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Indigents Have No Fundamental Right to Appointed Counsel in Proceedings to Terminate Parental Rights - Lassiter v. Department of Social Services

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NOTES

INDIGENTS HAVE NO FUNDAMENTAL RIGHT TO APPOINTED COUNSEL IN PROCEEDINGS TO TERMINATE PARENTAL RIGHTS— *LASSITER V. DEPARTMENT OF SOCIAL SERVICES*

An indigent's right to counsel is guaranteed by both the sixth[1] and fourteenth amendments[2] to the United States Constitution. Although the sixth amendment is expressly limited to criminal prosecutions, the fourteenth amendment guarantee of due process applies equally to civil and criminal proceedings.[3]

The goal of the fourteenth amendment due process clause is to protect against arbitrary state intervention in the lives of its citizens.[4] Specifically, the due process clause requires that certain procedural protections be guaranteed when the government deprives an individual of his fundamental

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1. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The sixth amendment right to counsel was applied to the states through the due process clause of the fourteenth amendment in Gideon v. Wainwright, 372 U.S. 335 (1963). *See generally* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955). (seminal work that traces the right to counsel from early English common law to American law in the 1950's) [hereinafter cited as BEANEY].

2. The fourteenth amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The Supreme Court, in Powell v. Alabama, 287 U.S. 45 (1932), first declared that the assistance of counsel was so "vital and imperative" that failure to appoint counsel was a denial of due process. *Id.* at 71. Although the Court has not defined "due process" in precise terms, it has described its significance as embodying "certain immutable principles of justice which inhere in the very idea of free government . . . as that no man shall be condemned in his person without due notice and an opportunity [to be] heard." Holden v. Hardy, 169 U.S. 366, 389-90 (1898). The *Powell* Court stated that failure to appoint counsel constituted a denial of due process because "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 287 U.S. at 69.

3. *In re* Gault, 387 U.S. 1 (1967). In *Gault*, the Supreme Court relied on the fourteenth amendment to hold that due process requires appointed counsel for indigent children facing juvenile delinquency proceedings even though such hearings are designated civil rather than criminal. *See also* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14 (1950) (both fifth and fourteenth amendment due process clauses require at least notice and an opportunity to be heard in civil cases).

4. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). In the *Slaughter House Cases*, the Court construed the fourteenth amendment due process clause as a restraint upon the power of the states, analogous to the fifth amendment restraint upon the federal government. *Accord*, Wolff v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972). *See also* BEANEY, *supra* note 1, at 32.

right to life, liberty, or property.[5] Once an asserted right is found to require specific procedural protections, every individual invoking that right is accorded those same protections.[6] Courts have traditionally resolved the question of what procedures are required by balancing private interests against governmental interests.[7]

Recently, however, in *Lassiter v. Department of Social Services*,[8] the Supreme Court departed from traditional interest balancing and found that due process protection only guarantees the appointment of counsel when the private interest is physical liberty.[9] According to the *Lassiter* Court, when the interest at stake is not physical liberty, the decision whether due process requires the appointment of counsel must be made on a case-by-case basis.[10]

Close examination of the *Lassiter* decision reveals that the Supreme Court's departure from traditional due process interest balancing was based upon a misinterpretation of precedent. Contrary to the Court's assertion in *Lassiter*, precedent does not support a presumption that physical liberty is the only interest warranting a right to counsel. A more accurate reading of precedent would have guided the Court to a result consistent with traditional due process analysis. Specifically, previous right to counsel cases have established that due process requires the appointment of counsel when the state seeks to deprive an indigent of a fundamental right through an adversary proceeding. Additionally, a comparison with the ad hoc decision-making formerly practiced by courts considering the right to counsel suggests the possible impact of the *Lassiter* analysis.

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5. There have been many cases delineating the process due in various factual contexts. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (due process requires hearing on issue of fault or liability prior to suspension of driver's license); Boddie v. Connecticut, 401 U.S. 371 (1971) (violates due process to deny indigents seeking divorce access to courts because of their inability to pay court costs and fees).

6. *E.g.*, Board of Regents v. Roth, 408 U.S 564 (1972) (that nontenured professor's interests in re-employment were of major concern to him is irrelevant in due process analysis that looks to nature, not weight, of interest); Fuentes v. Shevin, 407 U.S. 67 (1972) (deprivation of stereo equipment through prejudgment replevin violates due process because debtor's interest in uninterrupted use constitutes a property interest within meaning of fourteenth amendment irrespective of weight of interest). Due process protects the "interest," not merely the individual litigant, the degree of whose interest may vary from case to case. *See* Green, *The Bill of Rights, The Fourteenth Amendment and the Supreme Court*, 46 MICH. L. REV. 869, 907 (1948) [hereinafter cited as Green].

7. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972) (parolee's liberty interest requires informal parole revocation hearing since the state has no interest in revoking parole without a hearing); Goldberg v. Kelly, 397 U.S. 254 (1970) (individual's substantial interest in welfare benefits outweighs state's interest in summary adjudication and requires increased procedural safeguards). For a discussion of interest balancing as it is used to define public policy rather than merely to check government power over the individual, see Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

8. 101 S. Ct. 2153 (1981).

9. *Id* at 2158-59. *See* notes 74-75 *infra*.

10. 101 S. Ct. at 2162. *See* note 84 and accompanying text *infra*.

BACKGROUND

The Right to Counsel Cases

The sixth amendment provides that all criminal defendants shall "enjoy the right" to the assistance of counsel.[11] Although originally interpreted to grant only the right to retained counsel,[12] the Supreme Court eventually recognized that the sixth amendment guarantees the assistance of government-appointed counsel for indigents in federal criminal proceedings.[13]

The sixth amendment, however, is not the only constitutional source for the right to appointed counsel. In *Powell v. Alabama*,[14] the Supreme Court held that the fourteenth amendment guaranteed appointed counsel for indigent defendants charged with capital offenses in state court proceedings. *Powell* involved seven illiterate black youths who were sentenced to death for raping two white women.[15] The *Powell* Court declared that the necessity of counsel was imperative in a trial for a capital offense and that the failure of the trial court to appoint counsel was a denial of due process under the fourteenth amendment.[16]

Ten years later, however, the Court refused to extend the holding in *Powell* to require appointment of counsel for indigents in noncapital state cases. In *Betts v. Brady*,[17] the Court reasoned that the right to court-

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11. U.S. CONST. amend. VI. *See* note 1 *supra*. Prior to 1836, English law denied felons and those charged with treason the right to be represented by counsel. BEANEY, *supra* note 1, at 27-30. Curiously, in England, it was only civil litigants who were permitted to retain counsel, or who were appointed counsel if indigent. *See* Cohen, *The Origins of the English Bar* (pts. 1 & 2), 30 L.Q. REV. 464 (1914), 31 L.Q. REV. 56 (1915). Although the intent of the authors of the sixth amendment is not completely certain, some commentators maintain that the amendment was primarily a rejection of the English rule. *See* Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 381 (1923). Therefore, some authors contend that the sixth amendment does not represent a denial of a right to counsel in civil litigation. *See, e.g.*, Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1327 (1966) [hereinafter cited as Note, *Right to Counsel*].

12. BEANEY, *supra* note 1, at 32.

13. Johnson v. Zerbst, 304 U.S. 458 (1939) (unless waived, sixth amendment right to counsel bars government from depriving uncounselled indigents of life or liberty in federal criminal proceedings).

14. 287 U.S. 45 (1932).

15. *Powell* was the case of the famous "Scottsboro boys." Community tensions were high and the trial was rushed without giving the defendants an opportunity to employ counsel. Although the trial court appointed "all members of the bar" to represent the defendants, it was "little more than an expansive gesture, imposing no substantial or definite obligations upon anyone." *Id.* at 56.

16. The Supreme Court reasoned that the ignorance and illiteracy of the defendants, as well as the seriousness of the crime, rendered the lack of appointed counsel a denial of due process within the meaning of the fourteenth amendment. *Id.* at 71.

