CASENOTE

The *Lassiter* Decision: Termination of Parental Rights—New Standards for Right to Appointed Counsel

Over the past fifty years, the Supreme Court has been called upon to analyze, and has attempted to refine, the circumstances under which an indigent defendant has a constitutional right to appointed counsel in state proceedings.[1] While some Supreme Court guidelines for the appointment of counsel in criminal proceedings have emerged,[2] an indigent defendant's[3] right, if any, in civil cases has remained less clear.[4] In state actions, whether criminal or civil, the issue of guaranteed representation by an attorney rests primarily[5] with a determination of whether appointed counsel

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1. The landmark case of Powell v. Alabama, 287 U.S. 45 (1932), first acknowledged this right to have counsel appointed in certain state criminal trials. *See infra* notes 27-31 and accompanying text. The historical development of the right to appointed counsel will be dealt with later in this article. *See infra* notes 32-76 and accompanying text.

2. *See infra* notes 26-51 and accompanying text.

3. For the purposes of this casenote, defendant or respondent in a civil action will be used to describe the party subject to some governmental action as opposed to private litigation unless otherwise noted.

4. *See infra* notes 52-67, 76-83 and accompanying text.

5. The equal protection clause of the fourteenth amendment has been advanced by commentators as requiring appointed counsel in civil cases. *See* Comment, *The Indigent Parent's Right to Appointed Counsel in Actions to Terminate Parental Rights*, 43 U. CIN. L. REV., 635, 643-45 (1974); Comment, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1332-34 (1966) [hereinafter cited as Comment, *Right to Counsel*]; Comment, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 550-51 (1967). However, in application, the equal protection analysis is more difficult to sustain because of the necessity of finding that the challenged statute either interferes with a fundamental right or creates a suspect classification scheme. Absent a showing of a fundamental right or suspect class, the mere rationality standard is utilized and the challenged statute is almost always upheld. With such findings, however, strict scrutiny is invoked and the statute will fail unless justified by a "compelling" state interest. *See* B. SCHWARTZ, CONSTITUTIONAL LAW, A TEXTBOOK §§ 9.2, 9.5, at 368-69, 374 (2d ed. 1979) [hereinafter cited as SCHWARTZ]. *See also* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 522-25 (1978) [hereinafter

is necessary to fulfill the "fundamental fairness" requirement of the fourteenth amendment's due process clause.[6]

The Supreme Court in *Lassiter v. Department of Social Services of Durham County, North Carolina*[7] was asked to decide whether an indigent parent has a constitutional right to counsel in an involuntary termination of parental rights hearing. The five to four decision of the Court that due process might require appointment of counsel in some cases but not for *every* indigent parent[8] is significant for serveral reasons. First, the Court dealt with a civil proceeding[9] in which the deprivation of liberty[10] at stake—a permanent and legal severance of the parent-child relationship[11]—was

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cited as NOWAK]. The equal protection analysis in furthering a civil defendant's right to appointed counsel has therefore received more limited application and is beyond the scope of this case note. *See* Comment, *Appointment of Counsel Is Required for Indigent Parents Faced with a Dependency-Neglect Proceeding*, 6 RUT.-CAM. L.J. 623, 625 n.13 (1975); Note, *Parents' Right to Counsel in Dependency and Neglect Proceedings*, 49 IND. L.J. 167, 169 (1973).

In criminal proceedings, the equal protection clause has been relied on to require the state to provide certain procedural services, e.g., Douglas v. California, 372 U.S. 353 (1963) (counsel for indigent on appeal as of right); Griffin v. Illinois, 351 U.S. 12 (1956) (free transcripts provided on appeal to indigents). However, the criminal defendant's right to counsel at the trial court level has been rooted in a due process analysis as will be seen in the historical section of this article.

6. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

"The essential guarentee of the due process clause is that of fairness. The procedure must be fundamentally fair to the individual in the resolution of the factual and legal basis for government actions which deprive him of life, liberty or property." NOWAK, *supra* note 5, at 501. *See* Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963) (sixth amendment guarantee of counsel is a fundamental right made obligatory upon the states through the fourteenth amendment); *Powell*, 287 U.S. at 67-68 (right to the aid of counsel is of a fundamental character).

7. 101 S. Ct. 2153 (1981).

8. *Id.* at 2162.

9. N.C. GEN. STAT. §§ 7A-289.22—7A-289.34 (1981) provide the relevant statutes governing Termination of Parental Rights.

10. Liberty which is protected by the due process clause encompasses the freedom of choice and the right of privacy in family matters. *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Carey v. Pop. Serv. Int'l, 431 U.S. 678, 684-85 (1976); NOWAK, *supra* note 5, at 485-86; SCHWARTZ, *supra* note 5, at 358-60. The Supreme Court has 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." Prince v. Massachusetts, 321 U.S. 153, 166 (1944). *See infra* note 131 and accompanying text.

11. N.C. GEN. STAT. § 7A-289.33 provides:

described by the court as "unique"[12] and "extremely important."[13] The Court was faced with deciding how the liberty interest in raising one's child fits into the context of precedent dealing with the traditional criminal defendant's interest in freedom from physical restraint.[14] Second, the opinion lends guidance to the Supreme Court's and lower courts' future treatment of right to counsel claims in non-criminal proceedings. Third, the Court in *Lassiter* deviated from an established due process analysis and formulated a new test to be applied in evaluating whether due process requires the appointment of counsel for an indigent whose physical freedom is not in jeopardy.[15]

This casenote will examine the historical development of the constitutional right to counsel. It will then analyze the Court's opinion in *Lassiter* in light of previous cases and look to the future impact of the decision.

HISTORICAL BACKGROUND

With no prior available case law on the narrow issue of due process appointment of counsel in a termination of parental rights hearing, it is important to examine the evolution of the right to counsel and to note which cases and legal theories the Supreme Court relied upon in *Lassiter*. In determining whether the denial of the assistance of counsel contravenes the essence of due process, the Court in the past has looked to the English common law and to American practices established during the pre-Constitution colo-

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An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the child and of the child to the parent, arising from the parental relationship, except that the child's right of inheritance from his or her parent shall not terminate until such time as a final order of adoption is issued. Such parent is not thereafter entitled to notice of proceedings to adopt the child and may not object thereto or otherwise participate therein . . . .

12. 101 S. Ct. at 2160.

13. *Id.* at 2162.

14. A number of constitutional safeguards attach when the government seeks to restrict a person's physical liberty as is evidenced in the field of criminal procedure. While other liberty interests are protected by the due process clause, the recognition of the physical liberty interest is perhaps at the core of the fair procedure guarantee. *See* NOWAK, *supra* note 5, at 483-85, 503. This is not meant to imply, however, that physical liberty would per se be valued over and above all other liberty interests. *See infra* notes 43, 131, & 159 and accompanying text.

15. *See infra* notes 122-30 and accompanying text.

nial days.[16] Contrary to this country's modern-day practices, under early English common law, indigent civil litigants[17] and misdemeanant defendants[18] were afforded the right to counsel whereas persons charged with felonies were not.[19] While the right to counsel for accused felons made some advances in England during the nineteenth and twentieth centuries, it remained primarily a matter of judicial discretion.[20] In America, the colonial charters and early state constitutions generally made a "legislative" provision for the right to counsel;[21] however, the scope and meaning of this right varied from state to state and for the most part were not much broader in practice than was English custom.[22] Against this check-

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16. *E.g., Powell,* 287 U.S. at 60-65 (providing an examination of this history). *See also* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8-26 (1955); Comment, *Right to Counsel, supra* note 5, at 1325-29.

