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Mary Helen McNeal
Professor of Law, University of Montana School of Law

TOWARD A "CIVIL GIDEON" UNDER THE MONTANA CONSTITUTION: PARENTAL RIGHTS AS THE STARTING POINT

Mary Helen McNeal*

To the extent justice depends on charity . . . it is destined to be unequal.[1]

I. INTRODUCTION

Litigants appear regularly in Montana courts without the assistance of counsel. In disputes ranging from abuse and neglect to landlord-tenant, consumer, public benefits, social security, insurance, dissolution, child support and parenting issues arising in administrative proceedings, Montana's courts of limited jurisdiction, the district courts, and the Montana Supreme Court, many litigants do not have access to attorney assistance.[2] Some elect not to be represented, but many low or moderate income individuals cannot secure free legal assistance and cannot afford to hire lawyers.

Few would disagree that many of these litigants would benefit from counsel.

Many believe counsel should be appointed for them. This article proposes theories under which Montana courts should be obligated to provide counsel to indigent parties in certain circumstances, focusing on the fundamental right to parent as

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1. Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L.J. 83, 101 (2000) [hereinafter *Access to Justice*].

2. Attorneys are not permitted in Montana's small claims courts unless all parties are represented. MONT. CODE ANN. § 25-35-505 (2003).

an example.

The Montana Constitution is a unique document providing important individual rights absent from the United States Constitution and many other state constitutions. Examples include the right to a clean and healthful environment,[3] the right to privacy,[4] the right to culturally appropriate education,[5] and the right to dignity.[6] Selected Montana constitutional rights, when recognized together, create a limited right to counsel. This article will analyze these theories and lay the foundation for the development of a "civil Gideon" in Montana.[7] It will conclude that the administration of justice and dignity clauses, working in tandem, create the strongest argument in support of the right to counsel. This right is most compelling when additional fundamental rights also are at stake, such as the right to parent.

Part II analyzes the Montana Constitution's administration of justice and dignity clauses and demonstrates how they support a right to counsel in limited situations. It also briefly addresses other potential legal theories, including Montana's due process clause and unenumerated rights provision, and a relevant statutory provision. Part III analyzes the fundamental rights that arise in the parenting context, a potential starting point for the development of a civil Gideon. Part IV applies the constitutional rights articulated above to the parenting context, concluding that the right to counsel exists in these civil cases. Finally, Part V outlines general recommendations for the Montana courts on successfully implementing a "civil Gideon" for indigent litigants.

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3. MONT. CONST. art. II, § 3 and art. IX, § 1.

4. MONT. CONST. art. II, § 10.

5. MONT. CONST. art. X, § 1

6. MONT. CONST. art. II, § 4. According to Professors Larry Ellison and Fritz Snyder, the Montana Constitution's Declaration of Rights contains seventeen provisions not contained in the federal document. LARRY M. ELLISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE 20 (G. Alan Tarr, ed., Greenwood Press 2001).

7. The term "civil Gideon" refers to the landmark decision Gideon v. Wainwright, 372 U.S. 335 (1963), in which the United States Supreme Court held that the Sixth Amendment right to counsel requires the court to appoint counsel to indigent criminal defendants. The court concluded that certain fundamental rights are also safeguarded against state action by the due process of law clause of the Fourteenth Amendment. The fundamental right of the accused to the aid of counsel in a criminal prosecution is one of the safeguards of the Sixth Amendment deemed "necessary to insure fundamental human rights of life and liberty." *Id.* at 343, (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)).

II. A "CIVIL GIDEON" UNDER THE MONTANA CONSTITUTION: LEGAL THEORIES

There are numerous theories under the Montana Constitution that support a civil Gideon. In Montana, as elsewhere, state constitutions represent the best strategy for creating greater rights to counsel in civil cases.[8] The basic principles employed in interpreting the Montana Constitution—that it creates a variety of individual rights that do not exist at the federal level, is to be interpreted more broadly than the United States Constitution, and is a cohesive set of interlocking principles—support the right of indigent litigants to court-appointed counsel in certain situations.

The Montana Constitution consistently has been interpreted more broadly than the Federal Constitution; the Montana Supreme Court has held that it need not be constrained by interpretations of the Federal Constitution.[9] Montana constitutional provisions that have been interpreted more broadly include the equal protection[10] and due process[11] clauses. For example, the court created a unique middle level of equal protection scrutiny, finding that for certain rights which are not fundamental rights but which are referenced in the constitution, the court should conduct a balancing test, evaluating whether the State's classification is reasonable and

8. For an interesting discussion of the Montana constitution and its relationship to similar documents, *see* G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 MONT. L. REV. 1 (2003) [hereinafter *Montana Constitution*] (noting that the 1972 Montana Constitution reflects a blending of two constitutional reform movements of the Twentieth Century, one emphasizing changes in fundamental laws and the other limits on governmental powers). For a discussion of general principles for interpreting state constitutions, *see, e.g.*, James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003 (2003) (arguing that state recognition of greater protection for individual rights may ultimately influence reasoning in federal constitutional cases); Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N. M. L. REV. 271 (1998) (arguing for distinguishable principles for interpreting the federal and state constitutions, and suggesting a "trans-state constitutional theory").

9. *See, e.g.*, Armstrong v. Mont., 1999 MT 261, ¶ 41, 296 Mont 361, ¶ 41, 989 P.2d 364, ¶ 41 (stating Montana's Constitution affords significantly broader protection than does the federal constitution due to the explicit privacy right); Dorwart v. Caraway, 2002 MT 240, ¶ 84, 312 Mont. 1, ¶ 84, 58 P.2d 128, ¶ 84 (Nelson, J., concurring) [hereinafter "*Dowart II*"] (noting that members of the constitutional convention intended for the Montana Constitution "to stand on its own footing and to provide individuals with fundamental rights and protections far broader than those available through the federal system." *Id.* at ¶ 94 (internal citations omitted)).

10. MONT. CONST. art. II, § 4.

11. MONT. CONST. art. II, § 17.

whether its interest in classifying persons according to a certain characteristic is more important than the individuals' rights at stake.[12] Montana's equal protection clause also applies to private as well as state actors.[13]

This trend to interpret state constitutions more broadly than identical provisions in the United States Constitution has been called "the new judicial federalism."[14] The recent pattern of devolution of power to the states increases the role of state constitutions in policy making and "rights debates."[15] As a result, state constitutions provide the best vehicle for creating more rights for indigent litigants unable to secure counsel.[16]

The Montana Supreme Court also has held that Montana's constitution should be interpreted as a coherent document. In a seminal case challenging restrictions on abortions performed by physicians' assistants, Justice Nelson wrote as follows for the

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12. Butte Cmty. Union v. Lewis, 219 Mont. 426, 434, 712 P.2d 1309, 1313-14 (1986) (invalidating a Montana welfare statute that classified individuals eligible for general assistance benefits on the basis of age). For further discussion, *see infra*, Section II(A)(4)(b).

13. *See Dorwart II*, ¶ 75 (recognizing private causes of action for damages for violation of state constitutional rights). *See also* Mark S. Kende, *Technology's Future Impact on State Constitutional Law: The Montana Example*, 64 MONT. L. REV. 273 (2003) (arguing that technological advances will result in the Montana Supreme Court applying the state constitution to private actors in addition to the state government).

14. Tarr, *Montana Constitution*, *supra* note 8, at 19.

15. *Id.* at 18.

16. Efforts to create a civil Gideon are burgeoning across the country and frequently rely on state constitutional provisions. John Nethercut, *"This Issue Will Not Go Away": Continuing to Seek the Right to Counsel in Civil Cases*, 38 CLEARINGHOUSE REV. 481 (Nov.-Dec. 2004) (describing efforts to develop "Civil Gideon" litigation and organize a national coalition focused on this issue). These strategies have taken the form of litigation, *see, e.g.*, Frase v. Barnhart, 840 A.2d 114. (Md. 2003) (holding that conditions imposed on parental custody violated the mother's due process rights, and that this finding mooted the right to counsel issue. In a strong concurrence, three justices admonished the majority for failing to address the right to counsel issue, stating that the Maryland constitutional provisions of "due process" and "law of the land" allow Maryland courts not to be constrained by decisions of the United States Supreme Court interpreting the federal constitutional counterparts); scholarship, *see, e.g.*, Lisa Brodoff, Susan McClellan & Elizabeth Anderson, *Access to Justice—A Call for Civil Gideon: The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE J. SOC. JUST. 609, 611 (2004) (arguing that many disabled litigants need accommodations and that attorneys are the only way to "provide the knowledge, energy, strategy, translation and understanding to mount a case or provide a defense for those whose disabilities block their ability to do so pro se."); Deborah Perluss, *Access to Justice—A Call For Civil Gideon: Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 SEATTLE J. SOC. JUST. 571 (2004) (describing an access-based approach to the constitutional right to counsel under Washington State Constitution's access to justice provision); and a "working group" organized by the Public Justice Center in Baltimore, Maryland, http://www.publicjustice.org (last viewed October 31, 2004).

court:

> Montana's constitution, and especially the Declaration of Rights, is not simply a cookbook of disconnected and discrete rules written with the vitality of an automobile insurance policy. Rather, our Constitution, and in particular its Declaration of Rights, encompasses a cohesive set of principles, carefully drafted and committed to an abstract ideal of just government. It is a compact of overlapping and redundant rights and guarantees.[17]

These basic principles assist in creating new interpretations of the right of indigent litigants to court-appointed counsel. This is particularly true when there are liberty interests at stake. Applying these principles to the administration of justice and dignity clauses results in the conclusion that court-appointed counsel should be provided for indigent civil litigants. This case is strongest when fundamental rights are at stake, such as the liberty interest in parenting that arises in abuse and neglect proceedings and in contested custody cases.[18]

A. The "Administration of Justice" Provision

1. Introduction

Like many other state constitutions, the Montana Constitution contains what is referred to as an "open courts" provision. More accurately characterized as an "administration of justice" provision,[19] this section states, in pertinent part, as

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17. *Armstrong*, 1999 MT 261, ¶¶ 71-72, 296 Mont 361, ¶¶ 71-72, 989 P.2d 364, ¶¶ 71-72 (holding that the statute violated Montanans' right to privacy, but also referencing other fundamental rights in the constitution, such as dignity, equal protection, due process and freedom of religion and speech). *But see* Tarr, *Understanding State Constitutions*, *supra* note 8, at 1183-85 (arguing that most state constitutions do not have a coherence of design).

18. In 1997, the Montana legislature changed the language in applicable statutes from "custody" to "parenting." *See, e.g.*, Mont. Code Ann. § 40-4-234 (2003) (requiring parents involved in a legal separation, marriage dissolution or parenting proceedings to file a proposed parenting plan to be incorporated into a final decree). Although technically there is no longer a "contested custody dispute," many parents still disagree about who should have the children when, and often these disputes are quite "contested." *See, e.g.*, *In re* Marriage of Burk, 2002 MT 173, 310 Mont. 498, 51 P.3d 1149 (modifying a parenting plan that had been adopted "after a contested custody hearing" following dissolution of the parents' marriage in 1998). To conclude that the change in statutory language has resulted in different behaviors by parents would be purely speculative.

19. The characterization of this provision as the "administration of justice" clause is consistent with its title in the Montana Constitution and the fact that it embodies many concepts in addition to that of "open courts." Interestingly, Reginald Heber Smith, writing in 1919 in his seminal work *Justice and the Poor*, made the following comments about the administration of justice:

follows: "Section 16. The administration of justice. Courts of justice shall be open to every person, and speedy remedy afforded to every injury of person, property, or character. . . . Right and justice shall be administered without sale, denial or delay."[20]

Up to thirty-nine state constitutions have "right to remedy" provisions.[21] Many of those provisions also contain "open courts" clauses.[22] This provision provides a variety of rights—to open courts, to a remedy, and "right and justice" "without sale, denial or delay." This section explores the origins of these provisions and comparable provisions in other state constitutions, how the Montana Supreme Court has interpreted section 16, and the application of these collective rights to a civil Gideon. Advocates for Montanans without the resources to secure legal counsel rightfully look to this provision for assistance in addressing these unmet legal needs.

Article II, section 16 results in a right to counsel in civil cases under two theoretical frameworks. Section 16, in and of itself, creates a fundamental right. The rights afforded in section 16 prove fundamental both because they are found in the Declaration of Rights and because they are rights without which other constitutionally protected rights would have little meaning.[23] Once the right of access in section 16 is characterized as a fundamental right, classifications impinging

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> It is the wide disparity between the ability of the richer and poorer classes to utilize the machinery of law which is, at bottom, the cause of the present unrest and dissatisfaction. Denial of justice to the poor is due to the *conditions*, imposed by our traditional system, upon which alone can suits be brought and conducted. There is something tragic in the fact that a plan and method of administering justice, honestly designed to make efficient and certain that litigation on which at last all rights depend, should result in rearing insuperable obstacles in the path of those who most need protection, so that litigation becomes impossible, rights are lost, and wrongs go unredressed.

REGINALD SMITH, JUSTICE AND THE POOR 15 (1919). Smith also emphasized the critical role of counsel and the inability of the poor to afford legal counsel. *Id.* at 31-34.

20. The omitted section, irrelevant for this discussion, states as follows: "No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state." MONT. CONST., art II, §16.

21. David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197 (1992). *See also* Ned Miltenberg, *The Revolutionary 'Right to a Remedy,'* TRIAL, Mar. 1998, at 48 (noting that thirty-eight states have right to remedy provisions).

22. JENNIFER FRIESEN, 1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES §§ 6-1 to 6-3 (3d ed. 2000) (noting that twenty-seven state constitutions require courts to be open).

23. In the Matter of C.H., 210 Mont 184, 201, 683 P.2d 931, 940 (1984).

on that right are subject to a strict scrutiny analysis. Alternatively, the right of access discussed in section 16 can arise when different fundamental rights are at stake. The fundamental right of parenting is one example. When such a right is at stake, section 16 mandates that counsel be provided. After outlining the background of section 16, this section will discuss these theoretical approaches to developing a civil right to counsel.[24]

2. *General History*

Although there is little consensus about the meaning and purpose of "open courts" clauses, some historical background elucidates their role in the right to counsel context. With the resurgence of interest in state constitutions,[25] scholars began examining the historical antecedents of these common state constitutional provisions.[26]

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24. For a discussion of the general obligations of courts to provide access, *see* Tenn. v. Lane, 541 U.S. 509 (2004) (holding that Title II of the Americans with Disabilities Act ("ADA") is within Congress' authority under Section 5 of the Fourteenth Amendment). In this case alleging that Tennessee's failure to provide court access and court services to the physically handicapped violated the ADA, the Court found a duty to accommodate to provide citizens a meaningful opportunity to be heard. *Id.* Justice Stevens wrote the following: "Each of these cases makes clear that ordinary considerations of costs and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts." *Id.* at 1994. The Court concluded that Title II's affirmative obligations to accommodate the disabled in the administration of justice was a "reasonable prophylactic measure, reasonably targeted to a legitimate end." *Id. See also* Brodoff et al., *supra* note 16.

25. *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (arguing "[t]he legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it the full realization of our liberties cannot be guaranteed"); Gardner, *supra* note 8 (identifying ways in which individual rights in state constitutions can restrain the exercise of national governmental power); Tarr, *Understanding State Constitutions*, *supra* note 8 (offering suggestions for creating state constitutional jurisprudence that does not rely on theories designed for interpreting the federal constitution).