17. 316 U.S. 455 (1942). Betts' request for counsel was denied by the trial court. At trial, Betts cross-examined the prosecution's witnesses and called his own witnesses. He was convicted of burglary and sentenced to eight years in prison. For an exceptional literary treatment of *Betts*, see A. LEWIS, GIDEON'S TRUMPET 109-18 (1964) [hereinafter cited as LEWIS].

appointed counsel was not a fundamental right essential to a fair trial.[18] Accordingly, the Court held that the due process clause of the fourteenth amendment did not require the appointment of counsel in every case.[19] The *Betts* Court mandated a case-by-case determination of the right to appointed counsel, based upon the "special circumstances" rule.[20] Under this rule, due process requires counsel to be appointed only when the totality of circumstances in a particular case demonstrates that there has been "a denial of fundamental fairness, shocking to the universal sense of justice."[21] Thus, the *Betts* Court held that the state court's refusal to appoint counsel to represent the petitioner at his trial for burglary was not a violation of due process because the issues presented were simple and the petitioner was mature and intelligent.[22]

From soon after its inception, the "special circumstances" rule was in gradual demise due to difficulties in application.[23] Although the Supreme Court propounded specific criteria for a finding of special circumstances,[24]

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18. The *Betts* Court stated that lack of counsel could result in some convictions that were fundamentally unfair, but maintained that the sixth amendment did not compel the conclusion that no trial for any offense could be conducted fairly without counsel. 316 U.S. at 473.

19. *Id.* at 471.

20. The *Betts* rule became known as the "special circumstances rule" after the Court so described it in Palmer v. Ashe, 342 U.S. 134 (1951) (young, irresponsible boy who had spent years in mental institutions desperately needed counsel at trial for armed robbery).

21. Betts v. Brady, 316 U.S. at 462. In Uveges v. Pennsylvania, 335 U.S. 437 (1948), Justice Reed summarized the Court's approach as follows:

> Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, [we] hold that the accused must have legal assistance under the amendment.

Id. at 440-41 (footnotes omitted).

22. 316 U.S. at 472.

23. *See* Gideon v. Wainwright, 372 U.S. 335 (1963). Justice Harlan, in his concurrence, stated: "In noncapital cases, the 'special circumstances' rule has continued to exist in form while its substance has been substantially and steadily eroded . . . . The Court has come to recognize . . . that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial." *Id.* at 350-51 (Harlan, J., concurring). *See also* Hamilton v. Alabama, 368 U.S. 52 (1961) (absence of counsel at arraignment violated petitioner's due process rights under the fourteenth amendment).

24. The following factors were deemed relevant in determining whether the proceeding was fundamentally fair under the "special circumstances" rule: (1) the complexity of the statute and nature of offense, *e.g.*, Carnley v. Cochran, 369 U.S. 506 (1962); Chewning v. Cunningham, 368 U.S. 443 (1962); Reynolds v. Cochran, 365 U.S. 525 (1961); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956); (2) that certain arguments or objections could have been, but were not, made, *e.g.*, Hudson v. North Carolina, 363 U.S. 697 (1960); Gibbs v. Burke, 337 U.S. 773 (1949); (3) lack of education or illiteracy, *e.g.*, McNeal v. Culver, 365 U.S. 109 (1961); Cash v. Culver, 358 U.S. 633 (1959); Moore v. Michigan, 355 U.S. 155 (1957); Reece v. Georgia, 350 U.S. 85 (1955); (4) mental illness or retardation, *e.g.*, Massey v. Moore, 348 U.S. 105 (1954); Palmer v. Ashe, 342 U.S. 134 (1951); (5) youth of defendant, *e.g.*, Uveges v. Penn-

the rule was applied inconsistently.[25] Generally, state courts refused to find that special circumstances existed;[26] whereas, the Supreme Court found special circumstances in nine out of the fourteen cases it decided involving the issue.[27] When the Supreme Court finally reconsidered the indigent's

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sylvania, 335 U.S. 437 (1948); DeMeerleer v. Michigan, 329 U.S. 663 (1947); (6) a plea of guilty by codefendant, *e.g.*, Hudson v. North Carolina, 363 U.S. 697 (1960); Cash v. Culver, 358 U.S. 633 (1959); (7) extent of accused's previous experience with criminal proceedings, *e.g.*, Quicksall v. Michigan, 339 U.S. 660 (1950); Wade v. Mayo, 334 U.S. 672 (1948); (8) adequacy of assistance by judge, Gibbs v. Burke, 337 U.S. 773 (1949); (9) misconduct by judge or prosecutor, Townsend v. Burke, 334 U.S. 736 (1948); and (10) severity of the sentence, Uveges v. Pennsylvania, 335 U.S. 437 (1948).

25. The Supreme Court's decisions applying the *Betts* "special circumstances" rule were at times inconsistent. *Compare* DeMeerleer v. Michigan, 329 U.S. 663 (1947) (court found age to be a critical factor when 17 year old was charged, tried, convicted, and sentenced to life imprisonment for murder all in one day) *and* Uveges v. Pennsylvania, 335 U.S. 437 (1948) (court found youth of 17 years old convicted of burglaries to be important factor in denial of due process) *with* Gayes v. New York, 332 U.S. 145 (1947) (16 year old convicted of petty larceny without assistance of counsel not denied due process) *and* Canizio v. New York, 327 U.S. 82 (1946) (19 year old petitioner who pled guilty without the aid of counsel was not deprived of due process).

State court application of the "special circumstances" rule was similarly uneven. *See, e.g.*, Asbey v. State, 102 So. 2d 407 (Fla. Dist. Ct. App. 1958) ("ignorant Negro" denied due process of law when not represented by counsel); Shaffer v. Warden of Md. House of Corrections, 126 A.2d 573 (Md. 1956) (19 year old mental defective suffering from a speech defect not deprived of due process when denied appointed counsel); People v. Coates, 81 N.W.2d 411 (Mich. 1957) (feeble-minded defendant sentenced to life imprisonment without assistance of counsel denied due process). Moreover, while the Supreme Court expanded the meaning of "special circumstances," state courts continued to narrowly define the rule. In Chewning v. Cunningham, 368 U.S. 443 (1962), the United States Supreme Court held that the complex legal issue presented in that case necessitated the appointment of counsel. In contrast, less than a year before, the Supreme Court of Pennsylvania had found no special circumstances when an illiterate 18 year old, with the mental capacity of a nine year old, was convicted of rape and robbery and sentenced to 20 to 40 years in prison without the aid of counsel. Commonwealth *ex rel.* Simon v. Maroney, 405 Pa. 562, 176 A.2d 94 (1961).

26. Out of 139 cases heard by state courts on the issue, only 11 recognized the existence of special circumstances. Brief for the American Civil Liberties Union and the Florida Civil Liberties Union, Amici Curiae at 19, Gideon v. Wainwright, 372 U.S. 335 (1963), *reprinted in* 57 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 463, 488 (P. Kurland ed. 1975). *E.g.*, Truelove v. Warden of Md. House of Corrections, 115 A.2d 297 (Md. 1955); People v. Whitsitt, 359 Mich. 656, 103 N.W.2d 424 (1960); State v. Simpson, 243 N.C. 436, 90 S.E.2d 708 (1956).

27. *See, e.g.*, McNeal v. Culver, 365 U.S. 109 (1961) (black man who was incapable of his own defense because of ignorance and mental illness entitled to counsel); Hudson v. North Carolina, 363 U.S. 697 (1960) (18 year old defendant required assistance of counsel due to prejudicial position he was put in by his codefendants' guilty plea); Cash v. Culver, 358 U.S. 633 (1959) (uneducated 20 year old with no previous trial experience had a right to counsel); Giggs v. Burke, 337 U.S. 773 (1949) (lack of counsel handicapped defendant to the extent that he was denied due process); Rice v. Olson, 324 U.S. 786 (1945) (Indian who committed crime on reservation and was not advised of his right to counsel denied due process); Williams v. Kaiser, 323 U.S. 471 (1945) (defendant incapable of preparing his own defense). After 1950, the Supreme Court consistently found special circumstances in sixth amendment cases. Gideon v. Wainwright, 372 U.S. 335, 351 (1963) (Harlan, J., concurring).

right to court-appointed counsel in *Gideon v. Wainwright*,[28] the *Betts* decision was expressly overruled.[29]

The facts in *Gideon* were substantially similar to those in *Betts*. Gideon was charged with a felony and denied appointed counsel by the trial court.[30] He was convicted and sentenced to serve five years in prison.[31] On appeal, the Supreme Court held that an indigent's right to appointed counsel was a fundamental right essential to a fair trial, regardless of the specific circumstances of a particular case,[32] and thus protected against state intervention by the fourteenth amendment.[33]

The *Gideon* decision, however, failed to clearly define the extent of an indigent's right to appointed counsel. This uncertainty has resulted in inconsistent application of the *Gideon* rationale. For example, because the petitioner in *Gideon* was charged with a felony, some courts have concluded that appointed counsel is required only for indigent felons.[34] Other courts have maintained that the right extends to indigent defendants in all criminal proceedings.[35] A middle position taken by other courts was that counsel is guaranteed for indigents accused of crimes for which the punishment was "serious."[36] Because of this rampant confusion in the lower courts, the scope of an indigent's right to counsel depended upon the jurisdiction of his trial.[37]

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28. 372 U.S. 335 (1963). In the order granting certiorari, Gideon v. Cochran, 370 U.S. 908 (1962), the Court requested that both sides discuss in their briefs and oral arguments whether *Betts v. Brady* should be reconsidered. *See* LEWIS, *supra* note 17, at 43.

