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Lassiter v. Department of Social Services: Due Process Takes an Ad Hoc Turn - What's a Parent to Do?

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LASSITER V. DEPARTMENT OF SOCIAL SERVICES: DUE PROCESS TAKES AN *AD HOC* TURN—WHAT'S A PARENT TO DO?

INTRODUCTION

In the recent Supreme Court decision, *Lassiter v. Department of Social Services*,[1] the majority, by a vote of five to four, held that there is no *per se* constitutional requirement that counsel be appointed for indigents in parental status termination proceedings.[2] The Court left the question whether due process requires the appointment of counsel to the determination of the trial court, subject to appellate review.[3]

This comment will examine the evolution of the procedural due process right of indigent litigants to appointed counsel, and will briefly discuss the Court's holding in *Lassiter*. The majority's rationale will be analyzed in depth with an exploration of the potential ramifications of the decision. Finally, there will be consideration of equal protection, which the *Lassiter* Court failed to address, as an alternate source of the right to counsel.

I. FACTS OF THE CASE

On May 23, 1975, a state court in North Carolina determined that Ms. Abby Lassiter's son, William, was a neglected child, based on evidence that she had not provided him with adequate medical care.[4] At that time, the Durham County Department of Social Services (Department) gained custody of William. A year later, Ms. Lassiter was convicted of second-degree murder with a twenty-five-to-forty-year sentence.[5]

In the spring of 1978, the Department filed a petition to terminate Ms. Lassiter's parental rights with respect to William.[6] Subsequently, Ms. Lassiter was served with the petition in prison, and received notice and a summons, which she failed to answer.[7]

The attorney representing the Department requested that Ms. Lassiter be brought to the hearing on August 31, 1978. Before taking testimony at the hearing, the court discussed Ms. Lassiter's lack of legal representation.[8] It was disclosed that although she had apparently informed several prison officials of her pending termination hearing, she had received no advice of her right to counsel, nor was any action taken to help her secure representa-

1. 452 U.S. 18 (1981).
2. *Id.* at 31.
3. *Id.* at 31-32.
4. Petitioner's Brief for Certiorari at 2, *In re* Lassiter, 452 U.S. 18 (1981) (Juvenile Petition) [hereinafter cited as Joint Appendix].
5. *Id.* at 5 (Order Terminating Parental Rights).
6. *Id.* at 2-4 (Juvenile Petition).
7. *Id.* at 16 (Exception to Record on Appeal, Narrative of Testimony).
8. Petitioner's Answer Brief for Certiorari, IV at 3-9, *In re* Lassiter, 452 U.S. 18 (1981) (Transcript of Evidence) [hereinafter cited as Appendix IV].

tion.[9] While in prison, Abby Lassiter's mother retained counsel for an appeal of her daughter's murder conviction. However, Abby did not discuss the proceeding to terminate her parental rights with that attorney.[10]

The court concluded that Ms. Lassiter had had sufficient opportunity to obtain counsel prior to the hearing and nonetheless had failed to do so.[11] Therefore, the hearing proceeded without appointment of counsel. She was allowed to cross-examine and testify on her own behalf.[12] The court terminated Ms. Lassiter's status as William's parent based on a finding of her infrequent contact with, and lack of demonstrated concern for, her son.[13] On appeal, Ms. Lassiter claimed that due to her indigency, the trial court erred in not appointing counsel for her in violation of the due process clause of the fourteenth amendment of the United States Constitution.[14] On November 6, 1979, the North Carolina Court of Appeals unanimously affirmed the judgment of the district court. Individual privacy was held to be a fundamental right; however, termination of parental status was found not to interfere with individual privacy sufficiently to require the appointment of counsel.[15] On January 17, 1980, the Supreme Court of North Carolina summarily denied Ms. Lassiter's application for discretionary review.[16]

After granting certiorari,[17] the United States Supreme Court affirmed the North Carolina decisions, holding that the Constitution does not mandate the appointment of counsel for indigent parents in every parental status termination proceeding.[18] Nevertheless, the trial court, subject to appellate review, may decide on a case-by-case basis whether due process requires the appointment of counsel.[19]

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9. Joint Appendix, *supra* note 1, at 16 (Exception to Record on Appeal, Narrative of Testimony).

10. *Id.* at 11 (Affidavit of T. F. Loflin). The attorney representing Ms. Lassiter for the appeal of her murder conviction, Mr. Loflin, indicated that had Ms. Lassiter asked him to represent her in the parental rights termination proceeding, he would have been unwilling to do so because of her indigent status.

11. *Id.* at 16 (Exception to Record on Appeal, Narrative of Testimony).

12. Appendix IV, *supra* note 8, at 19-42 (Transcript of Evidence).

13. Joint Appendix, *supra* note 1, at 5 (Order Terminating Parental Rights at 1). The termination order quoted from the N.C. GEN. STAT. § 7A-289.32 (1981) which states the grounds for terminating parental rights as of August 31, 1978—the date of Ms. Lassiter's hearing. The instant termination order was based on the following two grounds as stated in § 7A-289.32(1) and (3) (1977):

> (1) The parent has without cause failed to establish or maintain concern or responsibility as to the child's welfare. (repealed 1979).
>
> (3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services . . . to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

14. Joint Appendix, *supra* note 1, at 15 (Assignment of Error).

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

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

17. 449 U.S. 819 (1980).

18. 452 U.S. at 31.

19. *Id.* at 31-32.

II. THE EVOLUTION OF THE PROCEDURAL DUE PROCESS RIGHT TO COUNSEL

The due process safeguards embodied in the fifth[20] and fourteenth[21] amendments arose from an historical recognition of the need for institutional checks to protect individual freedom from arbitrary government action.[22] The value society places on different rights and freedoms has evolved, as have the governmental challenges to those rights. Therefore, the courts have been faced with the task of delineating the contours of due process in a way that provides both flexibility and guidance.