26. *See, e.g.*, Bari R. Burke, *Constitutional Initiative 30: What Constitutional Rights Did Montanans Surrender in Hopes of Securing Liability Insurance?*, 48 MONT. L. REV. 53 (1987) (analyzing the foundations of Montana's tort system, including Montana Constitution's article II, section 16 and its predecessor, article III, section 6, and the role of the judiciary and legislature in shaping remedies); Robert Williams, *Foreword: Tort Reform and State Constitutional Law*, 32 RUTGERS L.J. 897 (2001) (arguing that state constitutional provisions on open courts, right to remedy, civil jury trial, due process and equal protection have provided successful arguments for constitutional tort reform); Thomas R. Phillips, *The Constitutional Right to Remedy*, 78 N.Y.U. L. REV. 1309, 1322 (2003) (arguing that Blackstone's interpretation of Coke was "concerned not merely with the physical availability of judicial process but with the substantive opportunity to assert claims to protect absolute rights.") Phillips also notes that "the remedies clause may

Common historical interpretations suggest that "open court" provisions are derived from Sir Edward Coke's interpretations of the Magna Carta.[27] However, as Jonathan Hoffman points out, those limited analyses fail to articulate interpretation standards.[28] Hoffman engages in a comprehensive historical analysis of the conditions existing at the time of the Magna Carta, of Coke's interpretation of the Magna Carta, of the colonies' incorporation of these ideas into their own state constitutions, and of subsequent interpretations and analyses of open courts clauses.[29]

Hoffman argues the Magna Carta writers intended to combat the king's influence-peddling in the judicial system.[30] Sir Edward Coke, himself an appointee of the king, faced attempts by the king to influence cases and issued "writs of prohibition," precluding various ministers from becoming embroiled in disputes.[31] The king eventually removed Coke, who ultimately published *The Institutes*, posthumously. Hoffman concludes that in writing *The Institutes,* Coke wished to address common law remedies and their administration, with the goal of convincing readers that the Magna Carta protected citizens from improper influence by the Crown.[32]

Hoffman continues his analysis by examining the incorporation of open courts provisions into state constitutions, and raises many interesting questions about what framers might have known about the historical underpinnings of Coke's *Institutes* and the Magna Carta. Relating important events of colonial times and their relationship with the Crown, Hoffman notes that the same fears and concerns were present in the colonies as existed during Coke's era—that is, that the king

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impose some level of responsibility on courts to see that all citizens secure the promise of equal justice under the law." *Id.* at 1344; Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L. J. 1005 (2001) [hereinafter *Search*] (arguing for further development of the historical antecedents to this clause, and the grievances which inspired them).

27. *See, e.g.*, Phillips, *supra* note 26.

28. Hoffman, *Search*, *supra* note 26, at 1042.

29. *See id.*

30. Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause in State Constitutions*, 74 OR. L. REV. 1279, 1286 (1995) [hereinafter *Origins*].

31. *Id.* at 1292-93.

32. *Id.* at 1287, 1293-94. *But see* John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237 (1991) (arguing that the early history of these provisions does little to explain the framers' intent).

would interfere with the administration of justice.[33]

Noting the specific language in *The Institutes*, Hoffman summarizes his interpretation of Coke's work:

> Coke's language reveals important nuances. He was not concerned merely with guaranteeing a remedy for every injury; rather, *he wanted to assure that the remedies legally available were not to be denied because of the status of the parties.* Clerics who committed torts would be sued in a common-law court and would not be permitted to take shelter through the intervention of an ecclesiastical tribunal. Unpopular Puritans and Quakers, for example, would not lose a meritorious case merely because their well-placed adversary had connections to the King or Chancellor.[34]

Because these same conditions and concerns existed in early colonial days, the colonists adopted similar provisions.[35]

The conclusions in Hoffman's analysis are significant in a right to counsel debate. Many of the dangers that both Coke and the early colonists sought to protect against, particularly undue influence and pressures on the judiciary, exist today as we struggle to provide meaningful access to our legal system for all people, including the indigent. Although the perpetrators of these pressures differ in twenty-first century America, the dangers of such influences and the risks of failing to address these problems are comparably serious.

3. History and Interpretation of Montana's Administration of Justice Clause

Montana's administration of justice clause grants broad rights to all Montanans to access the judicial system, and to a fair resolution of their legal problems.[36] This Section summarizes the Montana Supreme Court's jurisprudence in this area, highlights trends in its interpretations of article II, section 16, and suggests future interpretive directions.

Adopted in 1898, Montana's first constitution contained an "administration of justice" clause—article III, section 6—virtually identical to the current clause,[37] and characterized as

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33. Hoffman, *Origins*, *supra* note 30, 1297.

34. *Id.*, at 1314 (emphasis added).

35. *Id.*

36. MONT. CONST. art. II, § 16.

37. MONT. CONST. of 1889, art. III, § 6 (1898). For a discussion of the history of Montana's "open courts" clause, *see* Burke, *supra* note 26 (exploring the historical antecedents to the current provision and anticipated court interpretations in light of Constitutional Initiative 30, which provided that the provision was not to be construed as a limit on legislative power to establish, limit, modify, or abolish claims.

derived from the Magna Carta.[38] In 1971, Montanans convened a Constitutional Convention which readily readopted the "administration of justice" clause.[39] Voters approved this new constitution in 1972.[40]

In her analysis of article II, section 16 written following the passage of Constitutional Amendment 30 and prior to its nullification by the court, Professor Bari Burke provides a useful summary of the court's interpretations of section 16 up to this time.[41] Much of the early case law interpreting section 16 and its predecessor focuses on the "right to remedy" portion of the clause, and the balance of power between the courts and the judiciary. Professor Burke argues that, historically, the Montana Supreme Court afforded section 16 "minimal significance."[42] Professor Burke characterizes the court's early interpretation of section 16 as "a proclamation of judicial protocol"[43] and quotes from Shea regarding its meaning:

> It relates directly to the duties of the judicial department of government. It means no more nor less than that, under the provisions of the Constitution and law constituting them, the courts must be accessible to all alike, without discrimination, at the time or times, and the place or places, appointed for their sitting, and afford a remedy for every wrong recognized by law as being remediable in a court.[44]

In the subsequent fifteen years, however, the court has given section 16 increasing significance. The court's shift began with the decision in *Corrigan v. Janney*, a wrongful death case

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Constitutional Initiative 30 was passed by the voters on November 4, 1986, but was later found unconstitutional on procedural grounds. State *ex rel.* Mont. Citizens for Pres. of Citizens' Rights v. Waltermire, 227 Mont. 85, 738 P.2d 1255 (1987)).

38. Burke, *supra* note 26, at 55 n.14 (citing Stephens v. Nacey, 47 Mont. 479, 482-83, 133 P. 361, 362 (1913) (since the days of Magna Carta it has been the proud boast of the English people that their courts are open to everyone to afford a speedy remedy for every injury to person, property or character, and to administer right and justice without sale, denial or delay. That charter of liberty was a part of the inheritance of the original American colonies, has been adopted in the later states, and finds expression in section 6, article III of the Constitution of Montana).

39. The language added to the Montana Constitution in 1971 was in response to a recent Montana Supreme Court decision holding that an employee had no legal redress against a third party if the employer had workers' compensation coverage. Ashcraft v. Mont. Power Co, 156 Mont. 368, 480 P. 2d 812 (1971) (absolving employer from liability for injuries to an employee whose immediate employer is an independent contractor).

40. ELLISON & SNYDER, *supra* note 6, at 15, but the amendment was nullified by the *Waltermire* decision, *see supra* note 37.

41. Burke, *supra* note 26, at 56-57.

42. *Id.* at 57- 59.

43. Burke, *supra* note 26, at 61.

44. *Id.* (quoting *Shea*, 55 Mont. at 533, 179 P. at 502).

arising in a landlord-tenant context.[45] Relying on section 16, the court overruled prior decisions and concluded that while a "repair and deduct" remedy provides compensation for damages to property, it is not a substitute for a personal injury or a wrongful death claim.[46] In a more recent case relying on section 16 and other state constitutional and statutory provisions, the court held that plaintiffs were entitled to damages against the state for violations of the search and seizure provision, the right to privacy, and due process.[47]

45. Corrigan v. Janney, 192 Mont. 99, 103, 626 P.2d 838, 840 (1981).

46. *Id.*

47. *Dorwart II*, 2002 MT 240, ¶ 48, 312 Mont. 1, ¶ 48, 58 P.3d 128, ¶ 48. It is also helpful to review other analyses of section 16, and what specific rights it protects. In several old cases, the court found that section 16, and its predecessor provision, section 6, required the court to allocate resources to litigants. For example, the court ordered that section 6 and a statute enacted to carry out its purposes mandated that the court provide transcripts for a criminal defendant noting an appeal. *Mont. ex rel.* Parmenter v. Dist. Ct. of Ravalli County, 111 Mont. 453, 453, 110 P.2d 971, 971 (1941). *See also* Sullivan v. Bd. of County Commissioners, 124 Mont. 364, 368, 224 P.2d 135, 137 (1950) (relying on article III, section 6 of the original Montana Constitution, the court held a criminal defendant is entitled to the transcript and whatever is necessary to appeal his conviction without costs).

In other contexts, the court has also held that section 16 does *not* require the allocation of resources. *See, e.g.*, Grooms v. Ponderosa Inn, 283 Mont 459, 469-70, 942 P.2d 699, 705 (1997) (holding that a workers compensation claimant was not denied her right to full legal redress when she could not pay for an optional, second medical exam to support her claim); Montana v. Lance, 222 Mont. 92, 106, 721 P.2d 1258, 1268 (1986) (holding that a criminal defendant was not denied access to the courts for allegedly being denied access to a library while in jail and by alleged inadequacies in his appointed counsel's performance).

Section 16 does *not* provide a right to any particular remedy, s*ee, e.g.*, Reeves v. Ille Elec. Co., 170 Mont. 104, 110, 551 P.2d 647, 650-51 (1976) (section 16 does not preclude court from eliminating a common law right, provided it does not interfere with a vested right), a new cause of action, *see, e.g.*, Nick v. Mont. Dep't of Highways, 219 Mont. 168, 175, 711 P.2d 795, 800 (1985); or attorneys' fees, *see, e.g.*, Schuff v. A.T. Klemens & Son, 2000 MT 357, ¶ 101, 303 Mont. 274, ¶ 101, 16 P.3d 1002, ¶ 101. Administrative review and exhaustion of remedies requirements do not violate section 16, *see, e.g.*, Art v. Mont. Dep't of Labor and Indus., 2002 MT 327, 313 Mont 197, 60 P.3d, although section 16 does preclude unnecessary delay. *See, e.g.*, Connell v. Mont. 280 Mont. 491, 498, 930 P.2d 88, 92 (1997) (holding that 44 month delay in resolving the amount of child support owed constituted an undue delay in violation of the due process clause and section 16).

4. Theoretical Approaches to Section 16

a. Section 16 Creates a "Fundamental Right"

Section 16 is characterized as a fundamental right for two reasons: for its place in the Declaration of Rights and as a "right without which other constitutionally protected rights would have little meaning."[48] As a fundamental right, it is subject to strict scrutiny. This section outlines the court's history of interpretation of article 16, and its evolution to a fundamental right.

i. Section 16 is part of the Declaration of Rights

The Corrigan case began the court's shift in interpreting section 16, and the initiation of a fundamental rights analysis. A subsequent case challenged the Montana Medical Malpractice Panel Act, which required plaintiffs to submit claims to the panel prior to filing in court.[49] Plaintiffs argued that the extra costs and delays required by the Act effectively denied them access to the courts.[50] The court determined that the right of access to the courts "*is not* an independent fundamental *right*; access is only given such a status when another fundamental right . . . is at issue . . . ."[51]

Once the court began applying constitutional principles to the right of access clause, the court launched on a long and convoluted journey to define the right of access guaranteed by article II, section 16. Since this decision in 1981, the court has wavered on whether or not section 16 creates fundamental rights subject to a strict scrutiny analysis. In *White v. Montana*,[52] the plaintiff was attacked by a patient who had escaped from Warm Springs Hospital.[53] White argued that the statutory limits on government liability and damages affected her fundamental right to bring an action for injuries and,

48. *Butte Cmty. Union*, 219 Mont. 426, 430, 712 P.2d 1309, 1312 (1986).

49. Linder v. Smith, 193 Mont. 20, 25, 629 P.2d 1187, 1190 (1981).

50. *Id.* The court held that the burdens imposed by the Medical Malpractice Panel Act were rationally related to the aims of the act and the act constitutes a reasonable response to the medical situation. *Id.*, 193 Mont. at 31, 629 P.2d at 1193.

51. *Id.* 193 Mont. at 25, 629 P.2d at 1190 (emphasis added).

52. White v. State, 203 Mont. 363, 661 P.2d 1272 (1983), *overruled by* 238 Mont. 21, 776 P.2d 488 (1989).

53. *Id.* 203 Mont. at 366, 661 P.2d at 1273-74.

therefore, the statute should be reviewed under a strict scrutiny analysis.[54] After determining that section 16 "guarantees . . . speedy remedy for every injury,"[55] the court examined the classifications in the statute. It held that they affected a fundamental right, and therefore applied a strict scrutiny analysis.[56] The court concluded that the state presented no compelling reason for the distinctions between economic and non-economic damages, and struck down the statute.[57]

Analysis in *Pfost v. State*, in which the court held that article II, section 16 creates a fundamental right, bolstered this view.[58] This case presented a challenge to a statutory distinction between damages caused by the state and other damages. Once it determined that the provision affected a fundamental right, the court concluded that the statute violated the intent of the Constitutional Convention to protect the rights of individuals.[59] Finding no compelling state interest justifying distinctions in the statute, the court found the statute unconstitutional under section 16.[60]

For the next fifteen years, the court periodically reconsidered the status of section 16 vis-a-vis a fundamental rights analysis.[61] In the landmark case of *Meech v. Hillhaven West, Inc.*,[62] the court reexamined the "fundamental rights" aspect of section 16 yet again. In evaluating whether the Wrongful Discharge From Employment Act, which provides exclusive remedies and limits the type of damages claims available, deprives a litigant of a right to full legal redress, the court said section 16 does *not* guarantee a fundamental right to

54. *Id.* 203 Mont. at 367-68, 661 P.2d at 1274-75.

55. *Id.*, 203 Mont. at 368-69, 661 P.2d at 1275.

56. *Id.*, 203 Mont. at 369, 661 P.2d at 1275

57. *Id.*

58. Pfost v. State, 219 Mont. 206, 219, 713 P.2d 495, 503 (1985), *overruled by* 238 Mont. 21, 776 P.2d 488 (1989).

59. *Id.*, 219 Mont. at 221-22, 713 P.2d at 504-05. *See also* Burke, *supra* note 26, at 77.

60. *Id.*, 219 Mont. at 222-23, 713 P.2d at 505.

61. *See, e.g.*, Peterson v. Great Falls Sch. Dist. No. 1 and A, 237 Mont. 376, 380, 773 P.2d 316, 318 (1989) (holding that access to the courts is not a fundamental right, thus the constitutionality of the statute is presumed and the State need only show the action is rationally related to a legitimate state interest).

62. 238 Mont. 21, 776 P.2d 488 (1989). A central issue in *Meech* was separation of powers, and the legislature's ability to alter or restrict common law remedies for injuries to person, property, or character. Ultimately, the court concluded that court interference with the right of the legislature to change the common law would violate the Constitutional separation of powers doctrine. *Id.*, 238 Mont. at 42, 776 P.2d at 501.

any *particular* cause of action or full legal redress.[63] Noting that section 16 is directed at the courts, the court found that the legislature could alter common law causes of action.[64] Justice McDonough, writing for the court, stated as follows:

> In conclusion, Montana's remedy clause seeks to guarantee equal access to courts to obtain remedies for injuries as provided by governing law. It does not, however, impart a definition of what the law considers a remedy or full legal redress. Nor does it empower this Court to exclude the legislature from defining what are legal injuries. Finally, we make clear here that the proper test to apply to the Act's classifications burdening one class and not another, is the rational basis test.[65]

In a strongly worded dissent, Justice Sheehy began: "This is the blackest judicial day in the eleven years that I have sat on this Court . . . the Court throws in the sponge as a co-equal in our tripartite state government."[66] Justice Sheehy continued:

> As surely as there are fundamental rights, there are surely no fundamental half-rights. The right of access to courts is only part of the fundamental right; the right to a full legal remedy completes the part to make a whole. The two, access to the courts and full redress, indivisibly make one fundamental right, and together they are the essence of justice. They must coexist to complete the fundamental right to justice . . . . When, however, the legislature acts invidiously to discriminate between persons similarly situated, Art. II, § 16 imposes a duty upon this Court to make certain that right *and* justice are not denied.[67]

In his dissent, Justice Sheehy concluded that the Wrongful Discharge From Employment Act violated the equal protection clause of the state constitution, finding that it did not serve a legitimate governmental purpose, had no rational basis, and could not support a balancing test between the rights of employers and employees to life's basic necessities.[68]

ii. Section 16 protects rights without which other rights would have no meaning.