29. For a discussion of the significance of Justice Black's authorship of *Gideon*, see Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 231-42. According to Professor Israel, Justice Black's belief that the sixth amendment, along with the entire Bill of Rights, was incorporated into the fourteenth amendment precluded him from according any validity to *Betts v. Brady*. Consequently, Justice Black was forced to reject traditional Supreme Court methods of overruling in favor of an approach characterizing *Betts* as "an abrupt break with precedent". 372 U.S. at 344. *See* note 32 *infra*.

30. More specifically, Gideon was charged with the felony of breaking and entering with intent to commit a misdemeanor.

31. The Supreme Court of Florida denied Gideon's application for a writ of habeas corpus. Gideon v. Cochran, 135 So. 2d 746 (Fla. 1961).

32. The *Gideon* Court stated that *Betts* had been an "abrupt break" with precedent, discussing in particular Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel is among fundamental rights safeguarded against state action by the fourteenth amendment); and Johnson v. Zerbst, 304 U.S. 458 (1938) (counsel necessary to protect fundamental rights of liberty and life). 372 U.S. at 343-44. Additionally, the Court asserted that reason and reflection required recognition of the right to counsel as fundamental and essential to a fair trial. That the government hires prosecutors and that defendants who can afford to retain lawyers, illustrates the widespread belief that the assistance of counsel is a necessity. *Id.*

33. *Id.* at 342.

34. *E.g.*, Cortinez v. Flourney, 249 La. 741, 190 So. 2d 909 (1966); City of Toledo v. Frazier, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967).

35. *E.g.*, People v. Letterio, 16 N.Y.2d 303, 213 N.E.2d 670, 266 N.Y.S.2d 368 (1965); City of Tacoma v. Healer, 67 Wash. 2d 736, 409 P.2d 869 (1966).

36. *E.g.*, Irvin v. State, 44 Ala. App. 101, 203 So. 2d 283 (1967); State v. Anderson, 96 Ariz. 123, 392 P.2d 784 (1964).

37. For a discussion of the impact of *Gideon* on the individual states as of 1970, see Com-

In 1972, the Supreme Court attempted to resolve the confusion in the state courts. In *Argersinger v. Hamlin*,[38] the Court concluded that the rationales of *Gideon* and *Powell* regarding the necessity of counsel to a fair trial was relevant to criminal proceedings when physical liberty was at stake.[39] Consequently, the right to appointed counsel was not dependent upon the classification of the offense as a felony or misdemeanor, but upon whether the defendant was likely to be incarcerated as a result of his trial. Imprisonment, the *Argersinger* Court recognized, was the most important consideration because it could jeopardize the defendant's career, reputation, health, and general well-being.[40]

Similarly, the classification of the offense was found to be nondeterminative of the right to appointed counsel for indigent defendants in *In re Gault*.[41] In *Gault*, the Supreme Court held that due process required the appointment of counsel for juveniles in delinquency hearings, even though such

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ment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103 (1970).

38. 407 U.S. 25 (1972). In *Argersinger*, the uncounselled petitioner was convicted by a Florida court of carrying a concealed weapon, an offense punishable by up to six months in jail and a $1000 fine. After being sentenced to pay $500 or spend 90 days in jail, the petitioner sought habeas corpus. The Florida Supreme Court held that the right to counsel extends to offenses punishable by more than six months imprisonment, but dismissed Argersinger's writ because his offense was just under the line. State *ex rel.* Argersinger v. Hamlin, 236 So. 2d 442 (Fla. 1970). *See* Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 AM. CRIM. L. REV. 601 (1975).

39. 407 U.S. at 33. The *Argersinger* Court stated:

> The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.

Id. (citations omitted).

40. *Id.* at 37 (citing Baldwin v. New York, 399 U.S. 66, 73 (1970)). The *Argersinger* Court expressly left open the question of whether counsel was required for a defendant charged with a crime for which imprisonment was authorized but not imposed. Subsequently, in Scott v. Illinois, 440 U.S. 367 (1979), the Court, in a plurality opinion, concluded that *Argersinger* had limited the constitutional right to counsel in state court proceedings to those cases in which physical liberty is at stake. *Id.* at 373. *Scott*, however, was based less on the underpinnings of *Argersinger* than it was on the plurality's fear of further extending the right to counsel. Noting that previous cases had departed from the literal meaning of the sixth amendment, the *Scott* Court warned that "constitutional line-drawing becomes more difficult as the reach of the Constitution is extended further." *Id.* at 372. The plurality opinion also expressed reluctance to extend the right to counsel for fear of political confusion and increased costs to the states. *Id.* at 373. The economic justification is clearly incompatible with previous decisions holding that state fiscal interests do not justify denying the constitutional rights of indigents. *See, e.g.*, Bounds v. Smith, 430 U.S. 817 (1977); Mayer v. Chicago, 404 U.S. 189 (1971). *See also* Note, *Scott v. Illinois: Holding the Line on the Indigent Misdemeanant's Right to Counsel*, 9 CAP. U.L. REV. 149 (1979) (Supreme Court's failure to extend right to appointed counsel to crimes for which incarceration is authorized is contrary to precedent and will result in problems for lower courts).

41. 387 U.S. 1 (1967).

hearings were considered civil.[42] The *Gault* Court refused to rely on the civil/criminal distinction and concluded that the assistance of appointed counsel was essential to a fair trial in cases that may result in incarceration.[43]

The *Gault* decision was a particularly significant step in the evolution of the indigent's right to counsel because it was based solely on general fourteenth amendment principles of procedural fairness, not on the explicit sixth amendment guarantee.[44] *Gault*, in effect, established a right to appointed counsel based exclusively on the fourteenth amendment's due process guarantee of a fair hearing.[45] As a result, the right to appointed counsel for indigent defendants in civil proceedings became a due process question.

The Due Process Analysis

Fourteenth amendment due process analysis typically requires the resolution of two issues. First, a court must determine whether an interest exists that gives rise to procedural protection.[46] Second, a court must establish what specific procedures are required to protect the interest in question.[47]

To determine whether a sufficient interest exists, a court must decide whether the government seeks to deprive the individual of life,[48] liberty,[49] or property[50] within the meaning of the fourteenth amendment. In one case, for example, the Supreme Court held that a nontenured university professor had no fourteenth amendment property interest in continued employment, and therefore, no procedural protection was due.[51] In another case, the

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42. *Id.* at 35-37. *Gault* dealt specifically with the Arizona Juvenile Code which left the appointment of counsel to the discretion of the court. The Supreme Court recognized that a child could be incarcerated "for anything from waywardness to rape and homicide." *Id.* at 27.

43. *Id.* at 41. The Court stated that to find that juvenile behavior was not criminal and therefore unprotected by the Constitution "would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings." *Id.* at 49-50.

44. The Court described the right to counsel as deriving from the right to "essentials of due process and fair treatment." *Id.* at 30 (quoting Kent v. United States, 383 U.S. 541, 562 (1966)).

45. *See* Comment, *The Indigent Parent's Right to Appointed Counsel in Actions to Terminate Parental Rights*, 43 U. CIN. L. REV. 635, 639 (1974) [hereinafter cited as Comment]; *Recent Developments, Constitutional Law—Due Process—Indigent Parents' Right to Counsel in Child Neglect Cases*, 46 TENN. L. REV. 649 (1979).

46. *See generally* Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977) (examination of Court's varying definitions of the liberty and property protected by due process); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926) (discussion of expanding interpretation given language of due process clause, most specifically the world "liberty").

47. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972) (due process requires notice, disclosure of evidence, confrontation of witnesses, neutral and detached hearing body and written decision for parole revocation).

48. *E.g.*, Powell v. Alabama, 287 U.S. 45 (1932). *See* note 15 and accompanying text *supra*.

49. *E.g.*, *In re* Gault, 387 U.S. 1 (1967). *See* note 42 and accompanying text *supra*.

50. *E.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972). *See* note 6 and accompanying text *supra*.

51. Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972).