A. *The Right to Counsel in the Criminal Context*

One facet of procedural due process, an accused's right to counsel in a federal court, is explicitly guaranteed by the sixth amendment.[23] In 1932, *Powell v. Alabama*[24] required the appointment of counsel in all capital cases. However, for many years after the *Powell* decision, there was no *per se* right to appointed counsel in non-capital cases. If, in a particular case, the court determined that lack of counsel produced unfairness, then an attorney was appointed. This process became known as the "special circumstances" rule of *Betts v. Brady*.[25] The *Betts* rule was based on the view that the right to counsel conferred by the sixth amendment was not a fundamental right and therefore was not binding on the states through the fourteenth amendment. During the next few decades this flexible, case-by-case approach to due process caused some confusion and resulted in the reversal of many state convictions.[26] Finally, *Betts* was overruled in *Gideon v. Wainwright*,[27] which established an absolute right to counsel in all felony cases. Justice Black, writing for the majority, emphasized that due to the fundamental character of the right to counsel in criminal prosecutions, a state would not have the prerogative to decide on an *ad hoc* basis whether to insure this right.[28] *Argersinger v. Hamlin*[29] further extended this principle, holding that no one can be imprisoned for any petty, misdemeanor, or felony offense without representation by counsel, unless there is a knowing and intelligent waiver of the right.[30] This right was limited later in *Scott v. Illinois*,[31] which held the right to counsel to be constitutionally mandated only when imprisonment is

20. U.S. CONST. amend. V, § 1 specifies that: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

21. U.S. CONST. amend. XIV, § 1 states in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

22. *See generally* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 340 (1957).

23. U.S. CONST. amend. VI, § 1 states in part: "In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence."

24. 287 U.S. 45 (1932).

25. 316 U.S. 455 (1942).

26. Davis v. Page, 442 F. Supp. 258, 264 (S.D. Fla. 1977).

27. 372 U.S. 335 (1963).

28. *Id.* at 344.

29. 407 U.S. 25 (1972).

30. *Id.* at 37.

31. 440 U.S. 367 (1979).

actually imposed.[32]

B. *The Right to Counsel in Civil Cases*

Although the Supreme Court has often expressed the view that 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,"[33] no single rule has developed concerning the right to counsel in civil proceedings. Instead, the Court has focused on the flexibility of due process and the necessity of considering the particularities in a given context.[34] Although the Court is not always explicit or consistent in its analytic approach to procedural due process issues, a two-tiered analysis is useful in understanding these cases. The first tier involves the question of whether some fundamental "life", "liberty", or "property" interest has been infringed by government action. If so, the second level of analysis determines what process is due.[35]

When the infringed fundamental right is considered to be one of substantial importance, such as personal freedom, the Court has questioned the usefulness of the civil/criminal distinction. In *Specht v. Patterson*,[36] the Court held that individuals facing commitment as sex offenders are entitled to counsel despite the fact that the proceedings are technically civil.[37] The Supreme Court likewise held in the case of *In re Gault*[38] that children must be provided with counsel in civil proceedings to determine delinquency. Such juvenile litigants need "the guiding hand of counsel"[39] to deal with problems of law, prepare and submit an effective defense, inquire into the facts, and insist upon adherence to procedural and evidentiary rules.[40]

Once a fundamental right is threatened, the second tier of analysis usually involves the Court's recognition that the procedural safeguards required in a given context depend on the interests at stake and the nature of the governmental proceedings. *Gagnon v. Scarpelli*[41] involved a due process analysis of probation revocation hearings which were found to be analogous to the parole revocation hearings in *Morrissey v. Brewer*.[42] The private interest at stake in both cases was held to be a conditional liberty interest because it depended on the observance of certain restrictions.[43] In assessing the process due in *Gagnon*, the Court focused primarily on the rehabilitative,[44] infor-

32. *Id.* at 373.

33. Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

34. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

35. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW at 477 (1978).

36. 386 U.S. 605 (1967).

37. *Id.* at 608.

38. 387 U.S. 1 (1967).

39. *Id.* at 36 (citing Powell v. Alabama, 287 U.S. 45, 69 (1932)).

40. *Id.* at 36.

41. 411 U.S. 778, 782 (1973).

42. 408 U.S. 471 (1972).

43. 411 U.S. at 781.

44. F. REMINGTON, D. NEWMAN, E. KIMBALL, M. MELLI & H. GOLDSTEIN, CRIMINAL JUSTICE ADMINISTRATION, MATERIALS AND CASES 910-11 (1969).

mal[45] and discretionary,[46] nature of the proceedings.[47] The Court concluded that the state is not under a constitutional duty to provide counsel for indigents in probation (parole) revocation hearings.[48]

A decision as to the need for counsel may be made on a case-by-case basis in which there is special consideration given to the probationer's (parolee's) ability to speak effectively for himself.[49] In *Wolff v. McDonnell*,[50] the Court held that inmates do not have a constitutional right to appointed counsel in prison disciplinary proceedings. However, the Court stressed that inmates should have the right to seek free aid when they are illiterate or the issues are complex.[51]

Outside the area of prisoners' rights, the Court also declined to find a constitutional mandate to appoint counsel in *Goss v. Lopez*,[52] which involved school disciplinary proceedings. The Court considered the brief, informal and educational nature of the proceedings to be significant.[53] In the more recent decision of *Parham v. J.R.*,[54] the Court balanced individual, family, and social interests in concluding there is no right to a formal adversary hearing or counsel when parents seek to commit their children to state mental institutions.[55] In his majority opinion, Chief Justice Burger stated that parents have a substantial role in deciding their child's treatment, but that such parental authority is not absolute. Furthermore, he emphasized that the issues were essentially medical and informal in nature.[56]

In *Mathews v. Eldridge*,[57] the Court developed a general balancing formula which has become the standard mode of analysis for resolving the second tier issue of which procedures are appropriate in a particular context. The formula requires a weighing of the private interest infringed, the risk that the government's decisionmaking procedure will yield erroneous results, and the countervailing state interest in the challenged procedure.[58] Unlike

45. 411 U.S. at 786-87 stating, in part, that members of the neutral and detached hearing body need not be judicial officers or lawyers and that the technical rules of procedure and evidence are not used at such proceedings.