17. The retention of counsel by civil litigants was so prevelant that by the mid-thirteenth century the King decreed that litigants could present their cases *pro se* except in certain suits. A recognition of the plight of indigent litigants in civil matters led to remedies providing access to the courts during the thirteenth century and providing counsel for the poor—the latter practice being codified in 1495 by Henry VII (11 Hen. 7 ch. 12). However, since "these exemplary procedures were not perpetuated . . . no absolute right to be provided counsel can be extracted from English history." Comment, *Right to Counsel, supra* note 5, at 1325-27 (footnote omitted).

18. W. BEANEY, *supra* note 16, at 8-9. "In these minor cases, . . . the state's interest was apparently deemed so slight that it could afford to be considerate toward defendants." *Id.* at 8 (footnote omitted).

19. Defendants in felony cases (except treason) had no legal right to *retain* counsel until an 1836 Act of Parliament (The Trials for Felony Act, 6 & 7 Will. 4, ch. 114, § 1) so provided. However, a practice had emerged before that time whereby counsel was allowed to participate on behalf of the defendant at the court's discretion. W. BEANEY, *supra* note 16, at 9-11. The pre-1836 rule regarding felonies was defended on the grounds that "the court itself was counsel for the prisoner." *Powell,* 287 U.S. at 61 (citing T. COOLEY, CONSTITUTIONAL LIMITATIONS 698 *passim* (8th ed.)). In 1903, the Poor Prisoners' Defence Act (3 Edw. 7, ch. 38, § 1) contained a provision allowing the court to appoint counsel for indigents (charged with felonies) on a case-by-case basis. With minor changes, this discretionary power has continued, although the Legal Aid and Advice Act of 1949 (12 & 13 Geo. 6, ch. 51) provided that any doubts concerning appointment should be resolved in favor of the defendant. W. BEANEY, *supra* note 16, at 12-14.

20. *See supra* note 19.

21. W. BEANEY, *supra* note 16, at 14-22, 25. *See also Powell,* 287 U.S. at 61-65. "The greater distrust of government which the colonists had" is offered as the reason that these provisions were placed in some statutory form rather than leaving the decisions regarding representation by counsel to judicial discretion. W. BEANEY, *supra* note 16, at 22.

22. In most states, the "counsel" provisions created only the privilege of re-

ered background, the sixth amendment[23] to the Constitution was adopted after a "dearth of discussion" regarding its meaning.[24]

Whatever constitutional protection had been afforded federal defendants, the right to counsel for those before state courts remained a local matter until well into the twentieth century. The historical debate over whether the fourteenth amendment's due process clause "incorporates" the Bill of Rights is well known.[25] The "acknowledged starting point"[26] of the development of the right to counsel as a component of due process, came in 1932 in a criminal case, *Powell v. Alabama.*[27] Determining that the right to

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taining an attorney although some went further and provided for the appointment of counsel. W. BEANEY, *supra* note 16, at 25. Connecticut had no statutuory provision before 1818. In practice, however, the court would appoint counsel for all indigent defendants. *Id.* at 16, 25. Delaware, Pennsylvania, and South Carolina provided the accused with counsel in capital cases. *Id.* at 25. Interestingly, North Carolina removed the subject of appointed counsel from the discretion of the judiciary and statutorily provided that every person accused of a crime was entitled to counsel. *Id.* at 19.

23. "In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defence." U.S. CONST. amend. VI.

24. W. BEANEY, *supra* note 16, at 24. Beaney suggests that each state could accept the amendment as "guaranteeing a right similar to that which the citizen already possessed against his own state government." *Id.* at 24. Another author proffers that, given the English recognition of a right to retain counsel in civil litigation and its "anomalous procedures" in criminal courts, "it is not surprising that the framers of the American Constitution specifically provided for a right to retain counsel in criminal prosecutions." Comment, *Right to Counsel, supra* note 5, at 1327. The deletion of civil litigants in the sixth amendment would not then be construed as a rejection of the established English custom in that regard. *Id.*