Court found that the physical liberty of a parolee, although conditional, constituted an interest within the scope of the liberty protected by the fourteenth amentment.[52] When the Court finds that a fourteenth amendment interest necessitates procedural protection, the issue of the requisite procedural safeguards must be resolved.[53]

In *Mathews v. Eldridge*,[54] the Court propounded three elements to be balanced in determining the necessary due process safeguards. At the outset, a court should look to the weight of the private interest to determine the degree of protection to which the individual is entitled.[55] Next, the court should evaluate the governmental interests advanced to justify limited procedural protections.[56] For example, in *Goldberg v. Kelly*[57] when a welfare recipient challenged the sufficiency of the procedures provided by the state prior to the termination of benefits, the Court first evaluated the private interests involved. The Court then balanced the state's interest in protecting public funds by avoiding the additional expense of increased procedural protections against the private need to receive welfare benefits. The Court found that the private interest outweighed the state's interest, and held that due process required increased procedural protections.[58] Finally, under *Mathews*, the court should examine the risk of error if the procedures are not employed.[59]

The Supreme Court has consistently utilized the *Mathews* balancing process to resolve fourteenth amendment procedural questions. Recently, in

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52. Morrissey v. Brewer, 408 U.S. 471 (1972).

53. Under a due process claim, litigants may pursue any of the usual components of a trial-type proceeding. *See generally* Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193 (1956) (analysis of types of hearings and the necessary accompanying procedures).

54. 424 U.S. 319 (1976). The *Mathews* Court concluded that due process does not require an evidentiary hearing prior to termination of social security benefits.

55. *Id.* at 335. *See* note 6 and accompanying text *supra*.

56. 424 U.S. at 347-48. Generally, the government will have an interest in either minimizing its administrative burdens, or safeguarding certain substantive objectives. If the latter interest is asserted, the Court weighs the importance of the state's objective. Next, the Court discounts or enhances this objective in relation to the effect the requested procedures would have on the government's ability to attain its objective. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (state's objective of keeping order in public school important, but not diminished by requiring hearing prior to suspending students for misconduct).

57. 397 U.S. 254, 260-71 (1970).

58. *Id.* at 265-66.

59. The determination of the risk of error is sometimes omitted. *E.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972).

To determine whether accurate fact finding is possible without the proposed procedures, the court should consider factors such as the nature of the issues presented, *e.g.*, Mitchell v. W.T. Grant Co., 416 U.S. 600, 609-10 (1974) (because legal issues are not complicated at prejudgment sequestration proceedings, due process allows initial seizure on sworn *ex parte* documents, followed by an early opportunity to put creditor to his proof); the litigants' ability to protect themselves, *e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 787-91 (1973) (appointed counsel is necessary only when especially needed in probation revocation hearing); and, the veracity of the witnesses, *e.g.*, Richardson v. Perales, 402 U.S. 389 (1971) (due process does not entitle social security disability claimant to cross-examine doctors testifying as to the nature of disability in part because of the doctor's unquestionable credibility).

Lassiter v. Department of Social Services,[60] the Court applied the *Mathews* formula to determine the right to court-appointed counsel in proceedings to terminate parental rights. The *Lassiter* Court, however, introduced a new element into the balancing process: the presumption that the right to appointed counsel is guaranteed only when the private interest is physical liberty.[61]

THE *LASSITER* DECISION

Abby Gail Lassiter, the mother of five children, lost custody of her youngest son, William, following a court determination that he was being neglected.[62] Subsequently, Lassiter began serving an unrelated twenty to forty-five year sentence for second-degree murder.[63] While in prison, Lassiter was informed that the County Department of Social Services planned to terminate her parental rights with respect to William. She did not, however, arrange for counsel to assist her at the termination hearing.[64]

At the outset of the proceeding, the North Carolina State District Court found that Lassiter had ample opportunity to seek representation, and refused to postpone the hearing based on her lack of counsel.[65] The judge explained to Lassiter that she could question the witnesses, but instead, she attempted to argue her position. Consequently, the judge continually disallowed her statements.[66] Finding that Lassiter had failed "to maintain con-

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60. 101 S. Ct. 2153 (1981).

61. *See* notes 72-75 and accompanying text *infra*.

62. *In re* Lassiter, 43 N.C. App. 525, 259 S.E.2d 336 (1979). The neglect charges stemmed from an incident in which a county social worker took the child from his home to a hospital where doctors advised that the child stay for two weeks "because of breathing difficulties, malnutrition, and [because] there was a great deal of scarring that indicated that he had a severe infection that had gone untreated." Trial Transcript at 11, *In re* Lassiter, No. 75J56 (Dist. Ct. N.C. Aug. 31, 1978).

63. The murder occurred during an altercation between Ms. Lassiter, her mother, and the victim. Apparently, Ms. Lassiter stabbed the victim seven times with a butcher knife. 101 S. Ct. at 2156 n.1.

64. *Id.* at 2157. The prison visit occurred in December, 1977. In April, 1978, Lassiter received a copy of the termination petition, and on August 11, 1978, a notice of the hearing to be held 20 days later. Trial Transcript at 3. North Carolina now statutorily provides for the appointment of counsel to indigent parents facing custody hearings. N.C. GEN. STAT., § 7A-587 (Supp. 1B 1979). This statute, however, was passed after Ms. Lassiter's hearing occurred. She had neither counsel nor the benefit of a "clear, cogent, and convincing evidentiary standard." *Lassiter*, 101 S. Ct. at 2160.

65. The judge apparently initiated the discussion of counsel on his own volition. Lassiter did not request that the court appoint her counsel. 101 S. Ct. at 2157. *See also* Trial Transcript at 3 (actual discussion of trial Judge).

66. The only witnesses to testify were Ms. Lassiter's mother and a Durham County social worker. 101 S. Ct. at 2157-58. The following excerpt from the transcript is an example of the problem:

> THE COURT: All right. Do you want to ask her [the social worker] any questions?

cern or responsibility" for the welfare of her son, the court terminated her parental rights.[67]

PETR: About what? About what she—
THE COURT: About this child.
PETR: Oh, yes.
THE COURT: All right. Go ahead.
PETR: The only thing I know is that when you say—
THE COURT: I don't want you to testify.
PETR: Okay.
THE COURT: I want to know whether you want to cross-examine her or ask any questions.
PETR: Yes, I want to. Well, you know the only thing I know about it is my part that I know about it. I know—
THE COURT: I am not talking about what you know. I want to know if you want to ask her any questions or not.
PETR: About that?
THE COURT: Yes. Do you understand the nature of this proceeding?
PETR: Yes.
THE COURT: And that is to terminate any rights you have to the child and place it for adoption, if necessary.
PETR: Yes, I know.
THE COURT: Are there any questions you want to ask her about what she has testified to?
PETR: Yes.
THE COURT: All right. Go ahead.
PETR: I want to know why you think you are going to turn my child over to a foster home? He knows my mother and he knows all of us. He knows her and he knows all of us.
THE COURT: Who is he?
PETR: My son, William.

Trial Transcript at 19-20, *reprinted in* 101 S. Ct. at 2173 n.22.

The trial transcript became part of the record on appeal only after the Supreme Court granted certiorari. The transcript is so replete with error that the County Attorney seriously considered confessing error when he first read it. Telephone interview with Thomas Russell Odom, Assistant County Attorney, Durham County, North Carolina, (June 5, 1981).

67. *Id.* at 2158 (quoting N.C. GEN. STAT., § 7A-289.32(1) (1972) (repealed 1979)). When the *Lassiter* termination proceedings began, grounds for termination included: failure of parent to maintain concern or responsibility as to the child's welfare, physical abuse or neglect, failure of parent whose child has been in foster care for more than two years to show progress in correcting conditions which led to child's removal from parent's home, and parent's failure to contribute financially to maintenance of child in custody of the county. N.C. GEN. STAT., § 7A-289.32 (Supp. 1B 1979). For an examination of statutes in a number of states, see Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 230-35 (1979) [hereinafter cited as *Family Integrity*] (recognition of right to family integrity as fundamental should result in application of strict scrutiny analysis for state intervention).