46. *Id.* at 784 n.8: "[I]n the sample studied, probation or parole was revoked in only 34.5% of the cases in which the probationer or parolee violated the terms of his release." (citing S. HUNT, THE REVOCATION DECISION: A STUDY OF PROBATION AND PAROLE AGENTS' DISCRETION 10 (unpublished thesis in University of Wisconsin library) (1964) (cited in Brief for Petitioner, Addendum 106).

47. 411 U.S. at 783-88.

48. *Id.* at 790.

49. *Id.* at 791.

50. 418 U.S. 539 (1974).

51. *Id.* at 570.

52. 419 U.S. 565 (1975).

53. *Id.* at 583.

54. 442 U.S. 584 (1979).

55. *Id.* at 604-09.

56. *Id.* at 591.

57. 424 U.S. 319 (1976).

58. *Id.* at 335. The three elements of the balancing test are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

the landmark case of *Goldberg v. Kelly*,[59] in which the Court held that the state could not terminate public assistance benefits to a recipient without affording him the opportunity for an evidentiary hearing prior to termination,[60] the *Eldridge* Court held that pretermination evidentiary hearings were not required in the context of disability benefits.[61] The Court distinguished *Goldberg*, stating that it involved an income maintenance scheme for those in financial need, whereas the Social Security disability system in *Eldridge* made payments to the disabled irrespective of financial need.[62]

One of the Court's most recent decisions involving the right to counsel in civil proceedings was *Vitek v. Jones*.[63] The Court held that the involuntary transfer of a state prisoner to a mental hospital implicates a liberty interest that is protected by the due process clause.[64] The case is noteworthy in that the infringed liberty interest was not strictly a loss of personal freedom, since the prisoner was involuntarily confined in both the prison and the mental hospital. Nevertheless, confinement to a mental hospital was found to require additional procedural protections for the prisoner because of the compelled therapeutic treatment[65] and stigma associated with such a transfer.[66] After applying the *Eldridge* balancing formula, four of the five Justices who reached the merits considered the deprivation of liberty and the limited mental capacity of the prisoner as justifying the right to counsel.[67] The fifth Justice stated that due process would be satisfied if the prisoner were provided with qualified and independent assistance—not necessarily by a licensed attorney.[68]

C. *The Liberty Interest in 'Family Integrity'*

The first Supreme Court case to acknowledge the right to the integrity of the family was *Meyer v. Nebraska*.[69] Justice McReynolds, writing for the majority, stated that "liberty" as used in the due process clause "denotes, not merely freedom from bodily restraint, but also the right . . . to marry, establish a home and bring up children."[70] Utilizing this broad definition of "liberty", the Court proceeded to invalidate a state law which prohibited the teaching of foreign languages to young children.[71]

Two years later in *Pierce v. Society of Sisters*,[72] Justice McReynolds developed the theme previously introduced in *Meyer*. *Pierce* sustained a challenge by private schools to the state law which required children to attend public

59. 397 U.S. 254 (1970).
60. *Id.* at 266.
61. 424 U.S. at 340.
62. *Id.* at 340-41.
63. 445 U.S. 480 (1980).
64. *Id.* at 488.
65. *Id.*
66. *Id.* at 492.
67. *Id.* at 496-97.
68. *Id.* at 497-98 (Powell, J., concurring).
69. 262 U.S. 390 (1923).
70. *Id.* at 399.
71. *Id.* at 402.
72. 268 U.S. 510 (1925).

schools.[73] The Court reasoned that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing . . . of [their] children."[74] Later the Court, in *Prince v. Massachusetts*,[75] reiterated the fundamental role and freedom that parents have in the care of their children. This freedom creates a private sphere into which the state cannot intrude.[76] In *May v. Anderson*,[77] the Court referred to a mother's custody right in her child as "rights far more precious to appellant than property rights . . . ."[78]

The 1972 Supreme Court case of *Stanley v. Illinois*[79] utilized both a due process and equal protection analysis in holding unconstitutional an irrebuttable statutory presumption that all unwed fathers are unfit to have custody of their children.[80] The Court stressed that the rights to conceive and raise one's children are "essential"[81] and "basic civil rights of man,"[82] which are recognized by the law regardless of whether the parents are married. Such rights are deemed to be fundamental and therefore invoke the strict scrutiny test associated with the equal protection clause.[83] The *Stanley* majority noted that the fundamental right to family integrity is derived from the due process[84] and equal protection clauses[85] of the fourteenth amendment.[86]

III. *LASSITER V. DEPARTMENT OF SOCIAL SERVICES*

Justice Stewart, writing for the majority, discussed prior cases dealing with the due process right to counsel,[87] and then examined parental status termination proceedings in light of the *Eldridge* balancing formula.[88] In terms of precedent, the Court cited the early criminal cases which helped establish an accused's right to counsel when actual imprisonment is threatened.[89] Next, there was an examination of civil cases,[90] in which the

73. *Id.* at 517.
74. *Id.* at 513.
75. 321 U.S. 158 (1944).
76. *Id.* at 166. The Court stated:
> It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . [a]nd it is in recognition of this that [*Meyer* and *Pierce*] have respected the private realm of family life which the state cannot enter.

Id.
77. 345 U.S. 528 (1953).
78. *Id.* at 533.
79. 405 U.S. 645 (1972).
80. *Id.* at 649.
81. *Id.* at 651 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
82. *Id.* at 651 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
83. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). The *Skinner* decision was one of the first Supreme Court cases to exercise strict scrutiny in favor of a 'basic liberty' not explicitly guaranteed by the Constitution. Justice Douglas, writing for the majority, stated that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Id.* The majority elaborated upon this equal protection argument by emphasizing that infringement of fundamental rights triggers the Court's strict scrutiny of state classifications.
84. 405 U.S. at 651 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
85. 405 U.S. at 651 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
86. 405 U.S. at 651 (citing Griswold v. Connecticut, 381 U.S. 479, 496 (1965)).
87. 452 U.S. at 25-27.
88. *Id.* at 27-32.
89. *Id.* at 25 (citing Argersinger v. Hamlin, 407 U.S. 25 (1972)). Gideon v. Wainwright, 372 U.S. 335 (1963); Betts v. Brady, 316 U.S. 455 (1942)).