The *Meech* decision that section 16 does not create a fundamental right was affirmed in subsequent Montana

63. *Id.*, 238 Mont. at 36, 776 P.2d at 497.

64. *Id.*, 238 Mont. at 34, 776 P.2d at 496.

65. *Id.*, 238 Mont. at 52, 776 P.2d at 507.

66. *Id.*, 238 Mont. at 52, 776 P.2d at 507 (Sheehy, J., dissenting).

67. *Meech*, 238 Mont. at 64, 65, 776 P.2d at 514, 515 (emphasis in original) (Sheehy, J., dissenting).

68. *Id.*, 238 Mont. at 67, 776 P.2d at 516 (Sheehy, J., dissenting).

Supreme Court decisions.[69] The state of the law remained generally unchanged until 2002, when the link between section 16 and fundamental rights again resurfaced.[70] In *Kloss v. Jones*, an investor's action against a securities broker for alleged violations of securities law, negligence, breach of fiduciary obligations, and fraud, addressed this issue.[71] The case concerned a mandatory arbitration agreement and its enforcement against the appellant, an elderly widow. Justice Trieweiler, writing for the majority, concluded that the arbitration agreements were in contracts of adhesion, and therefore unenforceable, and held that Respondent had a fiduciary duty to explain the arbitration agreements to the appellant.[72]

In a specially concurring opinion, Justice Nelson, joined by the majority of the court, addressed the appellant's rights of access to the courts and to a jury trial. He affirmed prior decisions that article II rights are fundamental rights, which "means that these rights are significant components of liberty . . . any infringement of which will trigger the highest level of scrutiny, and thus, the highest level of protection by the courts."[73] He characterized the right of access to the courts in article II, section 16 as follows:

> In my view, this right is as much a fundamental right as is any other article II right. This is so not only because the right of access to the courts is included within the Constitution's Declaration of Rights, but also, and just as importantly, without the right of access to the courts, other article II rights would have little protection from infringement and, thus, little meaning. . . . Purely and simply, access to the courts guarantees that other Article II rights are something more than mere dreams and aspirations. Access to the courts gives real existence to other fundamental rights. And, that makes access to the courts a fundamental right also, for without this right other rights have no meaning.[74]

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69. *See, e.g.*, Miller v. Fallon County, 240 Mont. 241, 248, 783 P.2d 419, 424 (1989) (reaffirming its holdings in Peterson and Meech that access to the courts and full legal redress are not fundamental rights).

70. *Id.* ¶¶ 6-7.

71. Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 Mont. 123, 54 P.3d 1, *cert. denied*, 538 U.S. 956 (2003).

72. *Id.* ¶¶ 28, 38.

73. *Id.* ¶ 52 (Nelson, J., concurring).

74. *Id.* ¶¶ 57-58 (Nelson, J., concurring).

Finally, Justice Nelson writes:

> In short, without access to the courts, there is no way to safeguard the other fundamental rights guaranteed by article II of Montana's Constitution. Indeed, to the extent that those rights cannot be protected by the courts, Montana's Declaration of Rights is little more than a collection of eloquent, but unenforceable words. Access to the courts is a fundamental right, and our cases that hold to the contrary are wrong.[75]

Although a concurrence, Justice Nelson's opinion was joined by the majority of the court, and therefore has precedential value.[76] The court has not explicitly addressed the "fundamental right" nature of section 16 since the *Kloss* decision in 2002.

Despite the convoluted interpretive history of section 16, it is now clear this provision creates fundamental rights.[77] For the purposes of this discussion, one must then ask if a litigant can secure meaningful access to the courts absent counsel. Although there is limited research addressing this issue, it is apparent that, at least in certain situations, access without counsel is meaningless, and therefore counsel is required by section 16.[78]

In a similar approach adopted prior to *Kloss*, the court developed a "necessary incident" test for determining fundamental rights.[79] In *Wadsworth v. State*,[80] the plaintiffs

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75. *Id.* ¶ 63 (Nelson, J., concurring).

76. Ordinarily, a concurrence has no precedential value and is not binding upon the court. 21 C.J.S. *Courts* § 141 (2004). However, "the views expressed in a separate concurring opinion of an individual judge are those of the court and a *controlling authority, only where a majority of the court concur therein.*" *Id.* (emphasis added). *See also* Longon Guarantee & Accident Co. v. McCoy, 45 P.2d 900, 902 (Colo. 1935) (noting that a concurring opinion joined by five other members of the court "became, equally with the other, the opinion of the court."); Anderson v. Sutton, 293 S.W. 770, 773 (Mo. 1927) (noting "[v]iews expressed in a separate concurring opinion of an individual judge are not the views of the court, unless it appears that the majority of the court concurred in such separately expressed views."); and Alabama v. Goldstein, 93 So. 308, 314 (Ala. 1922) (stating "it has well been said that the views of the individual judges are of no concern unless such views are adopted by at least a majority of the court.").

77. Kloss, ¶ 63.

78. The little research that does exist suggests that this assistance is more valuable for some litigants than others, and more useful for addressing certain kinds of problems than others. *See, e.g.*, Michael Millemann, Natalie Gilfrich & Richard Granat, *Rethinking the Full-Service Representation Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV. 1178 (1997) (describing a clinical course at the University of Maryland School of Law in which students provided legal information and advice to *pro se* litigants at the courthouse. The participants concluded that the clients' ability to proceed *pro se* after receiving the assistance depended on factors such as self-motivation, writing skills, and intelligence. Additionally, clients were most satisfied when their cases required mechanical justice compared to when their cases required "substantial legal judgment and discretion.").

79. *Id.*, 275 Mont. at 298, 911 P.2d at 1171.

challenged an informal agency decision precluding employees from having outside employment.[81] The Appellant argued that article II, section 3 of the constitution, which provides that Montanans shall have an inalienable right to pursue life's basic necessities, necessarily included an opportunity to earn a living.[82] After reasserting that section 3 created fundamental rights, the court continued:

> We conclude that without the right to the opportunity to pursue employment, the right to pursue life's basic necessities would have little meaning, because it is primarily through work and employment that one exercises and enjoys this latter fundamental constitutional right.[83]

The court concluded that "the right to the opportunity to pursue employment generally as a *necessary incident* of the fundamental right to pursue life's basic necessities."[84]

After determining the right to pursue employment a "necessary incident" to a fundamental right, the court applied a strict scrutiny analysis. It stated that the agency must show a compelling state interest for its restriction and the applicable classification must be "closely tailored to effectuate only that compelling state interest."[85] The state must also show that its "choice of legislative action is the least onerous path that can be taken to achieve the state objective."[86] Ultimately, the court found that the record submitted by the agency failed to show a compelling state interest, and found the regulation unconstitutional.[87]

The right to counsel is a right without which other fundamental rights have little meaning. Just as employment is a "necessary incident" of the right to pursue life's basic necessities, so, too, is the right to counsel a "necessary incident" of access to the courts, another fundamental right. Other rights

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80. 275 Mont. 287, 911 P.2d 1165 (1996).

81. *Id.*

82. *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1173-74.

83. *Id.*, 275 Mont. at 299, 911 P.2d at 1172.

84. *Id.* 275 Mont. at 301, 911 P.2d at 1173 (emphasis added). The court distinguished this right from a right or property interest in any *particular* job or employment. *Id.*

85. *Id.*, 275 Mont. at 302, 911 P.2d at 1174.

86. *Id.*

87. *Id.*, 275 Mont. at 303, 911 P.2d at 1174. While the agency alleged a compelling state interest, the court noted the record indicated that the agency was concerned about an appearance of impropriety, but could not substantiate any allegations of impropriety nor any detrimental affect on the agency due to appraisers' outside employment. *Id.*, 275 Mont. at 303-04, 911 P.2d at 1174-75.

are "rendered meaningless absent the courts being able to enforce these rights. Purely and simply, access to the courts guarantees that other Article II rights are something more than mere dreams and aspirations."[88] In fact, this is precisely the role filled by a right to counsel; it ensures that the other rights protected in the constitution have meaning.

b. Section 16 creates benefits "lodged in the Constitution."

An alternative approach to analyzing section 16 is as a "benefit lodged in our state constitution."[89] In a case challenging the state's efforts to reduce general assistance payments to poor people under fifty years of age, Appellants relied on article XII, section 3(3) and article II, section 4 of the Montana Constitution.[90] The court noted that welfare was important enough to merit mention in the constitution, and therefore any legislation that limited the availability of welfare should be subjected to a heightened scrutiny analysis.[91] The court stated that welfare is a "*benefit lodged* in our State Constitution [and therefore] is an interest whose abridgement requires something more than a rational relationship to a governmental objective."[92] The court also stated that "[w]here constitutionally significant interests are implicated by governmental classification, arbitrary lines should be condemned. Further, there should be balancing of the rights infringed and the governmental interest to be served by such infringement."[93] Butte outlined a two part test: 1) whether the classification is reasonable; and 2) whether the state's interest in classifying is more important than the peoples' interest in obtaining benefits.[94]

After finding that governmental benefits deserve more protection than that afforded under a rational basis test, the court balanced "the rights infringed and the government's

88. Kloss, ¶ 58 (Nelson, J., concurring).

89. *Butte Cmty. Union*, 219 Mont. at 434, 712 P.2d at 1313.

90. *Id.* At that time, article XII, section 3(3) provided that "[t]he legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities and misfortune may have need for the aid of society." Article II, section 4 is Montana's dignity clause and equal protection provision, discussed above. MONT. CONST. art. XII, § 3(3) (amended 1988).

91. *Butte*, 219 Mont. at 434, 712 P.2d at 1313.

92. *Id.* (emphasis added).

93. *Id.*, 219 Mont. at 434, 712 P.2d at 1314.

94. *Id.*

interest to be served by such infringement."[95] The court determined that the state failed to show that those under age fifty were more capable of surviving without money than those above age fifty, and that the state's interest in saving money needed to be balanced against the interests of those in need of the money.[96] Using this equal protection analysis and a newly-developed "middle tier" approach, the court determined that the legislation violated the state's equal protection clause.[97] The Montana middle-tier test applies to rights found in the constitution, even if not "fundamental rights," and requires a balancing of the state's interest and the individual's interest at stake.

Significantly, the *Butte* decision expanded development of Montana's equal protection jurisprudence, creating a new construct for analyses of equal protection issues. Notably, the court acknowledged the approach adopted by the United States Supreme Court, and stated, "[w]e will not be bound by decisions of the United States Supreme Court where independent state grounds exist for developing heightened and expanded rights under our state constitution."[98]

When applied to the right to counsel issue, the "benefit lodged in the constitution" analysis is helpful, but does not go far enough to result in the appointment of counsel. One can argue that the right to counsel, like the right to employment, is a "benefit lodged" in article 16. However, this analogy would result in a middle-tier analysis, requiring a balancing of the interests of the individual in need of counsel against the interests of the state. A balancing of these interests could result in the appointment of counsel in the most egregious circumstances, but certainly not in all, or even most, civil cases.[99] Thus, this argument is of limited usefulness in creating

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95. *Id.*

96. *Id.*

97. *Butte Cmty. Union* ,219 Mont. at 434-35, 712 P.2d at 1314. In the wake of this decision, the Montana Constitution was amended to make the provision of benefits discretionary. The new language provides as follows: "The legislature *may provide* such economic assistance and social and rehabilitative services for those who, by reason of age, infirmities, or misfortune, are determined by the legislature to be in need." Mont. Const., art. XII, § 3(3) (emphasis added).

98. *Butte*, 219 Mont. at 433, 712 P.2d at 1313. *See also* State v. Guillaume, 1999 MT 29, ¶ 13, 293 Mont. 224, ¶ 13, 975 P.2d 312, ¶ 13 (holding that the double jeopardy clause in the Montana Constitution provides more protection to defendants than the similar clause in the U.S. Constitution).

99. *See* Section II(C)(1) *infra* for a discussion of a balancing of interests under a due process analysis.

a civil Gideon.

c. Section 16 Requires Meaningful Access to the Courts in All Cases Involving a Fundamental Right

An alternative approach to developing a civil Gideon under the Montana Constitution is to apply section 16 in conjunction with other fundamental rights. The court has deemed fundamental a variety of rights in the Montana Constitution. An alternative right to counsel argument contends those other fundamental rights create a liberty interest that implicates due process, and the right to counsel is necessary to protect that interest. Section III analyzes the fundamental right to parent as an example of one such right, and why indigent litigants should be granted counsel when their right to parent is at stake.

B. The Dignity Clause

Article II, section 4 of the Montana Constitution provides as follows:

> INDIVIDUAL DIGNITY. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Montana's dignity clause, one of many clauses in the Montana Constitution with no counterpart in federal law,[100] is

100. *See* Ellison & Snyder, *supra* note 6 (noting that seventeen of the rights articulated in the Montana Constitution have no federal counterpart). Although there is no dignity clause in the United States Constitution, the U.S. Supreme Court has acknowledged the concept of dignity in some of its seminal decisions. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 574 (2003) (noting that the laws and traditions of this country have afforded constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education, the Court said, "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."); Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970) (ruling that welfare recipients have a due process right to a pretermination evidentiary hearing, the Court said, "[f]rom its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."). For further discussion of the role of dignity in U.S. Supreme Court jurisprudence, *see, e.g.*, Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 15 (2004) (describing "the role of the concept of 'human dignity' in the court's jurisprudence as episodic and underdeveloped"); Mathew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 MONT. L. REV. 301, 312 (2000) (describing "ordinary uses" of the dignity concept in U.S. Supreme Court

useful in formulating a "civil Gideon." Although it lay dormant for many years, scholars and the courts are applying this provision with increasing frequency. This section discusses two primary approaches to utilizing Montana's dignity clause: as a complementary right and as an independent right.[101] It also reviews current Montana Supreme Court jurisprudence in this area, laying the foundation for right to counsel arguments. Finally, this section concludes by arguing why the dignity clause, in conjunction with other state constitutional rights, supports a civil right to counsel.

1. Dignity as a Complementary Right

Mathew Clifford and Professor Thomas Huff propose an analytical framework for interpreting Montana's dignity clause,[102] a framework that ultimately supports a civil Gideon in certain contexts. They provide an extensive analysis of the clause's origin, and place it in the historical context of seventeenth-, eighteenth-, and nineteenth-century political philosophers. Clifford and Huff note that many of the leading thinkers of that era "each, in his own way, justified the modern liberal state by appealing to the significance of individuals and the importance of respect for their choices or preferences."[103]

One interpretation of the dignity clause recommended by the authors is as a "complementary" right.[104] They describe this approach as follows:

> [T]he dignity right can inform, reciprocally, the meaning and force of some of the other, especially the more abstract, rights of the Declaration of Rights, like the equal protection or the privacy rights. Operating in this way, the application of the dignity right can play a mutually complementary role, supporting or being

jurisprudence).

101. Clifford & Huff, *supra* note 100, at 328 (outlining these two approaches to interpreting Montana's constitutional right to dignity).

102. *Id.* at 302.

103. *Id.* at 311.

104. *Id.* at 325-26. Noted scholar Heinz Klug also has suggested various approaches for interpreting Montana's dignity clause. Heinz Klug, *The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?*, 64 MONT. L. REV. 133 (2003). Professor Klug concludes by encouraging the Montana courts to "mine foreign dignity jurisprudence to define the content and scope of its own clause." *Id.* at 155. *See also* James Dallner & D. Scott Manning, *Death with Dignity in Montana*, 65 MONT. L. REV. 309, 335 (2004) (analyzing whether Montana's dignity clause supports a right to die with dignity, the authors suggest three conceptualizations of Montana's dignity clause: 1) dignity as individual; 2) dignity as related to equal protection; and 3) dignity as inviolable).

supported by the other right.[105]

Similarities exist between interpretations of Montana's dignity clause and those of other nations. Although South Africa's dignity clause has been described as the "cornerstone" of its constitution,[106] it also has been interpreted in a complementary fashion. Four of the five references to dignity in the South African constitution appear in the Bill of Rights.[107] The last of these addresses dignity as "a factor for the courts to consider in deciding whether a limitation of a right is reasonable and justifiable."[108] Initially described by the South African Constitutional Court as a "value—a foundational norm which pervades the interpretation of other rights and the Constitution as a whole," increasingly South Africa's dignity clause can be seen as a right "considered in conjunction with the violation of other rights."[109]

The German Constitution's dignity clause states: "The dignity of man shall be inviolable. To respect, and protect it, shall be the duty of all state authority."[110] This section of the German Constitution cannot be amended, resulting in dignity being described as "the crown value" in the German Constitution.[111] Also described as having a "symbiotic"

105. Clifford & Huff, *supra* note 100, at 325-26. Equally significant to Clifford and Huff's proposed interpretations are the limitations they suggest. They conclude that violations of the dignity clause must be "significant enough to assault the core humanity of persons by degrading, demeaning, debasing or trivializing their worth as human beings." *Id.* at 326. Their second limitation is that "the substantive meaning of the clause must not be identified with, or justified by, any specific controversial religious or philosophical doctrines." *Id.* *See also* Snetsinger v. Montana University System, 2004 MT 390, ¶ 65, 325 Mont. 148, ¶ 65, 104 P.3d 445, ¶ 65 (Nelson, J., concurring) (noting that, historically, the dignity clause has been applied mostly to reinforce other rights).