Termination of parental rights permanently severs the parent-child relationship. As one judge stated: "The child is dead so far as that parent is concerned." *In re* William L., 477 Pa. 322, 370, 383 A.2d 1228, 1252 (Maderino, J., dissenting), *cert. denied*, 439 U.S. 880 (1978). In addition, the parent loses what has been described as "the security provided to a parent when his children become adults; favorable status in a society which attaches significant cultural value to parenthood and family life; and a right to psychologically important manifestations of

On appeal, Lassiter argued that she was entitled to appointed counsel under the fourteenth amendment due process clause. The North Carolina Court of Appeals rejected her argument, however, and held that the Constitution did not require the appointment of counsel for indigent parents.[68] The Supreme Court of North Carolina denied Lassiter's application for review,[69] and on October 6, 1980, the United States Supreme Court granted certiorari.[70]

In *Lassiter*, the Court held that the fourteenth amendment due process clause does not require the appointment of counsel for every indigent facing termination of parental rights.[71] In so holding, the Court reasoned that Lassiter was not entitled to appointed counsel because she had failed to express an interest in her son strong enough to rebut the presumption that an indigent has no right to appointed counsel unless faced with deprivation of physical liberty.[72] To establish this presumption, the *Lassiter* Court analyzed previous right to counsel cases. According to the Court, precedent clearly indicated that an indigent's right to appointed counsel is "triggered"[73] by his interest in personal freedom, not merely predicated upon the sixth and fourteenth amendments. The *Lassiter* Court stated that no case established a right to counsel in criminal prosecutions absent the threat of incarceration, and therefore, there was a presumption that due process required the appointment of counsel only where physical liberty was at stake.[74] Consequently, the Court reasoned that as an indigent's interest in personal liberty diminishes, so does his right to appointed counsel.[75]

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a child's natural love for his parent." Comment, *supra* note 45, at 635-36. Termination also puts an end to the child's right to be supported and maintained by, as well as to inherit from, the parent. *In re* K.S. & M.S., 33 Colo. App. 72, 76, 515 P.2d 130, 133 (1973).

68. *In re* Lassiter, 43 N.C. App. 525, 259 S.E.2d 336 (1979).

69. *In re* Lassiter, 299 N.C. 120, 262 S.E.2d 6 (1980).

70. Lassiter v. Department of Social Services, 101 S. Ct. 70 (1980).

71. Justice Stewart delivered the opinion of the Court in which Chief Justice Burger and Justices White, Powell and Rehnquist joined.

72. 101 S. Ct. at 2158.

73. *Id.* at 2159.

74. *Id.* The *Lassiter* Court stated that it was significant in Gideon v Wainwright, 372 U.S. 335 (1963), that the indigent defendant was sentenced to five years in prison. Accordingly, the Court interpreted Argersinger v. Hamlin, 407 U.S. 25 (1972), as establishing that an indigent's right to liberty, and thus appointed counsel, deserved protection regardless of the length of the sentence or the classification of the offense. 101 S. Ct. at 2158.

The *Lassiter* Court relied upon *In re* Gault, 387 U.S. 1 (1967) (juveniles have a right to appointed counsel in delinquency hearings that may result in institutionalization even though those proceedings are termed "civil" rather than "criminal"); and Vitek v. Jones, 445 U.S. 480 (1980) (appointed counsel is required for indigent prisoners facing involuntary transfer to a mental institution), for the statement that physical liberty triggers the right to counsel. 101 S. Ct. at 2159.

75. 101 S. Ct. at 2159. The *Lassiter* Court stated that in Morrissey v. Brewer, 408 U.S. 471 (1972), it had characterized a parolee's liberty as "conditional liberty." Relying on the *Brewer* characterization and equating parole with probation, the Court in Gagnon v. Scarpelli, 411 U.S. 778 (1973), found that due process does not mandate appointed counsel for indigents at

Having established the presumption, the Court then balanced the private interests, the state's interests, and the risk of error. Initially, the Court acknowledged that a parent's desire for the custody, companionship, care, and management of his or her child had been clearly established as an important interest.[76] Accordingly, the Court also stated that states should defer to parental rights and these rights must be protected "absent a powerful countervailing interest."[77] Finally, characterizing the termination of parental rights as a "unique kind of deprivation," the Court concluded that parents share with the state a commanding interest in an accurate and just termination decision.[78]

Evaluating the state's interests, the Court recognized that the state may also share the parent's interest in the availability of appointed counsel. This is true because an adversary system presumes that an accurate decision most likely occurs through the contest of opposing interests.[79] Additionally, the state may have an interest in avoiding the expense of appointed counsel. Nevertheless, the Court concluded that this pecuniary interest is not strong enough to overcome the parent's interests.[80]

Finally, the Court explored the risk that uncounselled parents could have their parental rights erroneously terminated. Acknowledging that termination proceedings sometimes involve difficult points of law, and that uneducated indigents are often ill-equipped to understand the expert medical and psychiatric testimony that might be introduced, the Court concluded that there was an appreciable risk of error.[81] In addition, the Court recognized that lower courts have generally required the appointment of counsel for indigent parents at termination proceedings.[82]

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parole revocation hearings. Because the liberty at stake is conditional rather than absolute, appointment of counsel is to be determined on a case-by-case basis.

76. 101 S. Ct. at 2160. The Court stated that past decisions have established this interest "beyond the need for multiple citation." *Id.* For the argument that recognition of these parental rights suggests the existence of a fundmental right to family integrity, see *Family Integrity, supra* note 67, at 215-23.

77. 101 S. Ct. at 2161.

78. *Id.* at 2160.

79. The Court pointed out that without the assistance of counsel for the parent, the contest of interests may be "unwholesomely unequal." *Id.* at 2160. *See* note 120 *infra*.

80. 101 S. Ct. at 2160. The Court stated that this is particularly true because the cost of appointed counsel is "de minimus" compared to the costs in criminal actions. *Id.* (quoting Brief for Respondent at 43, Lassiter v. Department of Social Servs., 101 S. Ct. 2153 (1981)).

81. *Id.* at 2161. The Court feared that parents thrust into a distressing and disorienting situation at the hearing may be overwhelmed without the aid of counsel.

82. *Id.* at 2161. *See, e.g.*, Danforth v. Maine Dep't of Health and Welfare, 303 A.2d 794 (Me. 1973); Department of Pub. Welfare v. J.K.B., 393 N.E.2d 406 (Mass. 1976); Crist v. Division of Youth and Family Servs., 128 N.J. Super. 402, 320 A.2d 203 (1974), *modified on other grounds*, 135 N.J. Super. 573, 343 A.2d 815 (1975); State *ex rel* Heller, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980); *In re* Chads, 580 P.2d 983 (Okla. 1978); *In re* Myricks, 85 Wash. 2d 252, 533 P.2d 841 (1975). Additionally, the *Lassiter* Court noted that 33 states and the District of Columbia statutorily provide for the appointment of Counsel at termination proceedings. 101 S. Ct. at 2163.

After establishing the presumption that counsel need be appointed only when physical liberty is at stake and balancing the traditional due process interests, the Court considered whether the outcome of the interest balancing was sufficient to rebut the physical liberty presumption. The Court hypothesized that if 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, the presumption would be overcome and due process would require the appointment of counsel.[83] The Court concluded, however, that the Constitution did not require the appointment of counsel in every termination proceeding.[84] Reviewing the facts at bar, the Court emphasized that the termination petition contained no allegations of neglect or abuse upon which criminal charges could be based, no expert witnesses testified, and no specially troublesome points of law were introduced. Consequently, the *Lassiter* Court held that the failure to appoint counsel for Lassiter did not deprive her of due process because the evidence against her was such that the presence of counsel could not have made a determinative difference.[85]

CRITICISM AND IMPACT

In *Lassiter*, the Court limited the scope of the fourteenth amendment right to appointed counsel by injecting a rebuttable presumption into traditional due process interest balancing.[86] Careful analysis of previous right to

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83. 101 S. Ct. at 2162.

84. The *Lassiter* Court adopted the standard set forth in Gagnon v. Scarpelli, 411 U.S. 778 (1973), a probation revocation case, that "due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed, . . ." 101 S. Ct. at 2162 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973)).

85. 101 S. Ct. at 2162. Justice Blackmun wrote a lengthy dissent, in which he was joined by Justices Brennan and Marshall. At the outset, he stated that the extent of due process required depends upon the interests at stake and the nature of the governmental proceedings. *Id.* at 2164. When the state seeks to curtail fundamental liberty interests by a formal adversarial proceeding, appointed counsel may be required for fairness. The dissent maintained that due process requires the appointment of counsel in a parental rights termination hearing, because the private interest is compelling, the state's role is adversarial, and the state's interest is minimal. *Id.* at 2165. A presumption that physical liberty alone triggers the right to counsel is not supported by precedent. See notes 87-111 and accompanying text *infra*. Further, the dissent asserted that the majority opinion misrepresented the Court's flexible approach to due process. 101 S. Ct. at 2167. The flexibility of due process does not involve case-by-case consideration of different litigants within a given context. *Id.* at 2172. Instead, due process analysis examines decision-making *contexts* and addresses the interests involved generally to formulate a general rule applicable to all cases arising within that particular context. *Id.* at 2171. Thus, an ad hoc approach to parental entitlement to counsel is cumbersome, costly, and inadequate to ensure fairness. Additionally, such an approach promotes increased federal interference in state proceedings. *Id.* at 2164-65.