majority argued that the primary determinant of the right to counsel is the potential loss of personal freedom.[91] The Court concluded the "precedents speak with one voice" that there is a "presumption" due process does not require that an indigent have a right to appointed counsel unless he may be deprived of his physical liberty. The results of the *Eldridge* balancing formula must be weighed against this presumption.[92]

In applying the three-pronged *Eldridge* analysis, the majority found the following interests. First, a parent's interest in a just and accurate parental status decision is a "commanding one," especially if there is potential criminal liability. Second, the state shares with the parent an interest in correct decisions and has an interst in informal procedures, in some cases. However, the state's economic interest is relatively weak. Third, the Court held there may be an "insupportably high" risk of an erroneous deprivation of parental rights where the uncounseled parent is incapable of handling complex proceedings.[93]

The majority acknowledged that the "courts have generally held that the state must appoint counsel for indigent parents at termination proceedings."[94] The Court also stated that the Department of Social Services had no precedent for its policy denying appointed counsel to indigent parents, except the North Carolina opinion in the instant case.[95]

Justice Stewart stated that the presumption could be overcome only if the *Eldridge* factors were balanced such that the parent's interest and the risk of an erroneous decision were at their highest level and the state's interest was at its lowest level.[96] Reasoning that such a balance would not always occur, the Court concluded there was no constitutional mandate for the appointment of counsel in every parental termination proceeding. The issue whether due process requires the appointment of counsel in a given case could then be decided by the trial court, subject to appellate review.[97] The majority pointed out in closing that, although the Constitution does not mandate the appointment of counsel in all termination proceedings, enlightened public policy may and often has required higher standards.[98]

IV. ANALYSIS OF THE MAJORITY'S RATIONALE

Significant portions of the majority's rationale involve a balanced examination of the competing views. However, at several crucial junctures, the majority made questionable assertions upon which it based its subsequent argument. The following analysis will focus on these assertions.

90. 452 U.S. at 25-26 (citing Vitek v. Jones, 445 U.S. 480 (1980)); Scott v. Illinois, 440 U.S. 367 (1979); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); *In re* Gault, 387 U.S. 1 (1967)).

91. 452 U.S. at 25-27.

92. *Id.* at 27.

93. *Id.* at 31.

94. *Id.* at 30.

95. *Id.* at 30-31.

96. *Id.* at 31.

97. *Id.* at 31-32.

98. *Id.* at 33.

A. *The Presumption that the "Precedents Speak With One Voice"*

Justice Blackmun's comprehensive dissent in *Lassiter* rejected the majority's notion that legal precedent supports a "presumption" that the Constitution requires the appointment of counsel only when physical liberty is infringed.[99] He further stated that "incarceration has been found to be neither a necessary nor a sufficient condition for requiring counsel on behalf of an indigent defendant."[100]

The majority's presumption is an accurate reflection of the right to counsel in criminal cases. In elucidating the sixth amendment's mandate that an accused should be afforded the right to counsel, the Court has found it necessary to define this constitutional right by drawing the line at actual imprisonment.[101]

However, strict extrapolation of this premise to civil cases is not justified. The fifth and fourteenth amendments state that fundamental rights may not be abridged without due process, but do not specify the requisites of that process.[102] Thus, ascertainment of due process requires an analytic approach sensitive to the variables in the civil arena.[103]

A closer examination of several of the civil cases cited by Justice Stewart reveals important distinctions which he failed to address. He relied heavily on *Gagnon v. Scarpelli*[104] as precedent for the case-by-case approach to assessing due process rights in *Lassiter*,[105] without adequately distinguishing the two cases. The probation revocation hearings in *Gagnon* were before a decisionmaker who was neither a judge nor an attorney. The hearing took place without the technical rules of procedure and evidence. The primary purpose of the *Gagnon* proceeding was rehabilitative, the state was not represented by counsel, and the ultimate decision was discretionary.[106] The presence of an attorney at such a hearing is unnecessary and arguably counterproductive to the extent that counsel introduces an undesirable adversarial edge.[107]

In *Lassiter*, the parental termination proceedings were heard before a judge, with the full panoply of procedural and evidentiary rules. The state was represented by counsel. The result, though perhaps not the intent, was punitive, and the court was required to make formal findings of fact and conclusions of law.[108] In such a formal, adversarial proceeding the parent's ability to understand, let alone effectively utilize, the available legal mecha-

99. *Id.* at 40 (Blackmun, J., dissenting).

100. *Id.*

101. Scott v. Illinois, 440 U.S. 367 (1979), where the Court stated: "[W]e believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Id.* at 373.

102. *See* notes 20, 21 *supra*.

103. Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.* at 895.

104. 411 U.S. 778 (1973).

105. 452 U.S. at 31-32.

106. 411 U.S. at 784-86.

107. *Id.* at 787-88.

108. 452 U.S. at 42-44 (Blackmun, J., dissenting).

nisms is substantially impaired by the lack of representation.[109]

The majority also cited *Vitek v. Jones*[110] in support of its presumption.[111] However, loss of physical liberty was not the determinative factor in *Vitek*, which involved a transfer from a prison to a mental hospital.[112] Four of the five Justices who reached the merits held there is a *per se* constitutional right to appointed counsel because of the diminished capacity of the prisoner to present his case, the stigmatizing effect of the transfer, and the compulsory therapy.[113]

If the "precedents speak with one voice," the message is mumbled. The majority's presumption does not adequately explain why there was no right to counsel in *Gagnon*[114] when there was the prospect of deprivation of personal liberty through revocation of probation, whereas four of the Justices in *Vitek*[115] held there was a right to counsel when personal freedom was not the major issue.

Lassiter also establishes a potentially dangerous precedent through its implicit value judgment that incarceration, even for a brief period of time, is a more grievous loss than the complete and irrevocable termination of a parent's right to her child.[116] Furthermore, Justice Blackmun argued that the majority's presumption "grafts an unnecessary and burdensome new layer of analysis onto its traditional three-factor balancing test."[117] *Lassiter* does not rest squarely on precedent and lacks predictive value.