25. The Supreme Court majority has continually rejected the theory of "total incorporation" of the Bill of Rights into the fourteenth amendment and has instead expressed in varying lauguage the position that certain provisions of the Bill of Rights are "selectively incorporated." Those rights which are applied to the states through the due process clause are those "principle[s] of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental" and therefore "implicit in the concept of ordered liberty. . . ." L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 567-68 (1978), quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937). *See also* NOWAK, *supra* note 5, at 376-77, 411-16. *Compare* Hurtado v. California, 110 U.S. 516 (1884), *Palko* and Adamson v. California, 332 U.S. 46 (1947) *with* Adamson v. California, 332 U.S. at 68 (Black, J., dissenting).

26. S. KRANTZ, C. SMITH, D. ROSSMAN, P. FROYD, & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES 19 (1976) [hereinafter cited as KRANTZ].

27. 287 U.S. 45 (1932). In *Powell*, "the Scottsboro boys," a group of illiterate black youths from out-of-state, were convicted of raping two white girls and sentenced to death. The state trial court had appointed all the members of the bar to assist the defendants but the Supreme Court found that "such designation of

the aid of counsel is of a "fundamental character"[28] embraced within the due process guarantee of the fourteenth amendment (without incorporating the sixth amendment),[29] the Court narrowly held that counsel must be provided in a capital case where the defendant is indigent and incapable of making his own defense.[30] Justice Sutherland's majority opinion language is much broader than this holding, however, and is often quoted:

> 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. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate. . . .[31]

The next step in the evolution of this right to counsel in a state[32] criminal prosecution came in 1942 with *Betts v. Brady*.[33]

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counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard." *Id.* at 53.

28. *Id.* at 68. The Court stated that one of the "compelling considerations which must prevail" in deciding whether the right to counsel is encompassed by the fourteenth amendment is whether the character of the right if denied violates "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 67 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

29. *Powell*, 287 U.S. at 67-68.

30. Whether [failure to appoint counsel] would be [a denial of due process] in other criminal prosecutions, or under other circumstances, we need not determine. All that is necessary now to decide . . . is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .

Id. at 71.

31. *Id.* at 68-69.

32. In the interim, the Supreme Court decided Johnson v. Zerbst, 304 U.S. 458 (1938), which held that in federal felony cases the defendant is entitled to appointed counsel pursuant to the sixth amendment if he is unable to secure his own attorney and has not executed an effective waiver of this right.

33. 316 U.S. 455 (1942). The defendant in *Betts* was convicted by bench trial without counsel for the offense of robbery. The accused was described as "not helpless," but rather a "man of forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue [an alibi]." *Id.* at 472. The Court pointed out that bench trials are "much more informal than jury trials and it is obvious that the judge can much better control the

The expansive language of *Powell* was rejected in *Betts*, a non-capital case, when the Court established what has become known as the "special circumstances"[34] test for determining on a case-by-case basis when due process requires the appointment of counsel in criminal proceedings.[35] The holding in part appeared to reflect the Court's fear of extending the right to counsel to small crimes, traffic cases, and civil cases involving property.[36] However, twenty-one years later, the Supreme Court accepted the argument that *Betts* was "an anachronism when handed down" and expressly overruled it in *Gideon v. Wainwright*.[37] In *Gideon*, the Court returned to the pre-*Betts* view that representation by counsel is a fundamental right, essential to a fair trial.[38] Because of the fact situation,

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course of the trial and is in a better position to see impartial justice done . . . ." *Id. Cf. supra* note 19 (the discretionary appointment of counsel in England prior to 1836 was justified on similar grounds).

34. KRANTZ, *supra* note 26, at 21; Gideon v. Wainwright, 372 U.S. 335, 350 (1963) (Harlan, J., concurring) (Betts did not more than "admit the possible existence of special circumstances . . . while at the same time insisting that such special circumstances be shown in order to establish a denial of due process").

35. *Betts*, 316 U.S. at 472-73. The Court stated:

> [T]he Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.