In the instant case, the dissenters reasoned, Ms. Lassiter was deprived of a fundamental liberty interest without due process of law because in the absence of counsel, she was not given a meaningful opportunity to be heard. *Id.* at 2163-76.

86. In no other case has the Supreme Court initiated its analysis of due process with a "presumption" drawn from prior case law. For example, in Little v. Streater, 101 S. Ct. 2202

appointed counsel case law, however, does not support the presumption that only potential deprivation of physical liberty triggers the right to counsel. A more accurate interpretation of precedent compels the conclusion that when the state seeks to infringe upon any fundamental liberty interest through a formal adversary proceeding, due process requires the appointment of counsel.[87] Additionally, introduction of the presumption alters the primary focus evident in traditional due process analysis. After *Lassiter*, the indigent's right to counsel must be determined on a case-by-case basis. This approach is a retrenchment of the ad hoc decision-making mandated by *Betts v. Brady* and is likely to cause a resurgence of problems similar to those experienced by the courts following *Betts*.[88]

This retrenchment is due in large part to the *Lassiter* Court's misunderstanding of right to counsel precedent. The *Lassiter* Court's interpretation of *Gideon* accorded great significance to the fact that the defendant in *Gideon* was sentenced to prison. It was not the particular circumstances of that case, however, that led the *Gideon* Court to overrule *Betts v. Brady*. Factually, *Gideon* and *Betts* were almost indistinguishable.[89] Crucial to *Gideon* was the Supreme Court's realization that counsel was indispensible to a fair criminal trial, regardless of the specific facts or potential punishment.[90] A more faithful reading of *Gideon* leads to the conclusion that the need for adequate representation, not the possibility of incarceration, makes court appointment of counsel essential to a fair trial.[91]

Similarly, in *Argersinger v. Hamlin*,[92] it was the indigent's need for representation that led the Court to mandate a right to counsel in nonfelony prosecutions. *Argersinger* specifically focused upon the fact that the need for counsel was not dependent upon the classification of the offense.[93] The *Lassiter* Court, however, maintained that the central premise of *Argersinger* was that "actual imprisonment [was] a penalty different in kind from fines or the mere threat of imprisonment,"[94] and thus interpreted the Court's holding to be that the potential for incarceration triggered the right to counsel.[95] Contrary to the *Lassiter* Court's extrapolation, *Argersinger*

(1981), decided the same day as *Lassiter*, the Court employed a traditional due process analysis to find that a defendant to a paternity suit may not be constitutionally denied access to blood grouping tests on the basis of indigency. Rather than formulating a rebuttable "presumption," the *Streater* Court utilized precedent only as a measure of the weight to be given certain interests in the balancing process.

87. *Lassiter*, 101 S. Ct. at 2164-65 (Blackmun, J., dissenting).

88. *See* notes 119-29 and accompanying text *infra*.

89. *See* notes 22 & 30 and accompanying text *supra*.

90. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

91. *Id.* at 339.

92. 407 U.S. 25 (1972).

93. *Id.* at 30-37. The *Argersinger* Court's emphasis on the effect of imprisonment upon an individual's career or reputation is an indication that there are interests other than physical liberty that call for the assistance of appointed counsel. *See* text accompanying note 40 *supra*.

94. 101 S. Ct. at 2159 (quoting Scott v. Illinois, 440 U.S. 367, 373 (1979).

95. *See* note 74 and accompanying text *supra*.

recognized that to deprive an individual of physical liberty was to deprive that person of a fundamental right, regardless of the length of the deprivation.[96] Furthermore, the *Argersinger* Court reasoned that a litigant's need for the assistance of counsel was not determined by the length of his or her prison sentence, or whether the proceeding was criminal or civil.[97]

The *Lassiter* Court also relied on *In re Gault*[98] for the proposition that the right to personal freedom, not the sixth or fourteenth amendments, triggered the right to counsel.[99] This reliance was misplaced, however. While the *Gault* Court emphasized the possibility of incarceration to some extent, the central premise of *Gault* was that due process may require court appointed counsel in civil proceedings.[100] Significantly, the Supreme Court previously refused to mandate a right to appointed counsel triggered by the loss of physical liberty in a case similiar to *Gault*. In *Parham v. J.R.*,[101] the petitioner was a juvenile facing commitment in a mental institution. The *Parham* Court acknowledged the child's interest in his physical liberty, but determined that the introduction of counsel would unnecessarily transform the commitment hearing from an essentially medical and informational proceeding into an adversarial contest.[102]

For similar reasons, the Court in *Gagnon v. Scarpelli*,[103] found that no constitutional right to counsel existed at informal probation revocation hearings. The *Lassiter* Court explained that in *Gagnon*, "conditional" rather than "absolute" liberty was at stake in a probation revocation hearing.[104] As the litigant's interest in personal liberty diminished, the *Lassiter* Court concluded, so did his right to appointed counsel. The nature of the litigant's physical liberty interest, however, was not the sole reason that the

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96. It is impossible to reconcile drawing a line between confinement and nonconfinement with the equal protection concept of Mayer v. City of Chicago, 404 U.S. 189 (1971). In *Mayer*, the litigant was convicted of a minor offense, punishable by fine only. The Supreme Court unanimously held that the litigant could not be denied a free transcript for purposes of appeal simply because he was not sentenced to incarceration. *Id.* at 196-97.

97. After the Court in Powell v. Alabama, 287 U.S. 45 (1932), held that the right to counsel originates in the fourteenth as well as the sixth amendment, subsequent determination of that right depended on what was fundamentally fair. *See* note 16 and accompanying text *supra*. In *Gideon* and *Argersinger*, the right to counsel continued to depend on the fair trial guarantee of the fourteenth amendment. *See* note 39 and accompanying text *supra*. Further, the *Argersinger* Court relied on *In re Gault* for its statement that "in prosecutions for offenses less serious than felonies, a fair trial may require the presence of a lawyer." Argersinger v. Hamlin, 407 U.S. 25, 34 (1972).

98. 387 U.S. 1 (1967). *See* note 43 and accompanying text *supra*.

99. 101 S. Ct. at 2159. *See* note 76 *supra*.

100. *See* notes 42-45 and accompanying text *supra*.

101. 422 U.S. 584 (1979).

102. *Id.* at 604-10. The only real distinction between *Gault* and *Parham* is the nature of the proceeding involved. In both cases the right at stake was the individual's interest in personal freedom, yet counsel was found to be an essential procedural safeguard only when the proceeding was a formal adversarial contest. 101 S. Ct. at 2164-65 (Blackmun, J., dissenting).

103. 411 U.S. 778 (1973).

104. 101 S. Ct. at 2159.

Gagnon Court refused to require the appointment of counsel. More important in *Gagnon* was the nature of the probation revocation hearing.[105] According to the *Gagnon* Court, the function of the probation officer was rehabilitative rather than punitive, and introduction of counsel into the revocation proceedings would unnecessarily alter the nature of the proceedings. Accordingly, the Court concluded that counsel was not required in every case because the hearing was informal and nonadversarial.[106]

The distinction drawn by the *Lassiter* Court between "conditional" and "absolute" liberty as it affects the right to counsel is also inconsistent with *Vitek v. Jones*.[107] In *Vitek*, the Court mandated the appointment of counsel for prison inmates being transferred to state mental hospitals.[108] The

105. 411 U.S. at 787. *Gagnon* addressed two issues: first, whether due process mandated preliminary and final revocation hearings; and second, whether due process required the appointment of counsel to probationers or parolees facing revocation. It was in its discussion of the first issue that the *Gagnon* Court considered the "conditional" nature of the liberty interest at stake. In its analysis of the second issue, the Court did not directly mention conditional physical liberty. Rather, the Court stated that the probationer's right to due process was limited because he had been convicted of a crime. *Id.* at 789. In addition, the Court discussed the rehabilitative role of the probation/parole officer, the great discretion he or she is accorded, and the informality of the proceedings. *Id.* at 784.