B. *Origins and Effects of the Case-by-Case Approach*

Justices Stewart's and Blackmun's application of the *Mathews v. Eldridge* balancing test is surprisingly similar, despite their contrary conclusions. Both Justices acknowledged the fundamental importance of a parent's interest in the care and custody of his or her child,[118] and the "unique kind of deprivation"[119] that results from the irrevocable termination of parental status. The majority and Justice Blackmun agreed that parents and the state

109. The inadequacy of *pro se* representation is further augmented by the fact that, like Ms. Lassiter, most parents in termination proceedings are poor and uneducated. *See* Schetky, Angell, Morrison & Sack, *Parents Who Fail: A Study of 51 Cases of Termination of Parental Rights*, 18 J. AM. ACAD. CHILD PSYCH. 366, 381 (1979) (describing the typical parent involved in a termination proceeding as being at an educational, economic, social, and emotional disadvantage). A recent North Carolina study of parents of foster children, who are the same group of parents involved in termination proceedings, shows that such parents have an average educational level of the eighth grade, an average income of $6,000 for a family of four, and are generally unemployed or working as unskilled labor. GOVERNOR'S ADVOCACY COUNCIL ON CHILDREN AND YOUTH, WHY CAN'T I HAVE A HOME?: A REPORT ON FOSTER CARE AND ADOPTION IN NORTH CAROLINA 16-17 (Dec. 1978).

110. 445 U.S. 480 (1980).

111. 452 U.S. at 25.

112. 445 U.S. at 494.

113. *Id.* at 496-97.

114. 411 U.S. 778, 788 (1973).

115. 445 U.S. at 496-97.

116. Brief for Amicus Curiae National Legal Aid and Defender Association, No. 79-6423 at 20, 452 U.S. 18 (1981).

117. 452 U.S. at 41 n.8 (Blackmun, J., dissenting).

118. *Id.* at 27, 35-42.

119. *Id.* at 27, 40.

share an interest in accurate and just adjudication,[120] that the state has a legitimate role in protecting the child's welfare,[121] and that the government has minimal pecuniary interests.[122] Although Justice Blackmun's discussion of the risk of an erroneous decision is more thorough and emphatic,[123] both he and Justice Stewart note the potential for complicated issues and the probable difficulty the uncounseled parent will have in effectively participating in a termination proceeding.[124]

On balance, the two opinions are similar in their *Eldridge* analysis and appear to weigh decisively in favor of the indigent parent's right to appointed counsel. However, the majority then stated that since the three factors "will not always be so distributed," the Constitution should not be read to require "the appointment of counsel in every parental termination proceeding."[125] This statement represents the illogical bridge between the *Eldridge* balancing analysis and the majority's final rejection of a *per se* constitutional right to counsel. The strength of the holding in *Lassiter* depends to a great extent on the structural soundness of this bridge.

The "bridge" is flawed in several respects. First, the majority departs from due process precedent by focusing on the individual litigant rather than establishing a general rule within a given context. This contradicts the principle espoused in *Eldridge* that "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."[126] In the *Eldridge* case, for example, the Court extracted the generic components of the balancing test from the particular context of Social Security disability benefits. As a result of that analysis, the Court then expressed the general rule that an evidentiary hearing is not required prior to termination of disability benefits.[127]

A second and related flaw in *Lassiter* stemming from the majority's failure to enunciate a general rule is the resulting inconsistency in due process doctrine and its application.[128] The *Lassiter* amalgamation of the *Eldridge* balancing test with the rebuttable presumption detracts from the judicial ideal of predictability.

Third, the *Lassiter* approach is simply impractical. An *ad hoc* method of determining the right to appointed counsel is riddled with problems, as illustrated by the consequences of the *Betts v. Brady*[129] decision. For two decades following *Betts*, there was confusion and a multitude of post-verdict challenges.[130] Finally, *Betts* proved so unworkable that it was overruled by

120. *Id.* at 27, 31, 47-48.
121. *Id.* at 27, 47-49.
122. *Id.* at 28, 31, 48.
123. *Id.* at 41-47.
124. *Id.* at 30-32, 41-47.
125. *Id.* at 31.
126. 424 U.S. at 344.
127. *Id.* at 340.
128. *See* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 28-29 (1976) (expressing need for general criteria to provide consistency and to minimize need for judicial testing of each procedure).
129. 316 U.S. 455 (1942), *overruled*, Gideon v. Wainwright, 372 U.S. 335 (1963).
130. *See* note 26 *supra* and accompanying text.

Gideon v. Wainwright.[131] In his concurring opinion in *Gideon*, Justice Harlan commented that in application, the *Betts ad hoc* approach was no longer a reality because the Supreme Court had found "special circumstances" justifying reversal for lack of counsel in most of the challenged cases.[132]

The increased federal court interference with lower court decisions results in a concomitant augmentation of the burden placed on the trial court.[133] The majority opinion in *Lassiter* requires the trial judge to assess whether an attorney will make a determinative difference—before the hearing takes place.[134]

The inherent risks in such an approach are vividly highlighted in Ms. Lassiter's hearing. The trial judge considered and rejected Ms. Lassiter's need for counsel before taking testimony.[135] Much of the evidence, which was subsequently admitted against Ms. Lassiter, was hearsay based upon social welfare records that were never authenticated or qualified as business record exceptions to the hearsay rule.[136] Without the aid of counsel, Ms. Lassiter's "cross-examination" was an empty ritual.[137] Her testimony was primarily delivered in response to leading questions from the court, and on several occasions the judge displayed impatience[138] and disbelief[139] at Ms. Lassiter's answers.

The Supreme Court, after announcing the *ad hoc* approach to the appointment of counsel, proceeded to evaluate Ms. Lassiter's case.[140] The majority held that the trial court's failure to appoint counsel was not a violation of due process largely because there were no criminal charges, expert witnesses, or complicated issues of law.[141] Justice Stewart reasoned that given the weight of authority, an attorney would not have made a determinative difference even though the state was represented by counsel, hearsay evidence was admitted, and Ms. Lassiter did not develop several potential defenses.[142] In addition, the majority would allow the trial court to consider a

131. 372 U.S. 335 (1963).

132. *Id.* at 351 (Harlan, J., concurring).

133. 452 U.S. at 51 n.19 (Blackmun, J., dissenting).