Id. at 473. Three justices in dissent (Black, Douglas and Murphy) continued to take the *Powell* view that "counsel in a criminal proceeding is 'fundamental' " to due process, *id.* at 475, and expressed the concern that without counsel it is "impossible to conclude, with any degree of certainty, that the defendant's case was adequately presented." *Id.* at 476.

36. *Id.* at 473.

37. 372 U.S. at 345 (1963). Gideon was charged with breaking and entering (a felony under Florida law) and was denied counsel upon request because the state law only provided for appointment in capital cases. The defendant conducted his own defense before a jury which found him guilty and he was sentenced to five years in prison. *Id.* at 336-37.

38. *Id.* at 343-44, citing Smith v. O'Grady, 312 U.S. 329 (1941); Avery v. Alabama, 308 U.S. 444 (1940); Johnson v. Zerbst, 304 U.S. 458 (1938); and Powell v. Alabama, 287 U.S. 45 (1932) as standing for the proposition that the right to the assistance of counsel is fundamental.

In addition, the Court noted that:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, *any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided*

Gideon was viewed by some state courts as limiting the appointment of counsel to felony defendants or misdemeanor defendants facing felony-length sentences,[39] despite its sweeping language.[40]

The Court resolved this apparent dispute in 1972 with its decision of *Argersinger v. Hamlin*.[41] Relying heavily on the rationale invoked in *Powell* and *Gideon*,[42] the Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[43] In making this

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> *for him.* This seems to us to be an obvious truth. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

Gideon, 372 U.S. at 344 (emphasis added). Justice Harlan, concurring, pointed out that "in truth the *Betts v. Brady* rule is no longer a reality," since "the 'special circumstances' rule . . . has been substantially and steadily eroded." *Id.* at 350-51. *See also* Krantz, *supra* note 26, at 22.

39. The Supreme Court shed little light for the states on the scope of the due process right to counsel. After *Gideon* was decided, the Court denied certiorari to cases where indigent defendants in nonfelonies had been denied counsel. *E.g.*, Hendrix v. Seattle, 76 Wash. 2d 142, 456 P.2d 696 (1969), *cert. denied*, 397 U.S. 948 (1970); DeJoseph v. Connecticut, 3 Conn. Cir. Ct. 624, 222 A.2d 752, *cert. denied*, 385 U.S. 982 (1966). The Court did reverse a defendant's misdemeanor conviction for lack of counsel; however, the defendant had been sentenced to two years imprisonment (a felony length sentence). Patterson v. Warden, 372 U.S. 776 (1963).

See also KRANTZ, *supra* note 26, at 23; Note, *Absent a Knowing and Intelligent Waiver, No Person May Be Imprisoned for Any Offense Unless Represented by Counsel at Trial*, 4 LOY. U. CHI. L.J. 273, 276 (1973); Note, *Right to Court-Appointed Counsel for Indigents*, 47 TUL. L. REV. 446, 447-50 (1973).

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

41. 407 U.S. 25 (1972). In *Argersinger*, the accused was convicted by bench trial of carrying a concealed weapon, a misdemeanor offense, and was sentenced to ninety days in jail. *Id.* at 26.

42. *Id.* at 31-33. *See supra* notes 31 & 38 and accompanying text.

43. 407 U.S. at 37 (footnote omitted). Justices Powell and Rehnquist concurred in the result but would have the Court return to a *Betts*-type special circumstances rule for the appointement of counsel in petty cases. While the concurring opinion explicitly referred to petty offenses, it conspicuously did not address misdemeanor charges and rejected the *Betts* rule for felonies. However, the language, implied that the case-by-case discretionary appointment of counsel would encompass misdemeanors as well. The concurring Justices proposed three factors for determining whether an attorney is necessary to assure a fair trial: (1) the complexity of the offense charged; (2) the probable sentence that will follow if a conviction is obtained (noting that "imprisonment is not the only serious consequence," *id.* at 64, the concurring opinion offered that "[l]osing one's driver's license is more serious for some individuals than a brief stay in jail," *id.* at 48); and

