich. Ct. App. 2010) (“The adjudicative and dispositional processes embodied in Michigan law and our court rules envision that early and meaningful parental participation facilitates the determination of the most beneficial permanency goal.”).

176. See *Bridge & Moore*, *supra* note 90, at 37 (“[T]he enhancement of parents’ representation has the potential to save increasing millions in state funding on an annualized basis.”).

177. See *supra* notes 134–136 and accompanying text (describing the difficult, fact-intensive questions courts are forced to ask when engaging in the harmless error analysis).

178. See cases cited *supra* note 12 and accompanying text.

VI. CONCLUSION

The application of a harmless error standard by appellate courts reviewing erroneous denials of counsel in child protective cases has undermined a critical procedural right that safeguards the interests of parents and children. Case law reveals that trial courts, on numerous occasions, have improperly rejected valid requests for counsel, and parents have been forced to navigate the child welfare system without an advocate. Appellate courts have excused these violations by speculating that the denials caused no significant harm to the parents, which is a conclusion that a court can never reach with any certainty.

The only appropriate remedy for this significant problem is a bright-line rule requiring the automatic reversal of the TPR decision in situations where a parent is denied the assistance of an attorney at critical stages of the case leading up to the TPR hearing. This rule is consistent with the Supreme Court's jurisprudence concerning the denial of counsel in criminal cases and would, as a matter of policy, lead to better outcomes for children in foster care. And undoubtedly, it would help further the appearance of a just decision making process that respects the rights of all parties affected by the child welfare system, an important consideration given current perceptions of the system.