134. *Id.* at 31-32.

135. Appendix IV, *supra* note 8, at 3-9 (Transcript of Evidence).

136. *Id.* at 10-18.

137. *Id.* at 19-24 (Ms. Lassiter made 27 statements during her "cross-examination" of which only two were questions. The remaining statements were dismissed by the judge as being improperly declarative).

138. *Id.* at 52, where the judge said in response to Ms. Lassiter's mother's answers to his questions, "I tell you what, let's just stop all this. You [attorney for the Department of Social Services] question her, please. Just answer his questions. We'll be here all day at this rate. I mean, we are just wasting time, we're skipping from one subject to another."

139. *Id.* at 30, where the judge asked Ms. Lassiter if she knew her mother had filed a complaint. When Ms. Lassiter responded in the negative, the judge said, "That was some ghost who came up here and filed it I suppose."

140. 452 U.S. at 32-33.

141. *Id.* at 32.

142. *Id.* at 32-33. *See also* note 13 *supra* (which quotes the applicable charges against Ms. Lassiter). There were possible defenses that Ms. Lassiter failed to develop. She could have argued that the Department had not made "diligent efforts" to help her reestablish an interest in her son, especially considering her lack of access to William because of her incarceration. Ms. Lassiter could have claimed that she had a "constructive plan" for William's future as demonstrated by her arrangement with William's grandmother to care for him. Furthermore, the

litigant's lack of interest in attending a prior hearing as one factor in evaluating due process.[143]

This analysis sets a dangerous precedent. Ms. Lassiter's status as a parent might have been terminated even if she had been represented by counsel. Nevertheless, due process should not pivot on a judicial guess as to the outcome of a case. In addition, by considering a litigant's lack of interest in attending a hearing, there is a risk of allowing character judgments to influence the determination of whether a litigant has a constitutional right to appointed counsel. Instead, the essential question of due process should be founded on an inquiry into whether there has been fundamental "fairness"[144] and a "meaningful opportunity to be heard."[145]

C. *Do Liberty Interests Fit on the* Eldridge *Scales?*

The *Mathews v. Eldridge* balancing formula originated in the context of administrative and *ex parte* quasi-judicial proceedings to determine due process requirements when property interests were in dispute.[146] The tripartite *Eldridge* test is suited for the comparison of such "quantifiable" factors as the fiscal and administrative burdens on government and the value of statutory property entitlements. The formula provides a "neutral" balancing mechanism designed to insure the accurate implementation of laws.[147]

All of the Justices in *Lassiter*, except Justice Stevens, made the dubious assumption that the *Eldridge* test is an appropriate method for balancing the fundamental liberty interest in family integrity.[148] There are multiple risks inherent in such an assumption.

First, liberty interests are not readily quantifiable and as such tend to be undervalued in a balancing test. One commentator has suggested that, "[a]s applied by the *Eldridge* Court the utilitarian calculus tends, as cost-benefit analyses typically do, to 'dwarf soft variables' and to ignore complexities and ambiguities."[149] Justice Stevens wove this critical theme into his dissent by noting that the majority appeared to treat Ms. Lassiter's deprivation as a property interest, less deserving of protection than a liberty interest.[150]

Second, there are certain explicit and implicit constitutional rights that are so fundamental to our concept of ordered liberty that care must be exercised to avoid balancing them away in a "neutral" test. In the case of *Stanley*

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charge that Ms. Lassiter "willfully" and "without cause" left her son in foster care could have been defended on the ground that during the majority of the two years in which William was in foster care, Ms. Lassiter was in prison.

143. *Id.* at 33.

144. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

145. Boddie v. Connecticut, 401 U.S. 371 (1971). In *Boddie* the Court emphasized that, "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Id.* at 377.

146. G. GUNTHER, CONSTITUTIONAL LAW 668-69 (10th ed. 1980).

147. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-14 (1978).

148. 452 U.S. at 27. The majority avoided the property/liberty distinction by describing a parent's interest in a termination proceeding as a "commanding one".

149. Mashaw, *supra* note 128, at 48.

150. 452 U.S. at 59 (Stevens, J., dissenting).

v. Illinois,[151] the Court characterized the due process clause as "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."[152]

Third, the cost-benefit trappings of the *Eldridge* balancing formula create the seductive illusion that the analysis is objective. However, the values placed on facts within the balancing framework are necessarily subjective. Furthermore, as was demonstrated in *Lassiter*, different Justices may apply similar values to the individual factors within the formula and yet reach astonishingly disparate conclusions.[153]

Fourth, the *Eldridge* balancing test creates a presumption in favor of the constitutionality of government procedures. The judicial balancing outlined in *Eldridge* duplicates, to a large extent, the process utilized by the legislature or agency in formulating procedures. This presumption was explicitly stated by Justice Powell in the majority opinion in *Eldridge*, which urged that "substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals."[154]

This criticism is not intended as a total indictment of the *Eldridge* balancing test. Balancing is an indispensable legal tool with which to consider multiple, competing interests. With growing budgetary constraints, cost-benefit analysis will become increasingly alluring. Just application of the *Eldridge* balancing test will necessitate a continual awareness of, and compensation for, the propensity to dwarf liberty interests.

D. *Has the Equal Protection Door Been Left Ajar?*

Ms. Lassiter never raised the issue that the court's refusal to appoint counsel at her termination proceeding was a violation of the equal protection clause of the fourteenth amendment,[155] thus precluding the Supreme Court from considering that argument.[156] Use of the equal protection clause would have fortified Ms. Lassiter's case and might have produced a different result.