decision, the Court appeared to "judge how well the states had digested the judicial pronouncement"[44] in *Gideon* that had removed the "special circumstances" rule nine years previously. Subsequent to the *Argersinger* decision, there arose a conflict among trial courts over its application which was resolved in *Scott v. Illinois*.[45] The issue became whether *Argersinger* reached that class of cases in which imprisonment was authorized by statute although not actually imposed.[46] The *Scott* Court favored an "actual imprisonment" standard[47] (over an "authorized imprisonment" test) as the constitutional line[48] at which an indigent must be afforded counsel.

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(3) the individual factors peculiar to each case, i.e., competency of defendant to present his case *pro se*. *Id.* at 63-64 (Powell, J., concurring).

44. KRANTZ, *supra* note 26, at 23. *See also Argersinger*, 407 U.S. at 27 n.1, where the Court noted that thirty-one states had extended the right to counsel to defendants charged with less than felonies, and where concerns regarding the legal resources to meet the new rule were dismissed. *Id.* at 37 n.7.

45. 440 U.S. 367 (1979). Without benefit of representation by an attorney, Scott was convicted of shoplifting and fined $50.00.

46. Under an actual imprisonment standard an indigent criminal defendant is guaranteed the assistance of appointed counsel only when his case results in a sentence of imprisonment. Thus, the presiding judge must make a pretrial determination of whether, if convicted, the defendant will be incarcerated. If the judge fails to appoint counsel, he must forgo the option of imprisoning the defendant.

Under an authorized imprisonment standard, an indigent criminal defendant is guaranteed the assistance of counsel when charged with any offense which carries a statutory penalty of imprisonment, even if imprisonment is not mandatory. This standard requires the trial judge merely to look at the statutory penalties and to appoint counsel whenever they include incarceration.

Note, *The Abandonment of the Fair Trial Basis for the Right to Court-Appointed Counsel*, 12 CONN. L. REV. 353, 358 n.38 (1980) (citation omitted).

47. 440 U.S. at 373. Again the Court expressed concern that an extension beyond *Argersinger* which "has proved reasonably workable . . . would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States." *Id.* at 373 (footnote omitted). *See also supra* note 44 and accompanying text.

48. The "constitutional line" being drawn was commented on in three of the four opinions in *Scott*. Writing for the plurality, Justice Rehnquist noted that "constitutional line drawing becomes more difficult as the reach of the Constitution is extended further . . . ." 440 U.S. at 372.

Justice Powell, concurring, warned that "the drawing of a line based on whether there is imprisonment (even for overnight) can have the practical effect of precluding provision of counsel in other types of cases in which convictions can have more serious consequences." *Id.* at 374. Justice Blackmun dissented and proposed that counsel be provided for defendants charged with offenses punishable

In criminal prosecutions of adults, therefore, while the language often spoke sweepingly[49] about the fundamental right to counsel in an adversary proceeding, the holdings themselves limited the appointment of an attorney to capital and felony cases or instances where imprisonment was actually imposed.[50] The Court appeared to move in measured steps—generally expanding the right to counsel while halting periodically, at least partially out of concern for a constitutional mandate's impact on the states.[51]

The issue of whether a constitutional right to counsel exists in civil litigation has not been developed by the Supreme Court as it has in criminal cases. Perhaps because of the diversity of suits labeled "civil," the varying procedures by which they are adjudicated,[52] and the lack of a specific sixth amendment guarantee, no clear rules have evolved in civil cases. The case often pointed to as indicating the sometimes blurred civil-criminal distinction with respect to court-appointed counsel is *In Re Gault*[53] decided in 1967 (after *Gideon* and before *Argersinger*). The Court reiterated its view that juvenile court[54] must conform to "the essentials of due process and fair treatment."[55] In *Gault* a fifteen year old boy had been adjudicated a delinquent and committed to an Arizona State industrial school without benefit of counsel or other procedural safeguards.[56] Finding "no material difference"[57] between the adult

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by more than six months' imprisonment, or whenever a term of incarceration is actually imposed. Justice Blackmun wrote that "[t]his resolution . . . would provide the 'bright line' that defendants, prosecutors, and trial and appellate courts all deserve . . . ." *Id.* at 389-90 (Blackmun, J., dissenting).