106. Heather Schooling, Note, *The Notion of 'Dignity' in South African Equality Jurisprudence*, RESPONSA MERIDIANA 2 (1999) (quoting National Coalition For Gay and Lesbian Equality v. Minister of Justice 1999 (1) SA 6 (CC) at [28]).

107. Klug, *supra* note 104, at 148.

108. *Id.*

109. Schooling, *supra* note 106, at 2-3 (describing the role of dignity in evolving equality jurisprudence in South Africa, in particular the court's emphasis on the protection of human dignity as a goal of the constitution's anti-discrimination provisions).

110. GRUNDGESETZ [GG] [Constitution] art. 1, § 1 (F.R.G.), *reprinted in* DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 298 (2nd ed. 1997).

111. Luis Anibal Aviles Pagan, *Human Dignity, Privacy and Personality Rights In the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico*, 67 REV. JUR. U.P.R. 343, 348 (1998) (stating that the German constitutional order is fundamentally based on a hierarchy of values, which human dignity "crowns").

relationship with other rights in the German Constitution, this section serves as either an "optical lens," which the court uses to scrutinize other rights, or as a "counterweight," for balancing conflicting rights.[112] Again, typically, the clause is used in conjunction with other rights established in the constitution.

Finally, Montana borrowed its dignity clause verbatim from the 1952 Puerto Rican Constitution.[113] Located in the Puerto Rican Constitution's Bill of Rights, that country's dignity clause reflects its colonial history and its desire for equality.[114] In all of these examples, courts interpreting the dignity provisions do so most frequently when interpreting other basic constitutional rights.[115]

2. Dignity as an Independent Right

Montana's dignity clause also can be viewed as an independent right. Clifford and Huff suggest the clause should provide "protections against treatment which degrades the worth of individual persons, treatment that is not otherwise protected by the more specific provisions of the Declaration of Rights."[116] They write, "[t]he dignity right, when applied in this independent form, fills the gaps between the other norms which also protect our dignity."[117] The protection of the disabled or mentally ill from degrading treatment is an example of this use of the dignity clause.[118] This approach is consistent with that of Professor Klug, who suggests that dignity can be treated as an independent, constitutionally protected right "with a

112. *Id.* at 351. *See also* Jackson, *supra* note 100, at 25 (referring to Germany's dignity clause as expressing "'the highest value of the Basic Law, informing the substance and spirit of the entire document.'" (internal citation omitted)).

113. Pagan, *supra* note 111, at 367 (citing P.R. Const. art II., § 1); *Snetsinger*, ¶ 64 (Nelson, J., concurring). For an interesting discussion of the origins of Puerto Rico's clause, see Jackson, *supra* note 100, at 23-24 (noting that drafters of the Puerto Rican constitution deliberately sought to draw on international norms, such as the International Declaration of Human Rights, wanting to incorporate different cultures' views on categories of rights).

114. Pagan, *supra* note 111, at 369. Like Montana's Constitution, the Puerto Rican Constitution has an explicit right to privacy, which has been interpreted in light of its dignity clause. *Id.* In most cases involving the right to privacy, the Puerto Rican courts stress the importance of human dignity and then decide the case without addressing the privacy interests involved in the specific facts. *Id.* at 372.

115. *Id.* at 372.

116. Clifford & Huff, *supra* note 100, at 325.

117. *Id.*

118. *Id.* at 331. In this context, the dignity right should afford disabled people basic human needs and the opportunity to develop and grow personally. *Id.*

substantive content distinct from other individual or collective rights."[119]

3. Montana Supreme Court's "Dignity" Jurisprudence

The Montana Constitution's dignity and equal protection clauses are in the same section, article II, section 4. Initially, the dignity clause served simply as an adjunct to equal protection, another explicit article II, section 4 right.[120] Although the court's reliance on the dignity clause began in this peripheral way, its use and view of the clause has expanded in recent years. An overview of the court's equal protection jurisprudence is helpful to understanding evolving interpretations of the dignity clause.

Montana has adopted three levels of equal protection scrutiny which are similar to, yet different from, federal equal protection doctrine.[121] Under Montana's rational basis test, a standard nearly identical to that developed in the federal jurisprudence, a classification must be "reasonable, not arbitrary, and it must bear a fair and substantial relation to the object of the legislation, so that all persons similarly situated can be treated alike."[122] Examples of classifications upheld under a rational basis standard include a distinction precluding a tribal employee from being eligible for workers compensation since the state could not compel the tribe to participate in its workers compensation program and substitute benefits were available under the statute,[123] tax classifications that exclude

119. Klug, *supra* note 104, at 145.

120. *See, e.g.*, Cottrill v. Cottrill Sodding Serv., 229 Mont. 40, 42-43, 744 P.2d 895, 897 (1987) (citing both the dignity and equal protection clauses, the court stated that Montana's constitution affords greater protections than the federal counterpart; however, the court limited its analysis to equal protection arguments); Davis v. Union Pac. R.R. Co., 282 Mont. 233, 240-41, 937 P.2d 27, 31 (1997) (stating the principal purpose of article II, section 4 is to ensure that citizens are not subject to arbitrary and discriminatory state action. The court cites the dignity clause as part of the article II, section 4, but does not analyze it separately from the equal protection clause).

121. *See, e.g.*, *Snetsinger*, ¶¶ 17-19, 27, 37 (after outlining the three levels of scrutiny, the court held, in a 4-3 decision, that the University System's policy of denying benefits to unmarried same sex partners while offering benefits to unmarried opposite sex partners was not rationally related to a legitimate government objective); McKamey v. State, 268 Mont. 137, 145-47, 885 P.2d 515, 521-22 (1994) (outlining the three levels of scrutiny).

122. Powder River County v. State, 2002 MT 259, ¶ 79, 312 Mont. 198, ¶ 79, 60 P.3d 357, ¶ 79 (applying a rational basis standard, the court determined that the exclusion of coal, oil and natural gas from statutory tax classifications, when combined with taxation in other provisions, did not violate equal protection).

123. Zempel v. Uninsured Employer's Fund, 282 Mont. 424, 938 P. 2d 27 (1997).

extractive materials from a statutory classification,[124] and a distinction in the workers' compensation law between coverage for mental stress injury and coverage for physical stress injury.[125] The court found no rational basis for a state university policy denying benefits to unmarried same sex partners while granting them to unmarried opposite sex partners,[126] venue rules that provided different rules for those litigants with claims against out-of-state corporations,[127] and for distinctions between those workers with work-related injuries and those with work-related diseases for the purposes of receiving workers' compensation benefits.[128] The court also applied a rational basis test to a workers' compensation provision providing that claimants covered by certain insurers could choose their physicians and those covered by other insurers could not.[129] The court concluded that "cost-control alone cannot justify disparate treatment that violates an individual's right to equal protection of the law."[130]

Montana's "strict scrutiny" analysis also mirrors that of federal law. This approach applies to fundamental rights, defined as those rights that are in the Montana Declaration of Rights or those rights without which other fundamental rights would not have meaning.[131] This standard has been held applicable to restrictions on private work by state employees[132]

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124. Powder River, ¶ 79 (stating that "if classification is neither capricious nor arbitrary, and rests upon real differences and some reasonable consideration of difference or policy, there is no denial of the equal protection of the law").

125. Stratemeyer v. Lincoln County, 259 Mont. 147, 153-55, 855 P.2d 506, 510-11 (1993).

126. *Snetsinger*, ¶ 27.

127. Davis v. Union Pac. R.R., 282 Mont. 233, 937 P.2d 27 (1997). The court in *Davis* applied a rational basis test. *Id.*, 282 Mont. at 242, 937 P.2d at 32. However, Justice Trieweiler filed a concurrence advocating the application of a strict scrutiny standard given that venue implicates Montana Constitution article II, section 16, the fundamental rights provision. *Id.*, 282 Mont. at 249, 937 P.2d at 36 (Trieweiler, J., concurring).

128. Henry v. State Comp. Ins. Fund, 1999 MT 126, ¶ 38, 294 Mont. 449, ¶ 38, 982 P.2d 456, ¶ 38.

129. Heisler v. Hines Motor Co., 282 Mont. 270, 284-85, 937 P.2d 45, 53 (1997).

130. *Id.*, 282 Mont. at 283, 937 P.2d at 52.

131. *See Butte*, 219 Mont. at 430, 712 P.2d at 1311.

132. Wadsworth v. State, 275 Mont. 287, 911 P.2d 1165 (1996) (holding that restrictions prohibiting a state appraiser from engaging in outside employment interfered with his right to work). In *Wadsworth*, the court held that article II, section 3 of the Montana Constitution, which provides a right to pursue life's basic necessities, includes the right to work, since work is a right "'without which other constitutionally guaranteed rights would have little meaning, and therefore the restriction is subject to strict scrutiny.'" *Id.*, 275 Mont. at 299, 911 P.2d at 1172 (citing *Butte*, 219 Mont. at 430,

and regulations affecting industry and their impact on the environment.[133]

Montana law diverges from the federal equal protection approach in the middle standard of review. Montana's standard was developed in the seminal case of *Butte Community Union v. Lewis*,[134] as discussed above. Analyzing the two relevant factors: 1) whether the classification is reasonable; and 2) whether the government's interest in the classification is more important than the people's interest in receiving the benefit.[135] The court concluded that the state failed to show that this legislation restricting welfare benefits was other than arbitrary, and that the state's interest in saving money through implementation of this restriction must be balanced against the needs of those receiving the benefit.[136] In this case, the record failed to demonstrate the state's dire need of the financial resources.[137]

4. Application of Montana's Dignity Approaches

This background assists in examining how the Montana Supreme Court has relied on the dignity clause. Clifford and Huff argue convincingly that standard tools of interpretation as well as constitutional convention history demonstrate that the constitution's framers intended these phrases to have distinct meaning.[138] Despite the court's independent use of the dignity

712 P.2d at 1311). Therefore, the court subjected the restriction to strict scrutiny analysis. *Id.*, 275 Mont. at 303, 911 P.2d at 1174.

133. Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 1999 MT 248, ¶ 63, 296 Mont. 207, ¶ 63, 988 P2d. 1236, ¶ 63 (holding that the right to a clean and healthful environment, as provided in article II, section 3 of the constitution, is a fundamental right because it is guaranteed by the declaration of rights, and therefore requires the application of strict scrutiny). *See also Snetsinger*, ¶¶ 97-98 (Nelson, J., concurring) (concluding that distinctions based on sexual orientation are sex-based, and therefore subject to strict scrutiny equal protection analysis).

134. 219 Mont. at 433, 712 P.2d at 1313-14.

135. *Id.*

136. *Id.*

137. In 1988, following the *Butte Cmty. Union* decision, article XII, section 3(3) of the Montana Constitution was amended. The new language reads as follows: "The legislature may provide such economic assistance and social and rehabilitative services for those who, by reason of age, infirmities, or misfortune are determined by the legislature to be in need." MONT. CONST. art. XII, § 3(3).

138. Clifford & Huff, *supra* note 100, at 303. The authors argue that the language of the dignity clause moves logically in a progression from the general to the specific and each of the three clauses must be viewed "as both substantively meaningful and not redundant." *Id.* at 305. The inclusion of the broad prohibition against violation of human dignity "leaves open the possibility that human dignity can be violated in ways that do not involve some arbitrary classification;" thus, the dignity clause must refer to

clause in recent years, most often the court has invoked the dignity clause in conjunction with other fundamental rights.[139] Dignity has played a complementary role with rights such as due process,[140] the right to be free from cruel and unusual punishment,[141] and the right to privacy.[142]

In *In the Matter of K.G.F.*, the court analyzed the right to counsel afforded mentally ill people facing involuntary civil commitment proceedings.[143] After finding that such patients have a right to effective assistance of counsel, the court articulated a standard for measuring effectiveness. Rejecting the criminal standard established in *Strickland v. Washington*[144] as insufficient to protect the liberty interests of the mentally ill, the court turned to Montana law, relying on section 17 of the Montana Constitution (the due process clause), section 53-21-101(1) of the Montana Code Annotated, and the constitution's dignity clause.

The relevant statute provides that patients who may be involuntarily committed must be afforded care and treatment that is "skillfully and humanely administered with full respect for the person's dignity and personal integrity."[145] The court noted the specific protections afforded in the statute to preserve the patients' dignity.[146] Characterizing the dignity right as a fundamental right present throughout the civil commitment process, the court stated, "[t]hus, we agree that the [sic] 'quality counsel provides the most likely way—perhaps the *only* likely way—to ensure the due process protections of dignity and privacy interests in cases such as the one at bar."[147] The court essentially analyzes dignity and privacy as liberty interests protected by the due process clause.[148]

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human dignity on a level "beyond that protected by the equal protection and non-discrimination clauses." *Id.* at 307.

139. Clifford & Huff, *supra* note 100, at 328.

140. *In re* K.G.F., 2001 MT 140, ¶ 91, 306 Mont 1, ¶ 91, 29 P.3d 485, ¶ 91.

141. Walker v. State, 2003 MT 134, ¶ 81, 316 Mont. 103, ¶ 81, 68 P. 3d. 872, ¶ 81.

142. *Armstrong*, 1999 MT 261, ¶ 72, 296 Mont. 361, ¶ 72, 989 P.2d 364, ¶ 72.

143. *K.G.F.*, ¶ 1.

144. 466 U.S. 668, 687 (1984) (requiring litigants alleging ineffective assistance of counsel in the criminal context to demonstrate that 1) counsel acted outside the range of competence and 2) but for counsel's incompetence, the result would have been different).

145. MONT. CODE ANN. § 53-21-101(1) (2003).

146. *K.G.F.*, ¶¶ 44-46.

147. *K.G.F.*, ¶ 48 (emphasis in original) (citing Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM BEHAV. 39, 47 (1992)).

148. *See id. but cf.* Elaine Dahl, Note, *Taking Liberties: Analysis of In Re* Mental

Another recent interpretation of the dignity clause arose in a case alleging cruel and unusual punishment.[149] After recounting the conditions which the appellant, Walker, experienced while at Montana State Prison, the court noted the expert's testimony that the mentally ill Appellant was given no medication or other treatment and the Behavior Modification Plans ("BMPs") imposed on him were "counter-therapeutic, punitive and cruel."[150]

In addressing Walker's cruel and unusual punishment claims under both the United States Constitution and article II, section 22 of the Montana Constitution, the *Walker* court reviewed applicable law on treatment of prisoners, especially those in administrative segregation, and examined allegations of excessive use of force. Significantly, it noted cases that reference the dignity of the prisoner. The court wrote:

> Just as we read the privacy provision of the Montana Constitution in conjunction with the provisions regarding search and seizure to provide Montanans with greater protections from government intrusion, so too do we read the dignity provision of the Montana Constitution together with article II, section 22 to provide Montana citizens greater protections from cruel and unusual punishment than does the federal constitution.[151]

Given their place in the Declaration of Rights, these rights become fundamental and require strict scrutiny.[152] Holding that the conditions which Walker experienced constituted both cruel and unusual punishment under article II, section 22 of the Montana Constitution and a violation of the state's dignity clause, the court stated, "[t]he plain meaning of the dignity clause commands that the intrinsic worth and the basic humanity of persons may not be violated."[153] The *Walker* case provides another example of the court's willingness to find violations of the dignity clause in conjunction with other fundamental rights violations.