106. *Id.* at 789. The *Lassiter* Court adopted its case-by-case approach, in part, from *Gagnon*. The *Gagnon* Court's ad hoc decision-making, however, is inappropriate when, as in *Lassiter*, the state seeks to abridge a fundamental interest. *See* note 112 *infra*. In *Gagnon*, the Court recognized that *Gideon* rejected the case-by-case approach of *Betts*. 411 U.S. at 788. The *Gagnon* Court concluded, however, that such an approach was adequate to protect the limited due process rights of an indigent probationer in an informal nonadversarial revocation hearing. *Id.* at 789-90. The Court stressed that in a probation revocation hearing, the state is represented by a probation officer whose function is essentially rehabilitative and the rules of evidence are not in effect. *Id.* at 789. As a result, the need for counsel is limited.

A parental rights termination proceeding, on the other hand, is a formal adversarial hearing at which the state is represented by an experienced prosecutor, and the rules of evidence and procedure are employed. *See, e.g.*, N.C. GEN. STAT., art. 24B § 7A-289.30 (Supp. 1B 1979). *See also* Catz & Kuelbs, *The Requirement of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 13 J. FAM. L. 223, 229-30 n.18 (1973-74) (appointed counsel a necessity in proceedings to terminate parental rights under both due process and equal protection clauses of fourteenth amendment). The need for counsel is greater because most parents faced with termination are uneducated and ill-equipped to cope with the hearing. *See* note 81 *supra*. Further, in a parental rights termination proceeding, as the *Lassiter* Court acknowledged, 101 S. Ct. at 2160, the state's pecuniary interest in avoiding the mandatory appointment of counsel does not outweigh parents' fundamental interests in their children. *See* note 80 and accompanying text *supra*.

Significantly, *Lassiter* is also distinguishable from *Gagnon* based upon the nature of the interest at stake in each case. In *Gagnon*, the Court emphasized that the due process right of a probationer is limited because he or she has been convicted of a crime. 411 U.S. at 789. While a probationer may be entitled to a lesser degree of protection because of his or her limited rights, a parent is not. As the *Lassiter* Court admitted, parental rights are compelling and deserving of great protection and deference. 101 S. Ct. at 2160.

107. 445 U.S. 480 (1980).

108. *Vitek* was a plurality decision in which Justice Powell concurred in part. Although Justice Powell agreed that an indigent prisoner facing commitment must receive qualified and independent legal assistance, he expressed his opinion that it need not be by a licensed attorney. *Id.* at 500.

Lassiter Court cited *Vitek* in support of its claim that the deprivation of physical liberty triggered the right to counsel.[109] Yet, in *Vitek*, the incarcerated litigant stood to lose no more than "conditional" liberty as the *Lassiter* Court would define it. A more accurate basis for the holding in *Vitek* was the Court's recognition of the stigma that accompanies commitment to a mental institution as well as the inability of diseased or defective individuals to represent themselves.[110] It was the prisoner's need for counsel that triggered the right in *Vitek*, not the loss of physical liberty as the *Lassiter* Court asserted.[111]

Thus, examination of right to counsel case law indicates that the due process guarantee of a fair hearing requires the appointment of counsel when the government seeks to deprive an individual of a fundamental liberty interest through a formal adversary proceeding.[112] In cases in which the liber-

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109. 101 S. Ct. at 2159.

110. The *Vitek* Court stated:

> The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement . . . . [C]ommitment to a mental hospital "can engender adverse social consequences to the individual. . . ." [W]hether we label this phenomena "stigma" or choose to call it something else . . . it can occur and it can have a very significant impact on the individual.

445 U.S. at 492 (quoting Addington v. Texas, 441 U.S. 418, 425-26 (1979)).

111. 101 S. Ct. at 2167 (Blackmun, J., dissenting). No new incarceration was threatened by the transfer in *Vitek*. Instead, the liberty interests implicated in *Vitek* were the prisoner's interest in his reputation and in not being subject to behavior modification while institutionalized. Because the prisoner could not adequately represent himself, fundamental fairness required counsel.

112. The Supreme Court has interpreted the term "liberty" as used in the fourteenth amendment as:

> [N]ot merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The fundamental nature of a parent's liberty interest in his children has been well established in a series of Supreme Court decisions. In one line of cases the Court limited the states' power to restrict parental decision-making when it invalidated state statutes forbidding foreign language instruction to school children in Meyer v. Nebraska, 262 U.S. 390 (1923); banning private school attendance in Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); and requiring mandatory school enrollment beyond the eighth grade in Wisconsin v. Yoder, 406 U.S. 205 (1972). In a second line of cases, the Court further defined the right of parents to the care and custody of their children. For example, in May v. Anderson, 345 U.S. 528 (1953), the Court accorded procedural protections to a mother's right to her children. Armstrong v. Manzo, 380 U.S. 545 (1965), established that procedural safeguards were required even by the inchoate custodial rights of a divorced father. In Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), the Court found that the state cannot legally define family as excluding a biological, but unwed, mother and her children. Similarly, the Court in Stanley v. Illinois, 405 U.S. 645 (1972), stated that an unwed father could assert both his and his children's rights to family integrity. A parent's right to maintain his parental status may be construed as a fundamental right based upon the foregoing cases. The *Lassiter* deci-

ty interest is less than fundamental, or the hearing is informal, the Supreme Court has refused to find the appointment of counsel constitutionally mandated.

Introduction of the *Lassiter* presumption into traditional due process analysis significantly alters the focus of fourteenth amendment right to counsel adjudication.[113] Due process analysis has traditionally involved examination of the nature of the interests and the risk of error within the context of specific rights.[114] The *Lassiter* approach, however, requires evaluation of the particular interests of a specific individual on each occasion they arise to determine whether those interests rebut the presumption drawn from prior case law.[115]

When a specific individual's interests will rebut the presumption is not clear from the *Lassiter* decision. The only guidelines the decision provides to lower courts emerge from the *Lassiter* Court's reference to the absence of expert testimony, particularly troublesome points of law, and allegations upon which criminal charges can be based.[116] These guidelines lend

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sion, in effect, establishes that physical liberty is "more" fundamental than other liberty interests. Yet, it is no less than absurd to pretend that a few months of imprisonment is a deprivation more grievous than the permanent loss of one's child. *See* 101 S. Ct. at 2176 (Stevens, J., dissenting). *See also* The Supreme Court, 1981 Term, 95 HARV. L. REV. 138 n. 58 (1981) (*Lassiter* rationale lends artificial weight to distinction between parental rights and imprisonment).

In *Santosky v. Kramer*, ____U.S.____, 102 S. Ct. 1388, 1394 (1982), the Court discussed *Lassiter* and acknowledged its own "historical recognition that freedom of choice in matters of family life is a fundamental liberty interest protected by the fourteenth amendment." *Id.* at 4335. Significantly, Justice Blackmun, author of the dissent in *Lassiter*, wrote the majority opinion in *Santosky*. *See* note 85 *supra*.

113. *See* 101 S. Ct. at 2167 (Blackmun, J., dissenting).

114. *E.g.*, Meachum v. Fano, 427 U.S. 215 (1976) (court must look to nature of interest at stake, not its specific weight); Mathews v. Eldridge, 424 U.S. 319, 344 (1976) ("procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions").

115. In its consideration of the facts, the *Lassiter* Court stated that the appointment of counsel would not have changed the outcome of the case, and that, therefore, the proceedings were fundamentally fair. 101 S. Ct. at 2162. The fourteenth amendment due process clause, however, requires that an individual whom the government seeks to deprive of a fundamental interest in life, liberty, or property must first be afforded a meaningful opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 394 (1914). The function of appointing counsel is to ensure that the hearing is meaningful and thus fair. That the presence of counsel might not have changed the outcome in *Lassiter* is not constitutionally relevant. *Cf.* Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915) ("To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits."). What is relevant is that counsel would have ensured that the termination proceeding was fair for the purposes of the fourteenth amendment. *Cf.* Bute v. Illinois, 333 U.S. 640, 682 (1948) (Douglas, J., dissenting) ("the need for counsel . . . is not determined by the complexities of the individual case or the ability of the particular person who stands as an accused before the court.").

116. *See* text accompanying notes 84 and 85 *supra*.

themselves to ambiguous and subjective application.[117] Moreover, *Lassiter* failed to delineate standards with respect to the weight or importance to be assigned each of the stated factors. One court may consider counsel as requisite in cases in which expert testimony is introduced. Another court may interpret *Lassiter* to require counsel only when expert testimony, troublesome points of law and allegations of criminality are all present.