49. *See supra* note 38 and text accompanying note 31.

50. *See Powell*, 287 U.S. at 71; *Gideon*, 372 U.S. at 342; *Argersinger*, 407 U.S. at 37; *Scott*, 440 U.S. at 373-74.

51. *See supra* notes 36, 44 & 47 and accompanying text.

52. Procedures range from formal, adversary trials (in which the state may be functioning as a public prosecutor) to administrative-type hearings carrying out a quasi-judicial role.

53. 387 U.S. 1 (1967).

54. Juvenile court proceedings are classified "civil" rather then "criminal" in part from the early reformers' intentional efforts to remove children from the apparent harsh rules of criminal procedure applicable to adults. This change was justified by the state's *parens patriae* authority to act on behalf of the juvenile's interests rather than as the juvenile's adversary. *Id.* at 14-17.

55. *Id.* at 30-31, quoting Kent v. United States, 383 U.S. 541, 562 (1966).

56. 387 U.S. at 9-10. Concerning the other procedures, the Supreme Court held that a juvenile has a right to notice of charges, to confrontation and cross-examination of witnesses, and to the privilege against self-incrimination.

57. *Id.* at 36.

and juvenile proceedings, the Court held that in adjudicatory hearings on delinquency which *may* result in commitment to an institution, counsel must be appointed to represent the child of indigent parents.[58]

During the post-*Gault* period, the Supreme Court heard various types of "non-criminal" cases and did not extend a due process right to counsel—at least not to every defendant. In 1970, *Goldberg v. Kelly*[59] addressed what procedures were due a public assistance recipient when local or state officials took action to terminate those benefits. Finding that recipients have a statutory entitlement to continued benefits,[60] the Court determined that procedural due process requires a pre-termination hearing[61] at which counsel need not be provided but may be retained by the recipient.[62] Students facing school suspensions were deemed to have an interest protected by the due process clause requiring notice and an opportunity to be heard.[63] However, because of the countless short disciplinary suspensions, the informal and nonadversary nature of the proceedings, and the costs involved, the Court determined that a student need only be allowed the opportunity to secure counsel in the more difficult cases.[64] Likewise, counsel was not

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58. *Id.* at 41. While the case specifically relates to the minor's right to counsel, the language immediately following the holding implies in a somewhat confusing way that the parents also may have a right to appointed counsel: "They [mother and son] had a right expressly to be advised that they might retain counsel . . . . If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and potential commitment to appointed counsel . . . ." *Id.* at 42.

59. 397 U.S. 254 (1970).

60. *Id.* at 262.

61. *Id.* at 266. The Court went on to indicate that this hearing "need not take the form of a judicial or quasi-judicial trial," *id.*, but rather should be an "evidentiary hearing," *id.* at 274 (Black, J., dissenting), before an "impartial decision maker." *Id.* at 271. Recognizing a need to have a quick resolution of eligibility issues, the informality with which welfare recipients and officials relate, and the heavy caseloads involved, the Court justified providing minimum procedural safeguards at these hearings. *Id.* at 267.

62. *Id.* at 270.

63. Goss v. Lopez, 419 U.S. 565, 581 (1975). The case concerned a class action suit brought by nine high school students who had been suspended from school for up to ten days without a hearing. The students alleged that they had been deprived of their right to an education in violation of the procedural due process component of the fourteenth amendment. *Id.* at 568-69.