Health of K.G.F., 64 MONT. L. REV. 295 (2003) (arguing, *inter alia*, that the court need not have considered the privacy and dignity issues in this case, given the physical liberty issues at stake in a civil commitment proceeding).

149. *Walker*, ¶ 1.

150. *Id.* ¶ 66.

151. *Id.* ¶ 73.

152. *Id.* ¶ 74.

153. *Id.* ¶ 82. *But see id.* ¶¶ 86-101 (Gray, C.J., dissenting) (arguing that the case is now moot and criticizing the majority for failing to thoroughly research the source of Montana's dignity clause). *See also* Clifford & Huff, *supra* note 100, at 318, arguing that the 1972 constitutional convention history demonstrates that dignity is a concept independent of other fundamental liberties and anti-discrimination provisions.

The court reached a similar conclusion in a challenge to Montana's statute prohibiting abortions performed by physician assistants and second trimester abortions performed outside of a hospital.[154] Although the court based its decision largely on the constitutional right to privacy, the court did note that:

> Respect for the dignity of each individual . . . demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives and the intrinsic value of life in general, answering to their own consciences and convictions.[155]

While the reference to the dignity clause in the *Armstrong* opinion may well be *dicta*, the opinion offers an example of the court's interest in developing a "dignity jurisprudence," applying the clause in conjunction with other fundamental rights.[156]

The court should adopt a similar approach in the civil Gideon context as that adopted in the *K.G.F.*, *Walker*, and *Armstrong* decisions. In each of those cases, the dignity clause's application to another fundamental right resulted in a violation of the inviolable right to dignity. In the civil Gideon context, the dignity clause can be utilized in conjunction with the administration of justice clause, which creates other fundamental rights. The dignity clause also works in conjunction with the administration of justice clause and the fundamental right to parent *together*, with all three rights working to create a limited right to counsel.[157]

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154. *Armstrong*, 1999 MT 261, 296 Mont. 361, 989 P2d. 364.

155. *Id.* ¶ 72. *But see id.* ¶ 78 (Gray, C. J., specially concurring) ("I am troubled by that portion of the court's opinion which states–without any analysis whatsoever–that the rights of personal and procreative autonomy at issue in this case also find protection in the individual dignity and equal protections rights set forth in Article II, Section 4. That discussion is far beyond the scope of the case as presented and, in any event, is totally unsupported by the court.").

156. For additional discussions by the court on the dignity clause, *see, e.g.*, *In re* Custody of J.C.O., 1999 MT 325, ¶ 16, 297 Mont. 327, ¶ 16, 993 P.2d 667, ¶ 16 (Nelson, J., specially concurring) (arguing the dignity provision "clearly . . . guarantees that a mother has as much right to have her child bear her surname as does a father and that a child has as much right to bear its mother's surname as it does its father's"); *In Re* Marriage of Davies, 266 Mont. 466, 481, 880 P.2d 1368, 1378 (1994) (Nelson, J., concurring) (arguing there is no basis for gender discrimination in any legal proceeding within the state, since every attorney and judge has sworn to uphold the Montana Constitution, including the right of individual dignity).

157. Other industrial democracies have granted the right to counsel for indigent litigants in all civil cases based on access to the courts. *See, e.g.*, Justice Earl Johnson, Jr., *Equal Access: Will* Gideon's *Trumpet Sounds a New Melody: The Globalization of the Constitutional Values and its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. SOC. JUST. 201, 202 (2003) [hereinafter, *Globalization*] (noting that the European Court of Human Rights (European Court) concluded that the "European

A recent concurring opinion takes Montana's dignity clause one step further, and interprets it as an independent right.[158] In analyzing the state university system's policy denying benefits to same-sex partners, Justice Nelson relies heavily on the dignity clause and the state constitution's unenumerated rights provision. First, Justice Nelson notes that the dignity clause provides that dignity is inviolable, meaning it is "'incapable of being violated.'"[159] Second, he notes this interpretation is consistent with "this Country's historical treatment of human dignity as a central foundational ideal at the root of our concept and system of ordered liberty and of our ethical tradition."[160] Finally, he cites the testimony of Constitutional Convention Delegate Wade Dahood on this issue:

> [T]he intent of Section 4 is simply to provide that every individual in the state of Montana, as a citizen of this state, may pursue his inalienable rights without having any shadows cast upon his dignity through unwarranted discrimination.[161]

Justice Nelson concludes that policies discriminating on the basis of sexual orientation "are an affront to the inviolable right of human dignity" and are therefore unlawful under the dignity

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Convention on Human Rights and Fundamental Freedoms (European Convention) and its guarantee of a "fair hearing" in civil cases, required the government to provide free counsel to indigent civil litigants"); Johnson, *Access to Justice, supra* note 1, at 89. Switzerland's constitution contains a provision similar to the United States' equal protection clause, and that country's highest court concluded in 1937 that indigents are not equal before the law unless they have representation. *Id.* at 89. Germany has a statutory right to counsel and its Constitutional Court has held that the constitutional guarantee of a fair hearing may require that counsel be appointed for indigent litigants where the statute does not. *Id.* at 90. Most notably, the European Court of Human Rights held that the European Convention on Human Rights and Fundamental Freedoms is intended to guarantee "not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right to access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.'" *Id.* at 90-91 (quoting Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) (1979)). The court then held that the mere possibility to appear in court does not provide litigants with an effective right of access and that the duty lies with the State to fulfill the Convention's mandate. *Id.* Additionally, the Canadian Supreme Court recently held that New Brunswick was constitutionally required to appoint counsel to indigent mothers whenever it wanted to assume or maintain custody over their children. *Id.* at 106-107. The Canadian Charter of Rights and Freedoms protects "security of the person," which could be analogized to Montana's dignity clause: "The right to security of the person protects both the physical and psychological integrity of the individual from state actions." *Id.* at 107.

158. *Snetsinger*, ¶ 59 (Nelson, J., concurring)

159. *Id.* ¶ 75 (quoting BLACK'S LAW DICTIONARY 832 (7th ed. 1999)).

160. *Id.* ¶ 78 (referencing Clifford & Huff, *supra* note 100, at 308-14).

161. *Id.* (quoting MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT 1643 (1972)).

clause.[162]

These rationales also apply to a right to counsel. First, to require an indigent litigant in need of, and wanting, counsel to proceed unrepresented is an affront to her dignity, dignity that the constitution states is incapable of being violated. Secondly, this affront to dignity is particularly egregious when the rights at stake are also foundational tenets of our democratic government—the right of access to the courts and to justice.[163] And finally, to force an indigent litigant to proceed unrepresented interferes with the litigant's pursuit of inalienable rights by casting shadows upon his dignity through unwarranted discrimination.[164] This discrimination is particularly egregious when there are additional fundamental rights at stake. This approach to the dignity clause further supports the creation of civil Gideon.

C. Brief Discussion of Other Selected Provisions

1. The Montana Due Process Clause

Most traditional analyses of the right to counsel, in both the criminal and civil contexts, rely on due process theories.[165] This holds true for both the federal and state due process clauses.[166] However, relevant case law does little to support the application of the due process clause to a rights-based analysis of a civil Gideon.[167] Although some might consider this to be the "death

162. *Id.* ¶ 79.

163. Johnson, *Access to Justice*, *supra* note 1 at 87 ("Equal justice . . . is at the essential core of the U.S. system of government itself.").

164. *Id.*

165. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law"); Gideon v. Wainwright, 372 U.S. 335 (1963); *In re* Gault, 387 U.S. 1, 41 (1967) (holding the due process clause of the Fourteenth Amendment guarantees a right to counsel for juveniles who are subject to delinquency proceedings which may result in institutional commitment).

166. See, *e.g., In re* A.S.A., 258 Mont. 194, 198, 852 P.2d 127, 130 (1993) (holding the due process clause of Montana's Constitution requires parents be represented by counsel in termination proceedings); State v. Colt, 255 Mont. 399, 403, 843 P.2d 747, 749 (1992) (holding the right to a fair trial in the due process clause of article II, section 17, guarantees a defendant the right to assistance of counsel in criminal cases).

167. An alternative due process approach to the right to counsel argument is an "access-based" approach. *See, e.g.*, Perluss, *supra* note 16, at 573 (arguing that the Washington State Constitution's fundamental right of access to justice "requires a court

knell" of the civil Gideon argument, the various state constitutional theories outlined above support civil Gideon, particularly when used in conjunction with due process concepts.

Classic interpretations of the federal due process clause begin with the landmark *Goldberg v. Kelly* [168] decision, followed by the legendary *Mathews v. Eldridge*[169] and *Lassiter v. Department of Social Services*[170]decisions. The *Mathews* court established a three-part test for determining what process is due: 1) the private interest that will be affected by the action; 2) the risk of erroneous deprivation and "probable value, if any, of additional or substitute procedural safeguards;" and 3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[171]

The Montana court has applied *Mathews* in numerous cases and contexts.[172] The Montana Supreme Court found sufficient

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to consider, as a matter of fairness and justice, the litigant's ability to negotiate the system of justice in which he or she is found."). Perluss further argues that "the ability of the courts to exercise their authority to appoint counsel *whenever necessary* to ensure access to justice and fundamental fairness is in fact a return to the basic traditions of our system of justice." *Id.* at 574 (*emphasis in original*). The Washington State Constitution's clause relied on by Perluss is nearly identical to the Montana administration of justice clause. *Compare* WASH. CONST. art. I, § 10, with MONT. CONST. art. II, § 16.

168. 397 U.S. 254 (1970) (concluding that due process requires a pretermination evidentiary hearing before terminating welfare benefits).

169. 424 U.S. 319, 340-48 (1976). In *Mathews,* the Court determining that in evaluating claimant's interest in Social Security benefits and the need for a pretermination hearing, it should consider degree of deprivation, fairness of existing procedures and administrative burden, and other social costs of providing the hearing. *Id.* at 430-48. The Court balanced the factors and concluded a pretermination hearing was unnecessary. *Id.*. at 349. The Mathews principles were reaffirmed in 2004. *See* Hamdi v. Rumseld, 124 S. Ct. 2633 (2004). In *Hamdi,* the Court, upon balancing the interests of "enemy combatants" in being free from physical detention with the interests of the United States government in ensuring that citizens who fought with the enemy during a war do not continue their fighting, the Court determined that "a citizen detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 2648.

170. 452 U.S. 18 (1981) (creating a rebuttable presumption that parents subject to termination of parental rights proceedings are not entitled to appointment of counsel).

171. *Mathews*, 424 U.S. at 335 (referencing *Goldberg*, 397 U.S. 254). *See also* M.L.B. v. S.L.J., 519 U.S. 102 (1996) (concluding that where parent had right to appeal decision terminating her parental rights, due process and equal protection clause prohibited denying appeal due to parent's inability to pay for the transcript).

172. Although this analysis is limited to civil cases, there is a plethora of cases on the criminal side that raise due process issues. An interesting criminal case that addresses the challenges faced by indigent litigants is *State v. Farrell*, 207 Mont. 483, 676 P.2d 168 (1984). In *Farrell,* the defendant challenged his sentence, arguing that it

due process in an unemployment insurance appeal in which the employer alleged that the employee's failure to advise employer of her testimony violated due process,[173] when a driver's license was suspended without a pre-suspension hearing,[174] and where a statute permitted the transfer of a juvenile from a school to the state mental hospital for a maximum of ten days.[175]

In other situations, the Montana Supreme Court has applied *Mathews*, and found an absence of due process. In an unemployment compensation case where the paper record of the incident forming the sole basis for employee's discharge was inadmissible hearsay, the court addressed whether the claimant's due process rights were violated due to her inability to confront and cross-examine witnesses.[176] Applying the *Mathews* test, the court determined that the claimant had a substantial interest in securing benefits, since benefits would replace her wages, and her professional reputation was at stake.[177] The court found the admission of hearsay reports created a risk of erroneous deprivation and that requiring live witnesses would not place an undue burden on the state.[178] Ultimately the court found due process violations.[179]

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was based on his indigency and therefore a violation of equal protection. *Id.* The court, however, adopted a due process analysis, writing that "[t]he record indicates that indigency may have been the criterion for imposing the sentence in this particular case, and we therefore view the sentence in this instance as a possible infringement upon fundamental fairness." *Id.*, 207 Mont. at 498, 676 P.2d at 177. The court concluded that it is fundamentally unfair to treat litigants differently due to their economic status. *Id.*

173. Wheelsmith Fabrication, Inc. v. Mont. Dep't of Labor and Indus., 2000 MT 27, 298 Mont. 187, 933 P.2d 713 (finding no risk of erroneous deprivation when employer had notice of the contested issue and an opportunity for cross examination).

174. *In re* Vinberg, 216 Mont. 29, 32, 699 P. 2d 91, 93 (1985) (relying on federal precedence and finding the government interest in highway safety justified use of a post-suspension hearing regarding driver's license).

175. M.C. v. Dep't of Insts., 211 Mont. 105, 108, 638 P.2d 956, 958 (1984) (concluding that because the transfer to the hospital was only for ten days, it did not result in the "grievous loss" presented in Vitek v. Jones, 445 U.S. 480, 100 S. Ct. 1254 (1980), where a due process violation was found due to a transfer from prison to mental health facility for an indefinite period of time).

176. Bean v. Mont. Bd. of Labor Appeals, 1998 MT 222, 290 Mont. 496, 965 P.2d 256 [hereinafter *Bean II*].

177. *Id.* ¶¶ 36-37 (citing *Mathews*, 424 U.S. at 334-35, 340).

178. *Id.* ¶ 43.

179. *Id.* ¶ 43. For an example of the court's alternative approach to applying *Mathews* in the due process context, see *Welsh v. City of Great Falls*, 212 Mont. 403, 690 P. 2d 406 (1984) (finding a due process violation but without a *Mathews* analysis). In *Welsh*, the plaintiff firefighter was terminated due to a physical disability. The plaintiff argued that he had a property interest in continued employment, and therefore was entitled to a pretermination hearing. The court agreed he had a property interest in the position, and found the failure to provide a hearing violated due process. *Id.*, 212 Mont.

Similarly, the court used a *Mathews* analysis to find Montana's post-judgment execution statutes violated due process.[180] The petitioner argued that the post-judgment execution procedures allowed the state to deprive him of personal property without due process.[181] The court held that all Montana "judgment debtors" have a property interest in the statutory exemptions, an interest protected by due process guarantees.[182] Applying *Matthews*, the court determined the judgment debtor's property interest in the statutory exemptions and risk of erroneous deprivation outweighed the state's interest in executing the judgments.[183] Finally, it held the statutes deficient because of inadequate notice and the absence of a provision for a prompt hearing on the debtor's claimed exemptions.[184]

Given Montana's adoption of the *Mathews* standard, a straight due process analysis is of limited usefulness in creating a civil Gideon. Applying the *Mathews* standards to the parenting context, for example, factors one and two support the appointment of counsel. The "private interest at stake"[185] is parenting, characterized by the United States Supreme Court as an interest "far more precious than any property right."[186] Factor two, the "risk of erroneous deprivation and the probable value . . . of additional or substitute procedural safeguards,"[187] also supports the appointment of counsel. Procedures in the abuse and neglect context are complex.[188] The Department of Health and Human Services develops the factual record, and the burden of proof is by a preponderance of evidence,[189] less than

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at 405, 690 P.2d at 408.

180. Dorwart v. Caraway, 1998 MT 191, ¶¶ 83-103, 290 Mont. 196, ¶¶ 83-103, 966 P.2d 1121, ¶¶ 83-103 [hereinafter *Dorwart I*], *overruled on other grounds by* Trs. of Ind. Univ. v. Buxbaum, 2003 MT 97, 315 Mont. 210, 69 P.3d 663.

181. *Id.* ¶ 65.

182. *Id.* ¶ 75.

183. *Id.* ¶ 101.

184. *Id.* ¶ 103.

185. *Mathews*, 424 U.S. at 335.

186. Santosky v. Kramer, 455 U.S. 745, 758-59 (1982) (finding that because of the fundamental nature of the right at stake, that due process requires clear and convincing evidence before terminating parental rights); *see also* M.G.B. v. S.L.J., 519 U.S. 102 (1996) (holding that a parent cannot be denied the right to appeal a termination proceeding due to the inability to pay for a transcript).