In the area of economic barriers to the judicial process, the Supreme Court has been divided over whether to apply due process or equal protection analysis. The majority of Justices have favored an equal protection approach.[157] The seminal case is *Griffin v. Illinois*,[158] in which it was held that both due process and equal protection require that an indigent defendant convicted of a felony be provided with a transcript or its equivalent on ap-

151. 405 U.S. 645 (1972).
152. *Id.* at 656.
153. *See* text accompanying notes 118-124 *supra*.
154. 424 U.S. at 349.
155. U.S. CONST. amend. XIV, § 1 states in part that, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."
156. 405 U.S. 658 n.10.
157. *See* GUNTHER, *supra* note 146, at 938.
158. 351 U.S. 12 (1956).

peal.[159] There is no constitutional mandate that the states provide a right to appellate review.[160] However once such a system of review has been created, a state cannot discriminate against destitute defendants by limiting their opportunity for an adequate appellate review.[161] There can be no equal justice where "the kind of trial a man gets depends on the amount of money he has."[162]

The equal protection principles articulated in *Griffin* were expanded in *Douglas v. California*[163] which held that an indigent criminal defendant must be given the assistance of counsel in a first appeal of right.[164] Prior to the decision in *Douglas*, California state appellate courts, upon request of an indigent for counsel, would review the transcript and determine whether appointed counsel would benefit either the defendant or the court.[165] This *ad hoc* approach to determine the right to counsel was rejected in *Douglas* as creating an invidious distinction based on wealth.[166] The opinion, which in many respects foreshadowed Blackmun's dissent in *Lassiter*, criticized California's procedure as forcing a court to prejudge the merits before determining whether to appoint counsel.[167] Justice Douglas went on to say that "[t]he indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal."[168]

Both *Griffin* and *Douglas* applied equal protection analyses to defendants convicted of felonies. However, in the subsequent case of *Mayer v. City of Chicago*,[169] the Supreme Court utilized the equal protection clause in holding that an indigent criminal defendant convicted of a misdemeanor was entitled to a free transcript on appeal, despite the fact that no jail sentence was imposed.[170] In reaching this conclusion, the Court emphasized the importance of considering the impact of the state's action on the defendant, not just the label attached to the action.[171] "The size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case."[172] The majority in *Mayer* rejected the interpretation that *Griffin* balanced the interests of society with the needs of the accused,[173] and held that *Griffin*'s principle "is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to

159. *Id.* at 19-20.

160. McKane v. Durston, 153 U.S. 684 (1894). One author has questioned the current viability of *McKane; see* Note, *The Supreme Court 1962 Term*, 77 HARV. L. REV. 79, 108 (1963).

161. 351 U.S. at 18.

162. *Id.* at 19.

163. 372 U.S. 353 (1963).

164. *Id.* at 357. *But cf.* Ross v. Moffit, 417 U.S. 600 (1974) (which refused to extend an indigent's right to appointed counsel in discretionary appeals).

165. *Id.* at 355.

166. *Id.*

167. *Id.* at 356.

168. *Id.* at 358.

169. 404 U.S. 189 (1971).

170. *Id.* at 196-97.

171. *Id.* at 197.

172. *Id.* at 196.

173. *Id.*

pay their own way."[174]

Griffin and its progeny dealt with the rights of an accused on appeal. Therefore, the issue of the requisite procedural rights arose after adjudication on the merits. In most of these cases, the defendants had the crucial safeguards of representation by counsel and the presence of a jury during the orginal trial. Indigent parents, by comparison, are denied the *per se* right to appointed counsel from the beginning of their legal effort to maintain custody of their children. The relative importance of a criminal appeal and a civil trial can be deduced from the fact that there is no constitutional mandate for an appellate system.[175] To suppose that the entire system of civil trial courts is equally dispensable is incomprehensible.[176]

The equal protection analyses set forth in *Griffin* and its subsequent line of cases are an appropriate legal framework within which to assess the rights of parents in termination proceedings. First, parental termination proceedings bear many of the indicia of a criminal trial.[177] For example, in Ms. Lassiter's case, the state initiated the proceeding and was represented by counsel. Unlike an administrative hearing, Ms. Lassiter's case involved a formal proceeding utilizing the technical rules of procedure and evidence and was heard before a trial judge. Furthermore, the judicial decision essentially branded Ms. Lassiter with the stigma of being an inadequate parent.

Second, the potential impact of the state's action is the devastating and irrevocable severing of a parent's fundamental right to family integrity.[178] The impairment of fundamental rights by the government invokes the Court's strictest scrutiny.[179] Unless there is a compelling state justification for a wealth-based classification of parents in termination proceedings, the government action is deemed unconstitutional. In *Lassiter*, the government's minimal pecuniary interest in not providing court-appointed counsel is far from compelling.[180]

Third, the North Carolina statute,[181] which does not require the appointment of counsel for indigent parents in termination proceedings, creates an invidious discrimination. The fourteenth amendment does not require absolute equality.[182] However, when an indigent is denied the right to appointed counsel, and this denial either is based on an "unreasoned distinction"[183] or results in fundamental unfairness,[184] there is a violation of the equal protection clause. The financial status of a parent is not rationally related to the legal adequacy of that parent. Furthermore, there is data to

174. *Id.* at 196-97.

175. *See* note 160 *supra* and accompanying text.

176. *See* Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 550 (1967).

177. *See* Catz & Kuelbs, *The Requirement of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 13 J. FAM. L. 223, 231 (1973).

178. *See* notes 69-86 *supra* and accompanying text.

179. *See* note 83 *supra* and accompanying text.

180. 452 U.S. at 31. *See* Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

181. N.C. GEN. STAT. § 7A-289.23 (1981). The only two instances in which indigent parents are entitled to court-appointed counsel are: parents under the age of 14 (effective Aug. 23, 1979) and parents with certain mental defects. *Id.*

182. *See* Tigner v. Texas, 310 U.S. 141, 147 (1940).

183. 404 U.S. at 193 (quoting Rinaldi v. Yeager, 384 U.S. 305, 310 (1966)).

184. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. at 162.

suggest that unrepresented parents are more likely than parents who are represented by counsel to lose custody of their children in neglect proceedings.[185] "Since there is no evidence indicating that the average respondent who can retain counsel is better or less neglectful than one who cannot, the conclusion seems inescapable that a significant number of cases against unrepresented parents result in findings of neglect solely because of the absence of counsel."[186]

CONCLUSION

The Supreme Court's five to four decision in *Lassiter* that indigent parents do not have a *per se* constitutional right to appointed counsel in termination proceedings is based on a novel amalgamation of tests. The results of the *Eldridge* balancing formula were weighed against a presumption that litigants do not have a right to appointed counsel unless they are in danger of losing their physical freedom as a result of the litigation. This presumption does not follow from prior Supreme Court cases, and the combination of tests sets a dangerous precedent. *Lassiter* places the Court in the position of stating that imprisonment, even for several days, is a more grievous loss than the irrevocable severance of a parent from his or her child.