In *Betts v. Brady*, the Court provided similarly vague direction for application of the special circumstances rule. Although subsequent decisions attempted clarification, lower courts as well as the Supreme Court applied the rule inconsistently due to its subjective and ambiguous nature.[118] The *Lassiter* rule is, in effect, no different from the *Betts* special circumstances rule.[119] Consequently, application of the *Lassiter* rule is likely to result in the same confusion that surrounded the special circumstances rule.

Similar to the special circumstances rule, *Lassiter* requires that the trial court determine whether the assistance of counsel is necessary prior to the trial. Although it is unlikely that a trial court will be able to accurately predict the course of the litigation and the indigent's response to potential difficulties, the court must attempt to do so. By inquiring into and making judgments about a case at the outset, however, it becomes impossible for the court to remain the impartial tribunal anticipated by our legal system.[120]

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117. The *Lassiter* rule may actually increase the resources already marshalled against the parent by the state. In addition to having an experienced prosecutor, a department of social services to aid in discovery, and access to social workers' records and testimony, the state can now influence the appointment of counsel in specific termination proceedings. The only element of the *Lassiter* guidelines that is not directly under government control is the presence of "especially troublesome points of law." 101 S. Ct. at 2162. Uncounselled parents, to whom the simplest concepts of the law may seem incomprehensible, are unlikely to succeed in isolating or proving legal complexities. Therefore, by opting to forego expert testimony and omitting allegations upon which criminal charges could be based from the petition, the state may be able to ensure the nonappointment of counsel. *Cf.* Catz & Kuelbs, *The Requirement of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 13 J. FAM. L. 223, 229-30 n.8 (1973-74).

118. *See* note 25 and accompanying text *supra*.

119. *See* note 28 *supra*.

120. L. HERMAN, THE RIGHT TO COUNSEL IN MISDEMEANOR COURT 6 (1973). A determination of what the "truth" is in a particular situation may be difficult for the court to make. Yet, since truth is necessary for justice, courts must seek to ascertain the truth as nearly as possible. Our adversary system is based upon the belief that a contest of opposing interests with a judge or jury sitting as arbitrator, will be most likely to reveal the truth. Although absolute equality in skill of the contending interests is not possible, the contest cannot approach equality without counsel for one side. Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1331 (1961). When the indigent litigant is unrepresented by counsel it becomes the duty of the judge to see that his rights are not violated.

In an empirical study, New York Family Court judges were asked about the effects of parents being unrepresented in neglect cases. The results indicated that 72.2% found that lack of representation made it more difficult to conduct a fair hearing. More specifically, 66.7% found it more difficult to develop the facts. *Representation in Child-Neglect Cases: Are Parents Neglected?*, 4 COLUM. J. L. & SOC. PROB. 230, 253 (1968). The lack of counsel for indigents in termination proceedings is thus burdensome for the judge as well as the indigents.

Moreover, because the right to counsel is derived from the sixth and fourteenth amendments, state law adjudication of that right is subject to federal court review. After *Betts*, there was a great increase in the number of state convicts who appealed their convictions to federal courts.[121] Federal judges were consequently obliged to extensively examine state decisions to determine whether state courts erroneously denied the assistance of counsel.[122] As a result, state judges were sometimes admonished that they had misapplied their own state law[123] or that they had failed to properly protect the defendant.[124] The friction that resulted was substantial. After *Lassiter*, indigent parents denied the assistance of appointed counsel in state courts may similarly appeal to federal courts. The increased federal supervision that will necessarily result may produce friction analogous to that which occurred in the aftermath of *Betts*.

Another risk of the *Betts* special circumstances rule was the unjust incarceration of individuals forced to await appeal. One convict spent nineteen years at hard labor before the Supreme Court ruled that he had been denied his constitutional right to counsel under *Betts*.[125] Due to the length of time generally necessary to perfect an appeal, uncounselled parents may, after *Lassiter*, be unfairly deprived of the care and custody of their children for several years. Additionally, children may be forced to await resolution of the appeal in a foster home or child care institution, forbidden to return home, and ineligible for adoption.[126] The effect of this uncertainty and instability can be emotionally disastrous for children.[127]

Potential for a fair determination on appeal is also diminished by *Lassiter*. While review of the pleadings and transcripts may uncover the

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121. BEANEY, *supra* note 1, at 196. For a discussion of the problems facing a judge trying to apply the "special circumstances" rule, see Potter v. Dowd, 146 F.2d 244, 248-50 (7th Cir. 1944) (Evans, J., concurring).

122. *See* Israel, *Gideon v. Wainwright: The Art of Overruling*, 1963 SUP. CT. REV. 211, 265 (1963).

123. *E.g.*, McNeal v. Culver, 365 U.S. 109, 116 (1961) (Supreme Court stated it was questionable whether the crime for which accused was convicted actually existed under Florida law).

124. *E.g.*, Gibbs v. Burke, 337 U.S. 773, 776-78 (1949) (state court judge found to have violated the accused's constitutional rights and "evinced a hostile and thoroughly unjudicial attitude"). The difficulties experienced by judges applying the "special circumstances" rule are illustrated by one state supreme court justice in an article suggesting ways to ensure that an accused's rights are not violated. Sloan, *The Jail House Lawyer Versus Court and Counsel: Some Ideas for Self-Protection*, 1 Washburn L.J. 517 (1962).

125. Moore v. Michigan, 355 U.S. 155 (1957) (accused sentenced to solitary confinement at hard labor in 1938, and in 1957 Supreme Court ruled he had been denied constitutional right to counsel). *Accord*, DeMeerleer v. Michigan, 329 U.S. 663 (1947) (15 years elapsed between trial and reversal for lack of counsel); Garton v. Tinsley, 171 F. Supp. 387 (D. Colo. 1959) (14 years elapsed prior to grant of writ of habeas corpus).

126. For a discussion of the problems with foster care, see Smith v. Organization of Foster Families for Equity & Reform, 431 U.S. 816 (1977).

127. Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887 (1975).

glaring errors and omissions of the uncounselled parent, the true significance of the lack of legal assistance may not be readily apparent from the record.[128] Illogically, *Lassiter* puts the burden of showing the need for counsel on the unrepresented parents, just as *Betts* did on uncounselled convicts. It is unreasonable to expect indigent parents who are generally uneducated to have the knowledge and skill necessary to garner essential facts and preserve them on the record. Faced with the prospect of losing their children, many parents become unable to function even at normal capacity,[129] yet *Lassiter* expects them to summon the requisite legal expertise. Ironically, the more the parent needs counsel, the less likely he will be able to prove that need to the court.

CONCLUSION

Since the Supreme Court has tied the right to appointed counsel to the fourteenth amendment's guarantee of a fair hearing, an indigent's right to counsel has become largely a due process question. In *Lassiter*, the Supreme Court introduced a new element into traditional due process analysis. According to the Court, previous right to counsel cases established the presumption that an indigent has a right to counsel only when he may be deprived of his physical liberty. This presumption, however, is unsupported by precedent. A more accurate reading of precedent would establish a right to appointed counsel in cases in which the government deprives an indigent of a fundamental interest through a formal adversary proceeding.

Lassiter indicates that the Court is reluctant to expand the indigent's right to counsel. By introducing a new element into the traditional due process analysis, the Supreme Court changed the focus of fourteenth amendment

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128. As one justice has so eloquently stated:

> Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson or the itching over-eagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light and yet not a soul who heard it, *nisi*, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print and yet there was that about the witness that carried conviction of truth to every soul who heard him testify.

Creamer v. Bivert, 214 Mo. 473, 479-80, 113 S.W. 1188, 1120-21 (1908).

129. In *Lassiter*, Ms. Lassiter found it so difficult to comprehend that her child could be taken away from her that she refused to attend the custody hearing. At trial she explained her absence as follows: "He [a county social worker] asked me . . . could I get up there because I didn't know what was happening. And I told him . . . I ain't going—I just said I'm going to Court about my own child? . . . I was just shocked and I didn't know what was going on." Trial Transcript at 32, *In re* Lassiter, No. 75J56 (Dist. Ct. N.C. Aug. 31, 1978).

right to counsel adjudication. As a consequence of the *Lassiter* presumption, the indigent's right to counsel must be decided on a case-by-case basis. This ad hoc approach, together with the *Lassiter* Court's failure to provide clear guidelines for its application, appears to be a return to the problematic special circumstances rule of *Betts v. Brady*. As a result, the problems created by *Lassiter* are likely to be much like those encountered in the aftermath of *Betts*.

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