187. *Santosky*, 455 U.S. at 758-59.

188. *See infra* Section IV(A)(1).

189. MONT. CODE ANN. § 41-3-422(5)(a)(ii)-(iii).

that required in termination cases.[190] Parents often become confused and frustrated with the process, and then fail to participate.[191] Providing counsel helps assure parents understand the proceedings and the necessary steps to secure custody of their children again. In the custody context, similar issues arise, although the arguments are not so compelling.

However, it is factor three, "the fiscal and administrative burdens that the additional or substitute procedural requirements would entail," that is the stumbling block.[192] Providing a right to counsel in abuse and neglect cases may be manageable, but the fiscal reality of a similar right in custody disputes is daunting.[193] Therefore, a due process analysis alone is unsuccessful in establishing a civil Gideon for parents.

Montana's due process clause does support civil Gideon arguments when used in conjunction with other constitutional provisions, particularly the dignity clause. An analysis similar to that adopted in *K.G.F., Walker* and *Armstrong* supports a right to counsel for parents. Although the liberty interest at stake in *K.G.F* is physical liberty, the right to parent is comparably critical. When one applies the right to dignity to the liberty interest, the result should be a similar finding, the right to counsel.

2. The Unenumerated Rights Clause and Montana Code Annotated Section 1-1-109

Montana's unenumerated rights clause, when combined with Montana Code Annotated section 1-1-109, also supports a right to civil Gideon. Article II, section 34 of the Montana Constitution provides as follows: "Unenumerated Rights. The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people."[194] The Montana Supreme Court has rarely invoked this clause, although arguably it has much potential application.[195]

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190. *Id.*, § 41-3-422(5)(a)(iv).

191. Telephone interview with Judy Williams, Assistant Attorney General, Child Protection Unit, Montana Attorney General's Office, July 16, 2004.

192. *Mathews*, 424 U.S. at 335.

193. In 2003, there were 994 abuse and neglect cases filed in Montana district courts, compared with 8,125 domestic relations matters. 2003 Judiciary of the State of Mont. Ann. Rep. 24, http://www.lawlibrary.state.mt.us/dscgi/ds.py/Get/File-35920/annualreport20033rdl.pdf

194. MONT. CONST. art. II, § 34.

195. *See supra* note 6.

Montana Code Annotated section 1-1-109 provides that the common law of England remains in effect in Montana.[196] Together, these provisions support the creation of a civil Gideon.

Montana's unenumerated rights provision was discussed at length in a recent concurring opinion addressing private causes of action for constitutional torts.[197] The plaintiff alleged that the county conducted an unlawful search and seizure of his home.[198] In *"Dowart I,"* the Montana Supreme Court ruled that this action was a violation of the constitutional search and seizure and the right to privacy provisions, and that the post-execution statutes violated the plaintiff's due process rights.[199]

On remand, the district court determined that the defendants were protected by statutory immunity, and therefore the plaintiff was not entitled to damages.[200] On appeal, the court explored other states' approaches to this issue and applicable federal decisions, including *Bivens v Six Unknown Narcotic Agents*.[201] The court reversed, upholding the plaintiff's right to sue for money damages for the state's violations of the Montana constitution.[202] The court primarily relied on article II, sections 10, 11, and 17, but said its position was further supported by article II, section 16, the "right to remedy" provision of the Montana Constitution, and by Montana Code Annotated, section 1-1-109 and section 27-1-202.[203]

Justice Nelson concurred in the decision, relying on the unenumerated rights provision. He would have based the decision solely on state constitutional grounds:

> I firmly believe that, *independent* of any federal jurisprudence, federal constitutional authority, the common law, or other authority, the foundation for private causes of action for constitutional violations is found in the language of Montana's Constitution and in the proceedings of the Constitutional

196. "The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, is the rule of decision in all the courts of this state." MONT. CODE ANN. § 1-1-109 (2003).

197. *Dorwart II*, ¶¶ 79-114 (Nelson, J., specially concurring).

198. *Dorwart II*, ¶ 15.

199. *Dorwart I*, ¶ 103.

200. *Dorwart II*, ¶ 17.

201. 403 U.S. 388 (1971) (holding that the Fourth Amendment limits the exercise of federal power and an unlawful search and seizure by federal agents entitled petitioner to recover money damages).

202. *Id.* ¶ 48.

203. *Dorwart II*, ¶¶ 44-45. "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefore in money, which is called damages." MONT. CODE ANN. § 27-1-202.

Convention.[204]

Nelson noted the importance of utilizing the protections in Montana's Declaration of Rights to protect individual rights.[205] He then relied exclusively and explicitly upon article II, section 34, referencing Montana Constitution Convention history:

> In proposing this Section, the [Constitutional Convention's Bill of Rights] Committee did two things: First, it recognized that the rights enumerated in Montana's Constitution were not exclusive – i.e. that there are unenumerated rights or 'rights beyond those specifically listed' which are retained by the people. Montana Constitutional Convention, Vol II, 645. Second, and important for our purposes here, the Committee considered this Section to be '. . . *a crucial part of any effort to revitalize the state government's approach to civil liberties questions . . . .[and that this Section] . . . . may be the source of innovative judicial activity in the civil liberties field.*' Montana Constitutional Convention, Vol. II, 645.[206]

Justice Nelson concluded that there is "no better application of Article II, section 34 than in the case at bar"[207] to protect from government infringement the rights delineated in the Declaration of Rights. In order to enforce those constitutional rights, "the people would, as they did, implicitly retain the right to directly access the courts to protect and enforce their other constitutional liberties."[208]

In a subsequent decision, Justice Nelson also notes the role of the unenumerated rights provision when combined with the dignity clause.[209] Acknowledging a constitutional convention delegate's view of this provision, as self-explanatory and that it protects "rights which are not enumerated which the people of Montana should not be denied."[210] Justice Nelson argues that classifications based on gender or sexual orientation are classifications included within the ambit of the unenumerated

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204. *Dorwart II*, ¶ 84 (emphasis in original) (Nelson, J., concurring); *see supra* Section II (further discussion of the value in relying on state constitutions).

205. *Dorwart II*, ¶¶ 96-97 (Nelson, J., concurring).

206. *Id.* ¶ 99 (emphasis added) (Nelson, J., concurring).

207. *Id.* ¶ 103 (Nelson, J., concurring).

208. *Id.* ¶ 107 (Nelson, J., concurring). *See also* Daniel Stackhouse, *Right to a Remedy–Cause of Action for Money Damages Is Available for Violation of Provisions of the Montana Constitution Protecting Right to Privacy, Right to be Free From Unreasonable Searches and Seizures, and Right to Due Process of Law. Dorwart v. Caraway*, 589 P.3d 128 (MONT.2002), 34 RUTGERS L. J. 1331 (2003) (analyzing the Nelson concurrence, Stackhouse responds to critics of the "primacy" model of state constitutional analysis, and concludes that the Nelson approach was sound).

209. *Snetsinger*, ¶¶ 54-111 (Nelson, J., concurring).

210. *Id.* ¶ 93 (citing 6 MONT. CONSTITUTIONAL CONVENTION TRANSCRIPTS 1832 (1972); *see supra* note 6.

rights provision. He concludes that the operation of article II, section 4 with article II, section 34 requires those discriminated against on the basis of sexual orientation be treated as a suspect class.[211]

Focusing now on the common law, the state statutory provision provides that the common law of England is the rule of decision unless inconsistent with other law.[212] At common law, indigent litigants had the right to appointed counsel.[213] At the time North America was colonized, England had a statute guaranteeing free counsel for indigent litigants in the common law courts,[214] a right that later was extended judicially to courts of equity.[215] This statutory provision authorized the courts to appoint counsel whenever needed.[216]

Many American colonies adopted the common law of England,[217] including indigents' right to counsel. Montana Code Annotated, section 1-1-109, is the relevant Montana provision adopting the English common law. However, this statutory provision has received little attention from the Montana courts. The first reported case addressing this provision concerned whether a citizen, whose claim had been rejected by the court, could be held in contempt for a newspaper account in which he criticized county officials and the judge who ruled against him.[218] The court stated, "[t]he common law of England is not our birthright . . . it was and is ours by adoption and not by inheritance."[219] The first legislative assembly did, however, adopt the common law, to the extent it was not in conflict with other law, and the provision has remained in existence with few changes since that time. Under the common law, the citizen's actions would have constituted contempt. After examining other states' approaches to this issue and examining the constitutional right to free speech,[220] the court ultimately concluded a finding of contempt would be inconsistent with the constitutional free speech provision, and therefore inappropriate.

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211. *Snetsinger*, ¶ 109.
212. MONT. CODE ANN. § 1-1-109 (2003).
213. *See* Johnson, *supra* note 2.
214. *Id.* (citing Statute of Henry VII, 11 Hen. 7, ch. 12).
215. *Id.* (citing Oldfield v. Cobbett, 41 Eng. Rep. 765 (1845)).
216. *Id.*
217. *Id. See also supra* note 16.
218. State *ex. rel.* Metcalf v. Dist. Ct . 52 Mont. 46, 155 P. 278 (1916).
219. *Id.*, 52 Mont. at 50, 155 P. at 279.
220. MONT. CONST. of 1889, art. III, § 10.

This statutory provision was addressed two years later in a case determining whether a surety, standing in the shoes of the state, had a preference to the claims of creditors.[221] Finding no express statute or constitutional provision on point, the court concluded the question had "to be resolved according to the common law."[222] The court defined the common law as follows:

> Broadly speaking, it means, of course, the common law of England; but it means that body of jurisprudence as applied and modified by the courts of this country up to the time it became a rule of decision in this commonwealth.[223]

After reviewing authority on this issue throughout the country, the court concluded the surety had a preference to the claims of creditors.[224]

Much more recently, this statutory provision was relied upon, in conjunction with article II, sections 10, 11 and 17 of the Montana Constitution, to support an action for money damages for violations of self-executing provisions in the state constitution.[225] Also referencing the statutory damages provision, the court held that:

> Either statute standing alone reinforces our decision based on the legislative policy of this state. However, when considered together, and with the right found at Article II, Section 16 of the Montana Constitution to a remedy for every injury, this body of statutory and constitutional law permits no other result.[226]

These meager interpretations of Montana Code Annotated section 1-1-109 shed little light on its applicability to a civil Gideon. However, if interpreted in conjunction with the unenumerated rights provision, together they create a right to counsel. The unenumerated rights provision references those other rights, not explicit in the constitution, that are retained by the people. The right to counsel in civil proceedings, which existed at common law and is retained by virtue of this statutory provision, is one such right. Just as the unenumerated rights provision may justify additional classifications protected in the equal protection clause,[227] it may also warrant an acknowledgment of a civil right to counsel for indigent litigants.

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221. Aetna Accident & Liab. Co. v. Miller, 54 Mont. 377, 170 P. 760 (1918).
222. *Id.*, 54 Mont. at 382, 170 P. at 760.
223. *Id.*
224. *Id.*
225. *Dowart II*, ¶ 44.
226. *Id.* ¶ 45.
227. *Snetsinger*, ¶¶ 96-97 (Nelson, J., concurring).

As author Justice Johnson writes:

> [T]he existence of this right for some 500 years in the nation that is the source of so many of the principles on which the U.S. government is founded underscores the longstanding and fundamental nature of the claim that free counsel should be a matter of right for poor people in the United States.[228]

It is unlikely that, used independently, the unenumerated rights provision could support right to counsel theories, particularly given the paucity of case law interpreting the provision. However, as Justice Nelson suggests, it can be used to protect those rights articulated in the Declaration of Rights. Just as Justice Nelson concludes that the *Dorwart II* plaintiffs retained the right to access the courts to protect their rights, so, too, should indigent civil litigants retain the right to counsel to assist them in asserting their fundamental rights to access the courts, to dignity, and to due process.

III. A FUNDAMENTAL RIGHTS ANALYSIS: THE LIBERTY TO PARENT

The most persuasive argument for a civil Gideon in Montana arises when there are fundamental rights at stake. The liberty interest in parenting is one such right. This section utilizes parenting as an example of a fundamental right that gives rise to the appointment of counsel for indigent litigants, especially when multiple fundamental rights are at stake. Following an overview of applicable federal and state law, this section joins the fundamental right to parent with the legal theories developed earlier to create a civil right to counsel.

A. Federal Background

In a seminal decision regarding the right to counsel in a termination of parental rights case, the United State Supreme Court held that there is a rebuttable presumption that the parent is not entitled to counsel in termination procedures.[229] The Court acknowledged that parents have a liberty interest in raising and parenting their children.[230] In addressing the right to counsel issue, the Court applied the balancing test adopted in *Mathews v. Eldridge* and concluded the procedures in place

228. *Access to Justice, supra* note 2, at 88.

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

230. *Id.* at 27.

satisfied the due process standard.[231] Writing for the majority, Justice Stewart concluded that this test did not dictate appointment of counsel in this particular termination case, given there was no risk of criminal liability to the parent, there were no expert witnesses called, and, according to the Court, there were no "troublesome points of law, either procedural or substantive."[232] In concluding states were free to impose a lower standard for the appointment of counsel if they so chose, Justice Stewart wrote:

> If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.[233]

A second critical decision regarding parental rights determined that the standard of proof in a termination of parental rights case is clear and convincing evidence.[234] Concluding that the "individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money,'"[235] the Court applied an intermediate standard of review. The Court rejected the *Lassiter* case-by-case approach, noting that litigants need to know the standard of review prior to the proceedings. Applying the *Mathews* balancing test, the Court concluded that the parents' interests were substantial, potentially resulting in a unique and permanent deprivation.[236] Regarding the risk of erroneous deprivation, the Court

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231. *Id.* at 31-33 (citing *Mathews*).

232. *Lassiter*, at 32.

233. *Id.* at 31. Justice Blackmun, joined by Justices Brennan and Marshall, adopted a different view of the role of the due process clause in this context. He wrote:

> [t]he Court has recognized that what process is due varies in relation to the interests at stake and the nature of the governmental proceedings. Where the individual's liberty interest is of diminished or less than fundamental stature, or where the prescribed procedure involves informal decision making without the trappings of an adversarial trial-type proceeding, counsel has not been a requisite of due process. Implicit in this analysis is the fact that the contrary conclusion sometimes may be warranted. . . . To say this is simply to acknowledge that due process allows for the adoption of different rules to address different situations or context.

Id. at 36-37 (Blackmun, J., dissenting).

234. *Santosky*, 455 U.S. at 747-48 (holding "before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State supports its allegations by at least clear and convincing evidence").

235. *Id.* at 756 (citing Addington v. Texas, 441 U.S. 418, 424 (1982)).

236. *Id.* at 758-59 (citing *Lassiter*, 452 U.S. at 27).

determined that standards are imprecise and open to judicial interpretation. Additionally, the state musters considerable resources, including expert witnesses, its own social workers and other staff, and "has the power to shape the historical events that form the basis of termination."[237]

Writing for the majority, Justice Blackmun emphasized that, "because parents subject to termination proceedings are often poor, uneducated, and members of minority groups . . . such proceedings are often vulnerable to judgments based on cultural or class bias."[238] The Court noted the government's two interests at stake: protecting the children and the fiscal and administrative costs of the proceedings. Ultimately, the Court concluded that a "stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State" and that a "clear and convincing evidence" standard of proof strikes a balance between the parents' and the States' interests.[239]

Finally, a third federal case challenged a Washington state statute that permitted a third party to seek visitation at any time.[240] In this case, grandparents sought visitation over the objection of the mother.[241] The Washington state statute gave the judge discretion to make the visitation decision, despite the absence of proof of any harm, and to ignore the mother's preferences.[242] Justice O'Connor, writing for the majority, concluded that the statute violated due process.[243] She noted that the due process clause "also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'"[244]

B. Montana Background

Montana law regarding the rights of parents generally mirrors federal law. Parents' due process rights arise in a variety of contexts, including dependency and termination of parental rights proceedings and adoption and custody cases.

237. *Santosky*, 455 at 763.
238. *Id.*
239. *Id.* at 767, 769.
240. Troxel v. Granville, 530 U.S. 57 (2000).
241. *Id.* at 60.
242. *Id.* at 67.
243. *Id.* at 60, 75.
244. *Id.* at 65 (citing Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

Parents' rights to the care and custody of their children are premised on the parents' liberty interests derived from the due process clause.[245] Montana's statutory scheme is designed, in part, to protect these fundamental rights.