Eight of the nine Justices applied the *Eldridge* balancing test in weighing Ms. Lassiter's fundamental right to the care and custody of her son. This cost-benefit analysis has the seductive appearance of objectivity. The most critical distortion associated with the *Eldridge* balancing test is that it undervalues core liberty interests which are not easily quantifiable. In this period of growing budgetary constraints, the Court will be faced with increasing pressure to determine the level of protection for fundamental rights according to cost-benefit analysis. If these vulnerable "core" liberties are to survive, the Court must recognize and compensate for the distortions inherent in the *Eldridge* balancing test.

While holding that Ms. Lassiter's lack of appointed counsel was not a violation of due process, the Supreme Court stated that in the future such issues should be resolved by the trial courts on an *ad hoc* basis, subject to appellate review. Such a case-by-case approach will undoubtedly increase the flexibility in determining the requisites of due process, but will also increase the burdens on the trial court. Judges will be forced to evaluate whether the appointment of counsel would make a determinative difference before assessing the merits of the case. In the past, an *ad hoc* approach to the appointment of counsel under the *Betts* rule created confusion, increased litigation, and was subsequently overruled.[187]

Although the Supreme Court has decided there is no *per se* due process

185. Note, *Representation in Child-Neglect Cases: Are Parents Neglected?*, 4 COLUM. J. OF LAW & SOC. PROB. 230, 241-43 (1968). This study indicated that in state initiated proceedings, 79.5% of the unrepresented parents were adjudicated neglectful and 16.6% of the petitions were either withdrawn or dismissed; whereas, only 62.5% of the proceedings resulted in findings of neglect when parents had retained counsel and of this group, 37.5% of the petitions were withdrawn or dismissed.

186. Note, *Child Neglect: Due Process For the Parent*, 70 COLUM. L. REV. 465, 476 (1970).

187. 316 U.S. 455 (1942), *overruled*, Gideon v. Wainwright, 372 U.S. 335 (1963).

right to appointed counsel in parental termination proceedings, the corresponding equal protection argument has not been adjudicated. It is likely the strict scrutiny test would be invoked since termination proceedings affect a parent's fundamental liberty interest in the integrity of the family. The *de facto*, wealth-based classification of parents in termination proceedings would be deemed unconstitutional unless there was a compelling state justification. Such a justification was not demonstrated in the *Lassiter* case. Despite the strength of this argument, it should be noted that equal protection arguments, in general, have not been overwhelmingly successful since 1972.[188] However, given the United States Supreme Court's past changes in emphasis, particularly with respect to fundamental rights, it would be a mistake to ignore or underestimate the potential leverage available to impoverished litigants through the equal protection argument. Nevertheless, for the present, indigent parents may obtain counsel in termination proceedings only on a case-by-case basis under the due process analysis of *Lassiter*.

EPILOGUE

In trying to discern the future ramifications of *Lassiter*, the subsequent case of *Santosky v. Kramer*[189] should be noted. Because the two cases dealt with different issues, the *Santosky* Court could not explicitly affirm or overrule *Lassiter*. Nevertheless, the analysis in *Santosky* is instructive to the extent it reflects the United States Supreme Court's attitude towards parental status termination proceedings almost one year after deciding *Lassiter*.

The *Santosky* decision makes it more difficult to terminate parental status since it compels the state to meet a more stringent standard of proof. A New York statute requiring a fair preponderance of the evidence was invalidated;[190] instead, the Court held that, at a minimum, due process necessitates that the state establish by clear and convincing evidence that the parent-child tie should be permanently severed.[191]

Justice Blackmun, writing for the majority in *Santosky*, reiterated many of the themes he had previously articulated in his dissenting opinion in *Lassiter*. The *Santosky* Court, quoting *Mathews v. Eldridge*, stated that "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 exception."[192] In light of this consideration, the *Santosky* Court refused to accept the *Lassiter* case-by-case approach to determining the requisite due process.[193] Utilizing the *Eldridge* balancing formula, Justice Blackmun rejected the *Lassiter* presumption disfavoring the appointment of counsel unless the litigant was threatened with loss of physical liberty as irrelevant to the issue of the standard of proof.[194]

188. *See* GUNTHER, *supra* note 146, at 946.
189. 50 U.S.L.W. 4333 (U.S. Mar. 23, 1982).
190. *Id.* at 4339.
191. *Id.*
192. *Id.* at 4336 (quoting Mathews v. Eldridge, 424 U.S. 319, 344 (1976)) (emphasis added in *Santosky*). *See* notes 126 & 127 *supra* and accompanying text.
193. 50 U.S.L.W. at 4336.
194. *Id.* at 4335.

Unlike the majority in *Lassiter*, the *Santosky* Court expressly described natural parents' custody, care, and management of their children as a fundamental liberty interest.[195] Furthermore, Justice Blackmun, in *Santosky*, espoused the need to go beyond civil labels in assessing due process,[196] particularly with respect to parental status termination proceedings which possess many of the characteristics of a criminal trial.[197] He concluded that greater due process must be accorded in government-initiated proceedings where an individual is threatened with a significant deprivation of liberty or the imposition of a stigma.[198]

Lassiter's holding that indigents have no *per se* right to appointed counsel in parental status termination proceedings has not been overruled by *Santosky*. Nevertheless, to the degree the majority in Santosky echoed the themes previously enunciated by the dissent in *Lassiter*, albeit in a different context, the Court appears more receptive to the due process rights of impoverished parents. The *Santosky* Court's explicit affirmation of parents' fundamental liberty interest in the custody, care, and management of their children[199] can only strengthen the as yet untried equal protection argument in favor of the indigent's right to appointed counsel in parental status termination proceedings.

Rayma Skeen

195. *Id.*
196. *Id.* at 4336.
197. *Id.* at 4337.
198. *Id.* at 4336.
199. *Id.* at 4335.