1. Dependency Proceedings

Dependency proceedings begin with the filing of a petition alleging that the child has been abused or neglected, stating the basis for the petition,[246] and seeking one of a number of remedies.[247] The parent or guardian is entitled to notice of the right to request an attorney and to contest the allegations.[248] At any time, the court *may* appoint counsel for any indigent party,[249] but currently there is no right to counsel prior to the termination phase.[250]

Upon a finding of probable cause that the child is being abused or neglected, the court may issue an order granting relief under the statute.[251] A show cause hearing must be held within twenty days of the initial filing of the petition.[252] The court shall explain the procedures and the parties' rights, including the parents' right to request appointed counsel if indigent and the right to challenge the allegations.[253] The court is required to issue written findings on the issues and the child's placement.

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245. *See, e.g., In re* J.L.S. and A.D.S., 234 Mont. 201, 761 P.2d 838 (1988); *In re* A.F. and A.C., 2003 MT 254, 317 Mont. 367, 77 P.3d 266; *In re* Custody of M.W. and C.S., 2001 MT 78, 305 Mont. 80, 23 P.3d 206.

246. MONT. CODE ANN. § 41-3-422(2)(a) (2003).

247. *Id.* § 41-3-422(1)(a)(i)-(viii). The filing party has the burden of presenting evidence to justify the relief sought; that burden varies from probable cause for emergency services and temporary investigative authority to clear and convincing evidence for a termination petition. *Id.* § 41-3-422(5)(a)(i)-(iv).

248. *Id.* § 41-3-422(13)(a)-(b).

249. *Id.* § 41-3-422(11).

250. The Montana Supreme Court follows the *Lassiter* criteria for determining whether counsel should be appointed for indigent parents in different stages of abuse and neglect proceedings. *See, e.g., In re* A.M., 2001 MT 60, ¶ 50, 304 Mont. 379, ¶ 50, 22 P.3d 185, ¶ 50; *In re* T.C., 240 Mont. 308, 314, 784 P.2d 392, 396 (1989) (relying on *Lassiter* criteria, the court held that a mother was not entitled to counsel during temporary custody proceedings). In practice, counsel are appointed for indigent parents in selected Montana counties. Telephone interviews with Judy Williams, Assistant Attorney General, (July 16, 2004).

251. MONT. CODE ANN. § 41-3-427(2)(a)-(g) (2003).

252. *Id.* § 41-3-432(1)(a). Alternatively, the court may grant an extension or the parties may stipulate otherwise. *Id.*

253. *Id.* § 41-3-432(4).

At the adjudicatory hearing, which must be held within ninety days of the show cause hearing,[254] the court must determine "the nature of the abuse and neglect and establish the facts that resulted in state intervention."[255] Following a finding that the child is a youth in need, which must be by a preponderance of the evidence,[256] the court schedules a dispositional hearing and orders any required investigations.[257] The court is required to hold a permanency hearing to determine permanent placement within twelve months of the initial determination or within twelve months after the first sixty days that a child has been removed from the home.[258]

At the termination phase, the petitioning party must show by clear and convincing evidence that termination is necessary.[259] It is at only this phase that parents must be advised of their *right* to court appointed counsel.[260] If termination is ordered, the court may transfer permanent legal custody to the state, a licensed child-placing agency, or another individual approved by the state.[261] A guardian ad litem must be appointed to represent the child's best interests in the hearings.[262]

Exploring the termination phase, the Montana Supreme Court ruled in 1993 that the guarantee of fundamental fairness in termination cases has its source in the due process clause of the Montana Constitution, article II, section 17, and that due process requires that the parent not be placed at an unfair disadvantage.[263] The court noted that the potential for

254. *Id.* § 41-3-437(1).

255. *Id.* § 41-3-437(2).

256. *Id.* § 41-3-437(2).

257. MONT. CODE ANN. § 41-3-437(6)(b) (2003). The child may also be adjudicated a youth in need of care at the show cause hearing. *Id.* § 41-3-432(9). The court may also grant the state temporary legal custody under certain circumstances. *Id.* § 41-3-442(1). The order for temporary legal custody is effective for six months, but can be extended upon the filing of a petition by the county. *Id.* § 41-3-432(2), (4)(a).

258. *Id.* § 41-3-422(14)(a). If a child has been in foster care for fifteen of the past twenty-two months, it is presumed that termination of parental rights is in the best interests of the child. *Id.* §§ 41-3-422(14)(b) and 41-3-604(1).

259. MONT. CODE ANN. § 41-3-422(5)(a)(iv) (2003).

260. *Id.* § 41-3-607(4).

261. *Id.* § 41-3-607(2)(a)(i)-(iii).

262. *Id.* § 41-3-607(5).

263. *In re* A.S.A., 258 Mont 194, 198, 852 P.2d 127, 127 (1993) (noting, "[w]ithout representation, a parent would not have an equal opportunity to present evidence and scrutinize the State's evidence."). Although the basis of the court's decision was the state due process clause, Petitioner noted that the district court's failure to appoint counsel also violated her statutory right to counsel. *Id.*, 258 Mont. at 197, 852 P.2d at 129. This

unfairness is especially likely when indigent parents are involved because they often have "limited education and are unfamiliar with legal proceedings," resulting in "substantial risk that the parent will lose his or her child due to intimidation, inarticulateness or confusion."[264] The court concluded that Montana's due process clause guarantees an indigent parent the right to court-appointed counsel in termination proceedings.[265]

In a subsequent termination decision, the court concluded that this necessarily means effective assistance of counsel. The court stated as follows:

> In the absence of effective, competent counsel, the right to counsel is reduced to nothing more than a procedural formality. That is, if there is no requirement that the counsel a parent receives be effective, then the mere act of appointing counsel is meaningless . . . as the façade of being represented by counsel casts upon the proceedings a veneer of fairness and legitimacy that may not actually exist.[266]

Since the decision in *A.S.*, the court has upheld its decision requiring that indigent parents be represented by counsel in termination proceedings. The court has continued to refuse to extend this rule to pretermination proceedings.[267] However, upon closer examination, it is apparent that there are substantial risks for parents at the pretermination proceedings that warrant the appointment of counsel.[268]

In *In re M.F.*,[269] the mother argued she was entitled to counsel when the state petitioned for Temporary Investigative Authority ("TIA") because the state used the time between this proceeding and the termination proceeding to develop its

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provision, Montana Code Annotated section 41-3-607(4), was enacted in 1981 and states: "At the time that a petition for termination of a parent-child relationship is filed, parents must be advised of the right to counsel, and counsel must be appointed for an indigent party."

264. *In re* A.S.A., 258 Mont. at 198, 852 P.2d at 129.

265. *Id.*, 258 Mont. at 198, 852 P.2d at 130.

266. *In re* A.S., 2004 MT 62, ¶ 20, 320 Mont. 268, ¶ 20, 87 P.3d 408, ¶ 20. The Montana Supreme Court rejected the *Strickland v. Washington* standard, 466 U.S. 668 (1984), stating that it does not go far enough to protect the interest of civil litigants when a fundamental liberty interest is at stake. *Id.* ¶ 23. The court similarly declined to apply the malpractice standard. *Id.* ¶ 24. Although the court found counsel in this case to be ineffective, the court concluded that the parent was not prejudiced. *Id.* ¶¶ 31, 33.

267. *See, e.g., In re* Custody of M.W. and C.S., ¶¶ 4, 27 (holding parents' liberty interests must be protected by fundamentally fair procedures, which require the appointment of counsel at the termination stage, but not before).

268. In contrast to state law, the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (2000), provides that parents are entitled to appointment of counsel during all abuse and neglect proceedings.

269. 201 Mont. 277, 653 P.2d 1205 (1982).

termination case against her.[270] The Montana court relied on *Lassiter* and its analysis of the three-part *Mathews* test, concluding that the same analysis should be applied at the TIA stage as is applied at the termination stage.[271] Here, the court found the state's interest in a just result to be great, and no complexities that counsel could have assisted the appellant in addressing.[272] The court explicitly rejected the Appellant's argument that counsel was necessary at the earlier proceedings because those events determined the relevant evidence for the termination proceedings.[273]

However, the court's opinions in recent cases indicate a shift in direction. In 2001, the court found no due process violations when a parent was unrepresented at the show cause hearing for the order of TIA.[274] However, this particular parent, a mentally ill patient confined at Warm Springs State Hospital, *was* represented when the state subsequently presented its petition for temporary legal custody and from that point forward.[275] The court noted that "[s]ubsequent to the initial determination that A.M. was a youth in need of care, the court reached the same determination on at least three separate occasions—each at a time when B.V. [the mother] was represented by counsel."[276] While one can only speculate on the result had the parent been unrepresented at all proceedings prior to termination, the court may be shifting toward providing additional parental

270. *Id.*, 201 Mont. at 283, 653 P.2d at 1208.

271. *Id.*, 201 Mont. at 284-85, 653 P.2d at 1209 (relying on *In re* M.D.Y.R., 177 Mont. 521, 582 P.2d.758 (1978)). Both decisions predate the enactment of Montana Code Annotated section 41-3-607(4), which requires the appointment of counsel for an indigent parent in a termination proceeding.

272. *In re* M.F., 201 Mont. at 285-86, 652 P.2d at 1209.

273. *Id. See also In re* T.C., 240 Mont. 308, 784 P.2d 392 (finding no due process violation for failure to appoint counsel for pre-termination proceedings); *In re* M.W., 2001 MT 78, 305 Mont. 80, 23 P.3d 206 (concluding that father had no right to counsel at proceeding regarding *mother's* termination of parental rights). The court did hold that mother's due process rights where violated when, unrepresented by counsel, she signed, on several conditions, a stipulation that her children were youths in need of care. She later argued that DPHHS failed to abide by those conditions, voiding the stipulation and any determination that the children were youths in need of care. The court held that because the stipulation had the effect of adjudicating the children without any fact-finding, it needed to determine if the mother's rights had been adequately protected, and concluded that they had not. Although it presents unique facts, this case is an excellent example of the critical role counsel can perform and the potentially grave losses to parents whose rights are not adequately protected.

274. *In re* A.M., ¶¶ 48-55.

275. *Id.* ¶ 49.

276. *Id.* ¶ 54.

protections.

This possibility is further supported by another 2001 decision in which a minor was simultaneously a youth in need of care and a parent in abuse and neglect proceedings where her own child had been adjudicated a youth in need of care.[277] Relying on *In re T.C.*, the district court denied the mother's request for appointed counsel during the abuse and neglect proceedings, saying it was inappropriate unless the state sought termination of parental rights.[278] While affirming its rule in *In re T.C.* and *In re M.F.*, the Montana Supreme Court stated that it had never held "that appointment of counsel was always 'inappropriate' or otherwise precluded during the earlier stages of child protective proceedings."[279] Justice Rice, writing for the unanimous court, continued:

> [T]his Court has not formulated any guidelines precluding or making inappropriate the appointment of counsel in child protective proceedings which precede termination proceedings, if due process so requires. Rather, whether due process requires counsel to be appointed at earlier stages in the proceedings must be determined in view of all of the circumstances.[280]

In this case, the mother was not represented at the time her treatment plan was formulated and approved. The court stated that the process for implementing the treatment plan must be fair and reversed the termination order because the mother had been unrepresented.[281]

In *In re D.S.* the parents were unrepresented at the TIA and the hearing for temporary custody.[282] At the conclusion of the termination proceedings, the court took judicial notice of the earlier proceedings. In appealing, the parents argued that this violated their due process rights.[283] The Montana Supreme Court found no due process violations, concluding the court need not have referred to those prior proceedings given the evidence presented during the termination phase.[284] In a strongly worded dissent, which was joined by Justices Gray and Trieweiler, Justice Hunt wrote as follows:

277. *In re* A.F.-C., 2001 MT 283, ¶ 14, 307 Mont. 358, ¶ 14, 37 P.3d 724, ¶ 14.
278. *Id.* ¶ 41.
279. *Id.* ¶ 42.
280. *Id.* ¶ 44.
281. *Id.* ¶¶ 50-51.
282. 253 Mont. 484, 485, 833 P.2d 1090, 1091 (1992).
283. *Id.*, 253 Mont. at 488, 833 P.2d at 1093.
284. *Id.*, 253 Mont. at 489, 833 P.2d at 1093.

> Today the decision by the Court effectively sanctions a violation of an individual's due process rights by the State. It is flatly wrong . . . to incorporate judicial notice of temporary custody hearings, where counsel is not present or mandatory, into its final order terminating parental custody rights. To do so, and prevent the parents from having the right to counsel, is to create the grave risk of an erroneous decision. . . . A parental termination case merits the utmost protection of the parents' rights to be adequately represented. . . . Substantiality of evidence has never been an adequate reason to sustain a violation of an individual's right to counsel."[285]

The Montana Supreme Court has not articulated specific reasons why due process does not require representation of parents during pre-termination proceedings. Although not stated explicitly, one can presume it is because the court believes that the "temporary" nature of the findings does not result in a permanent deprivation of the parents' liberty interests under a *Matthews* and *Lassiter* analysis.

When one explores this potential rationale more closely, it is less logical than it appears. As the appellant argued in *In Re M.F.*, during the time between the initial dependency proceedings and the termination proceeding, the state is developing the case against the parents. Social workers help develop a treatment plan and work with parents to implement it. Throughout this process, the parents' progress, or lack thereof, is monitored and recorded. Interim judicial proceedings address the parents' compliance with this plan. The record developed during this time becomes of paramount importance in the ultimate decision on termination of parental rights.[286] To conclude that the decisions made in the abuse and neglect process are not permanent and therefore do not affect a fundamental right is an overly simplistic analysis. Those proceedings ultimately have a dramatic effect on the result in the termination case, which can result in a permanent loss of custody. Because of the critical role the state plays in developing the facts that support the termination plan, it is fundamentally unfair for parents to be without counsel in these earlier abuse and neglect proceedings.

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285. *Id.*, 253 Mont. at 490, 833 P.2d at 1094.

286. *See, e.g., Santosky*, 455 U.S. 745. In addressing the standard of proof in the termination context, the Court recognized the state's "unusual ability to structure the evidence," and that "such proceedings are often vulnerable to judgments based on cultural or class bias." *Id.* at 762-63.

Counsel is required at the termination phase, where the burden of proof is clear and convincing evidence.[287] In the earlier abuse and neglect proceedings, the burden of proof is less strict, ranging from probable cause to preponderance of the evidence. Given that these earlier determinations contribute to the development of the termination case *and* require a lighter burden of proof, it is doubly unreasonable, and unfair, to fail to appoint counsel at these earlier stages.

Given the court's recent decisions on constitutional principles applicable to this context, including the dignity clause and the open courts clause, and the importance of effective assistance of counsel in termination proceedings, the court should reconsider its earlier decisions, expand the *In re A.F-.C.* decision, and conclude that counsel shall always be appointed for indigent parents in all phases of the abuse and neglect process given the fundamental liberty interests at stake.

2. The Custody Setting

In defining parents' rights in custody proceedings, the Montana Supreme Court has consistently noted that parents have a liberty interest in the care and custody of their children.[288] Preliminarily, the court has held there can be no deprivation of custody or appointment of a guardian until the parents' rights have either been relinquished or terminated.[289] Having acknowledged that interest, custody cases tend to address two categories of issues: 1) the due process rights to which parents are entitled by virtue of this liberty interest; and 2) whether or not a third party can obtain custody.

The court has examined the extensiveness of these parenting rights in a variety of cases. The court has held that courts have the authority to appoint Guardians Ad Litem ("GAL"), and parents have no right to participate in the selection.[290] Furthermore, natural parents cannot be deprived of

287. MONT. CODE ANN. § 41-3-609(1) (2003).

288. *See, e.g., In re* Krause, 2001 MT 37, ¶ 19, 304 Mont 202, ¶ 19, 19 P.3d 811, ¶ 19 (holding parents have a liberty interest in the custody of their children); *see also In re* J.N.P., 2001 MT 120, 305 Mont. 351, 27 P.3d 953 (holding parent's right to care and custody of child is a constitutional right that cannot be overridden by third party's petition for custody absent a termination of parental rights).

289. *See, e.g., In re* Doney, 174 Mont. 282, 570 P.2d 575 (1977) (finding that sister-in-law who served as temporary guardian was not entitled to keep children absent findings of abuse or neglect; court noted that parental rights are constitutionally protected).

290. *Krause*, ¶ 19 (appointment of GAL is within court's discretion, and father is not

their constitutional right to the custody of their children absent a finding of abuse, neglect or dependency.[291]

Regarding the rights of others to secure custody, the court has held that a third party cannot intervene and petition for custody unless the parent has relinquished his or her parental rights.[292] The court said that a parent must "manifest an intentional renouncement of the right to custody" and held that incarceration is not a voluntary relinquishment of this right.[293] Similarly, a statute that allowed a third party to petition for custody based on a "best interest of the child" standard is unconstitutional due to the parents' liberty interests at stake.[294] In another case, the child's natural father gave consent to temporary custody of his children to his sister and the district court refused to terminate the sister's guardianship at the end of the agreed two-month period.[295] The Montana Supreme Court reversed, and awarded custody to the father, stating that the careful protection of parental rights is constitutionally required.[296] The court held that a natural parent cannot be deprived of custody in the absence of a statutory showing of abuse or neglect and the statutory "best interests of the child" test cannot be used to award custody to a third party absent a showing of abuse and neglect or dependency.[297]

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entitled to input into the decision; father is entitled to review records of GAL prior to hearing).

291. *Doney*, 144 Mont. at 285-87, 570 P.2d at 577-78 (stressing the importance of the parent-child relationship and the need to strictly follow the legislative mandates: "There are . . . few invasions by the state into the privacy of the individual that are more extreme than that of depriving a natural parent of the custody of his children." *Id.*

292. Girard v. Williams, 1998 MT 231, ¶ 49, 291 Mont. 49, ¶ 49, 966 P.2d 1155, ¶ 49.

293. *Id.*, ¶¶ 35-44.

294. *In re* J.N.P., 2001 MT 120, ¶ 18, 305 Mont. 351, ¶ 18, 27 P.3d 953, ¶ 18. *See also* Erger v. Askren, 277 Mont. 66, 919 P.2d 388 (1996) (in stepparent adoption case, court said that allowing adoption based on a "best interest of the child standard" does not adequately protect the parents' rights or the child's rights to be with a parent). *But see* Heather Latino, *Erger v. Askren: Protecting the Biological Parents' Rights at the Child's Expense*, 58 MONT L. REV. 599 (1997) (arguing the Montana Supreme Court failed to evaluate the fundamental rights of all the parties involved; if it had, the court would have construed the statute narrowly to allow infringement on parental rights only in limited circumstances and only to the extent necessary to protect the child's rights).

295. *Doney*, 144 Mont. at 282-85, 570 P.2d. at 575-77.

296. *Id.* at 286, 570 P.2d at 577.

297. *Id. See also* Erger v. Askren, 277 Mont. 66, 919 P.2d 388 (1996). Furthermore, findings of abuse and neglect or dependency can be made only in proceedings commenced by the county attorney pursuant to Montana Code Annotated section 41-3-101 *et seq.*, not in guardianship proceedings.

Given the court's very strong language regarding parents' liberty interest in parenting, should not parents be entitled to representation in custody disputes as well? As in the abuse and neglect context, the parent maintains an ongoing liberty interest in parenting. Decisions in custody dispute matters alter this relationship significantly, despite a preference for joint parenting arrangements, and in many instances, negate one parent's role in that process altogether. Given the interests at stake, indigent parents should be entitled to the appointment of counsel in custody disputes as they are in termination cases.

IV. APPLICATION OF MONTANA CONSTITUTIONAL PROVISIONS TO CIVIL GIDEON ARGUMENT

This Section applies the legal theories discussed above, analyzes the viability of right to counsel arguments under each of those theories, and concludes with recommendations on the arguments most likely to succeed in Montana courts. The most compelling circumstances for the creation of a civil Gideon are when there are multiple fundamental rights at stake, including liberty interests such as the right to parent.

A. The Strongest Case for Civil Gideon: The Fundamental Right to Parent

The fundamental right to parent is at stake in abuse, neglect and custody proceedings, just as it is in termination cases. However, currently parents have no right to counsel. Because there are multiple fundamental rights at issue—parenting, access to the courts, and dignity—the Montana Constitution requires more.

1. In the Abuse and Neglect Context

A parent facing allegations of abuse and neglect is encouraged to participate in a series of hearings, with various standards of proof, purposes, and possible outcomes.[298] An indigent parent unable to hire counsel must proceed alone. The state's evidence against a parent might include live social worker testimony or documentation; expert testimony by teachers, counselors, therapists, child developments specialists,

298. *See* Section III, *supra.*

and others; and testimony from potential eye witnesses. The state essentially "creates" the record during the dependency process, a record that ultimately supports the state's petition for termination of parental rights if that becomes necessary. It is well documented that the results in the earlier abuse and neglect proceedings dramatically affect what happens in the subsequent hearings and at the termination stage.[299] Given this relationship, counsel is necessary at the earlier hearings to protect the ongoing liberty interests that exist throughout the dependency and termination process.

It is clear that article II, section 16 of the Montana Constitution creates fundamental rights, including the right of access to the courts, the right of open courts, and the right to a remedy. The fundamental nature of these rights requires the application of strict scrutiny. That litigants with resources can hire counsel and those who are indigent cannot effectively do so results in a classification sanctioned by the courts. Indigent litigants appearing in abuse and neglect cases, where their most precious right is at stake, are unable to effectively exercise their fundamental right of access without counsel. Therefore, counsel should be appointed.

Section 16 also creates rights without which other fundamental rights have little meaning.[300] There is no better example of this than in the abuse and neglect context. As Justice Nelson wrote in his *Kloss v. Jones* concurrence:

> Purely and simply, access to the courts guarantees that other Article II rights are something more than mere dreams and aspirations. Access to the courts gives real existence to other fundamental rights.[301]

This is precisely the issue in abuse and neglect proceedings. Without meaningful access to the courts, parents cannot protect their fundamental right to parent. In cases as complex as these where a right as fundamental as any is at stake, counsel should be appointed for indigent parents.[302]

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299. *See Santosky*, 455 U.S. 745.

300. *See* Section II, *supra*. Kloss v. Jones, 2002 MT 129, ¶¶ 57-58, 310 Mont. 123, ¶¶ 57-58, 54 P.3d 1, ¶¶ 57-58 (Nelson, J., concurring).

301. *Kloss*, ¶ 58 (Nelson, J., concurring).

302. For an interesting discussion of the New York City abuse and neglect system, *see* Sheri Bonstelle and Christine Schessler, Comment, *Adjourning Justice: New York State's Failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Proceedings*, 28 FORDHAM URB. L. J. 1151 (2001) (arguing that despite a statutory requirement of counsel for parents, inadequate funding of the system results in the needs of parents being overlooked). The authors describe the advantages of

Montana's right to dignity further augments a parent's liberty interest and further supports a civil Gideon. A "complementary" use of the clause suggests counsel is required. Absent counsel, a parent is hard pressed to mount an effective defense against such an arsenal of evidence developed by the Department of Health and Human Services. What could be more degrading and demeaning than to appear before a tribunal, facing allegations of abuse and neglect as well as general assertions of your weaknesses as a parent, without the technical, strategic, and legal resources to effectively rebut these allegations and retain custody of your children? It is difficult to think of a more basic right and of a setting more degrading to the intrinsic worth of human beings. The dignity clause complements the fundamental right to parent and requires that counsel be provided to indigent litigants in the abuse and neglect contexts.[303]

Finally, Montana's unenumerated rights provision offers an additional argument in support of a civil Gideon. The constitutional convention history demonstrates that the explicit constitutional rights are not exclusive.[304] Article II, section 34 was considered by the Constitutional Committee "to be . . . '*a crucial part of any effort to revitalize the state government's approach to civil liberties questions . . . [and that this Section] . . . may be the source of innovative judicial activity in the civil liberties field.*'"[305] Justice Nelson utilizes section 34 to further protect the fundamental rights in the Declaration of Rights. Requiring counsel be appointed for parents would do precisely that, enable parents to "implicitly retain the right to directly access the courts to protect and enforce their other

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parental representation as follows:

> The parent's legal representation in abuse and neglect proceedings directly affects her access to counseling, welfare benefits, job training, or other social services that are required by the court before her children may be returned home or allowed to remain in her care. A parent's inability to access these services because of lack of adequate counsel, deficiency of information about social services, or bureaucratic backlog, produces an unstable and unfavorable situation for the children.

Id. at 1199.

303. This is not to suggest children should never be removed from the home due to abuse and neglect, or there are no bad parents. Rather, it is to say that each person, with his or her own intrinsic worth, should be provided legal assistance in addressing such serious allegations.

304. *Dowart II*, ¶ 99 (Nelson, J., concurring).

305. *Id.* ¶ 99 (Nelson, J., concurring); (citing 2 MONTANA CONSTITUTIONAL CONVENTION 645 (1972)) (emphasis added).

constitutional liberties."[306]

2. Contested Custody Disputes

Custody cases raise similar fundamental liberty interests.[307] The confluence of the fundamental interests of parenting, access to the courts, and dignity should result in the appointment of counsel for indigent litigants in contested custody proceedings, although the arguments are weaker here than in the dependency context.

In a custody dispute, the court acts on one parent's request for custody. Although this action probably constitutes state action, state action is not required under the Montana Constitution for protection under the dignity and equal protection clauses.[308] Secondly, once a custody determination has been made, a record is developed that is then used against the non-custodial parent.[309] The party that secures custody initially has a much greater chance of maintaining custody throughout and at the end of the proceedings. Although a change in custody is a theoretical possibility, it is unlikely to happen absent some dramatic change of circumstances.[310] Although the decision is not technically permanent, it may, in effect, be permanent. Given these similarities between custody and abuse and neglect proceedings, the right to counsel arguments raised above also are applicable in the custody context.

B. Application to Other Fundamental Rights

The above theories also can be applied when there are alternative fundamental rights at issue. When the fundamental rights analyzed above—dignity, access to the courts, and unenumerated rights—arise in conjunction with additional

306. *Id.* ¶ 107 (Nelson, J., concurring); *see also* Stackhouse, *supra* note 210, at 1345-50.

307. *See* Section III(b)(2), *supra.*

308. ELLISON & SNYDER, *supra* note 6, at 35.

309. This is similar to the dependency context, where the DPHHS staff develops the record during the earlier proceedings, a record that may then be used to support a termination decision.

310. Montana law requires a change in circumstances before amending a parenting plan. MONT CODE ANN. § 40-4-219(1) (2003) ("The court may in its discretion amend a prior parenting plan if it finds, upon the basis of facts that have arisen since the prior plan . . . that a change has occurred in the circumstances of the child and that the amendment is necessary to serve the best interests of the child.").

fundamental rights, this confluence may create a right to counsel. Examples of other fundamental rights that may give rise to a right to counsel include the rights to privacy, liberty, equal protection, and participation; freedom of religion and of assembly; freedom of speech; and the right of suffrage.[311]

C. Circumstantial Factors Warranting Appointment of Counsel

Some factual circumstances further justify the appointment of counsel to indigent litigants. In many, although not all, contexts, one cannot secure meaningful access to the courts without legal assistance; therefore, lawyers are necessary in some circumstances to protect this fundamental right.[312] This argument is enhanced by the dignity clause. This is particularly true when one is confronted by an aggressive opponent with aggressive counsel. To appear in court, especially as a defendant, and unable to meaningfully represent oneself or defend the claim brought against you, is both demeaning and degrading. Montana's dignity clause reflects the idea that human beings "have intrinsic worth as individuals, and their dignity is found, in one form or another, in their capacity to live self-directed and responsible lives."[313] Additionally, many uninformed, indigent litigants appearing pro se in complicated matters are unable to respond to allegations in a self-directed way. Thus, the access to the courts provision, when complemented by the dignity clause, results in a right to counsel for indigent civil litigants in certain contexts.

V. RECOMMENDATIONS AND CONCLUSION

The Montana Constitution is an insightful document that anticipated many of the dramatic changes of the late twentieth and twenty-first centuries. Like many state constitutions, its

311. A full discussion of the right to counsel in each of these settings is beyond the scope of this article.

312. *See* Millenmann et al., *supra* note 78.

313. Clifford & Huff, *supra* note 100, at 303. One exception to this assertion may be small claims court, where all litigants appear without counsel. MONT. CODE ANN. § 35-25-505 (2003). Arguably, since neither litigant has counsel, the threat to the dignity of one litigant is lessened. However, this is not likely to be the case when the litigants are of uneven bargaining power. Examples include survivors of domestic violence, who may feel a legitimate and ongoing threat from a former partner, and landlords and tenants, particularly in tight housing markets. For a discussion of the "silencing" of tenants appearing pro se in Baltimore's "rent court," see Barbara Bezdek, *Silence in the Courts: Participation and Subordination of Poor Tenants' Voices*, 20 HOFSTRA L. REV. 533 (1992).

flexibility allows for creative protection of individual rights, and the Montana Supreme Court is increasingly willing to rely on these provisions for this purpose.

There is ample evidence that indigent people are unable to secure counsel, even when their most basic rights are at stake. The Montana Constitution is a resource that should be leveraged to assist indigent litigants in securing counsel, particularly to protect their fundamental rights. One such right is the right to parent. Under the various legal theories discussed above, parents facing abuse and neglect proceedings and unable to afford counsel should be appointed counsel by the courts. Similarly, unrepresented parents in contested custody disputes also should be appointed counsel. The Montana Constitution's administration of justice, dignity, and unenumerated rights clauses, and Montana Annotated Code section 1-1-109, operating together, dictate that parents' liberty interests be protected by counsel.

Adopting a limited "civil Gideon" in Montana is the next step in furthering equal justice for all Montana citizens. This evolutionary process should begin in the family law arena given the fundamental nature of parenting. To implement this right, I suggest that the Montana Supreme Court adopt the following approaches:

1. When presented with an appropriate case raising these issues, apply the legal theories outlined above and find as a matter of state constitutional law a right to counsel for indigent parents in all abuse and neglect proceedings and contested custody proceedings.

2. Work with the Montana legislature to implement additional filing fee surcharges that can be applied toward the cost of providing legal representation to indigent litigants, particularly parents in abuse and neglect and contested custody cases.[314]

3. Encourage the collection of empirical data on the effect of having attorneys, paralegal assistance, and other legal information available to litigants in the family law area who are otherwise unable to afford counsel. Work with equal justice advocates and others in securing funding for a comprehensive study that would evaluate not only the effect of having counsel, but also the effect of securing alternative legal assistance, such as pro se assistance, form pleadings, "ghost written pleadings," and information obtained from the internet.

314. The court should, however, continue to offer indigent civil litigants the right to petition for a waiver of fees based upon indigency. MONT. CODE ANN. § 25-10-404 (2003).

4. Work collaboratively with the broader equal justice community to evaluate the findings of the Montana Legal Needs Study.[315] Based upon these findings and the empirical data gathered pursuant to Recommendation Number 3, work with the legislature to secure funding to expand civil legal assistance programs to address these needs.

Without trained, competent advocates, many indigent litigants cannot maneuver through the maze of the civil justice system. The Montana Constitution is a unique document providing invaluable protection of individual rights. Its administration of justice, dignity and unenumerated rights provisions should be "mined" to provide indigent civil litigants a right to counsel.

Access to justice means meaningful access. We cannot allow this tenet of our constitutional and legal systems to be dependent on the charity of the government, the legal profession, and individuals, particularly when such basic rights as the right to parent hang in the balance.

315. The Montana State Bar, in conjunction with Montana Legal Services Association, the State Bar's Access to Justice Committee, and the Montana Supreme Court's Equal Justice Task Force, launched a Legal Needs Study in 2003. *See* Legal Needs Survey Showing Results, 29 THE MONTANA LAWYER 7 (2003). Using a survey form modeled after that used in Washington and Oregon and tailored to Montana with the assistance of consultant J. Michael Dale, volunteers participating in this effort interviewed 1000 Montanans. Only preliminary data is available at this time, but it is anticipated that the findings will be useful in determining areas of need and how best to utilize the resources available in this state to provide civil legal services to the indigent.