64. *Id.* at 583-84. The allowance of counsel in the more difficult cases is at the discretion of the school disciplinarian. Presumably, the disciplinarian's discretion will also determine what type of "unusual situations" might qualify for the

included as part of the constitutional process due a minor whose parents sought the child's commitment to a mental health care facility pursuant to state statute.[65] While recognizing the minor's liberty interest,[66] the Court decided that this interest could best be protected by a pre-admission inquiry by a mental health care specialist.[67] The implication of the Court's opinion is that lawyers and judges need not be imposed onto this proceeding as their presence would turn the inquiry into a formal and adversary judicial hearing.

Even in parole[68] and probation[69] revocation hearings, the Court found no due process guarantee to appointed counsel for every defendant.[70] The Court in *Gagnon v. Scarpelli*,[71] decided in 1973, followed its reasoning in *Morrissey v. Brewer*[72] the previous year that a revocation is not part of a criminal prosecution[73] and highlighted the "critical differences" between the proceedings.[74]

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exercise of this option—as the opinion lends no specific guidance. The Court did distinguish longer suspensions and expulsions as possibly requiring more formal procedures than *Goss* necessitated.

65. Parham v. J.R., 442 U.S. 584, 604-09 (1979). Under Georgia's mental health statute, such a commitment is deemed voluntary upon the parent's or guardian's signed application and the facility superintendent's authorization to admit the minor for treatment. *Id.* at 590-91.

66. *Id.* at 600.

67. *Id.* at 606-09. The Court emphasized that the pre-admission inquiry be informal and non-adversarial, as well as conducted by trained specialists rather than by judicial or administrative hearing officers.

68. Morrissey v. Brewer, 408 U.S. 471, 472-75, 487-90 (1972). Petitioners claimed their paroles were revoked without a hearing and therefore in violation of due process. The Court held that a parolee is entitled to notice, a prompt informal inquiry before an impartial hearing officer, opportunity to confront and cross-examine witnesses and a written statement of the findings.

69. Gagnon v. Scarpelli, 411 U.S. 778 (1973). Gerald Scarpelli was arrested for burglary while on probation for armed robbery for which he had received a suspended sentence. The probation was revoked without a hearing which the probationer claimed was a denial of due process. The court stated that minimum requirements of due process entitle the probationer to a *Morrissey*-type hearing. *Id.* at 779-81, 786. *Gagnon*, however, unlike *Morrissey*, dealt with the indigent's right to appointed counsel. *See infra* note 75 and accompanying text.

70. *Gagnon*, 411 U.S. at 790.

71. 411 U.S. 778 (1973).

72. 408 U.S. 471 (1972).

73. *Gagnon*, 411 U.S. at 781-82.

74. *Id.* at 788-89. In distinguishing the two proceedings the Court stated:

> In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised. . . . In short, a criminal

These distinctions (along with the more limited liberty interest of a probationer or parolee) justified the Court's return in revocation hearings to a *Betts* approach of appointing counsel on a case-by-case basis as certain circumstances warrant—an approach previously rejected in *Gideon*.[75]

In one of the Court's most recent opinions, *Vitek v. Jones*,[76] a convicted prisoner who was involuntarily transferred to a state mental hospital pursuant to a state statute[77] was found to have retained a protectable "residuum of liberty"[78] in spite of his loss of physical liberty.[79] The stigmatizing consequences of a transfer and the prisoner's subjection to mandatory treatment were deemed deprivations of liberty that require procedural due process.[80] Four of the five justices who reached the merits of the case,[81] determined that appointed counsel was a necesary component of the process due.[82] Justice Powell, concurring, concluded that an inmate must be provided independent assistance; however, that person

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> trial under our system is an adversary proceeding . . . . In a revocation hearing, on the other hand, the State is represented not by a prosecutor, but by a parole officer with the . . . orientation [of rehabilitation, rather than punishment]; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation and parole.

75. *Id.* at 788-90. The Court, unlike in the *Betts* opinion, did delineate some guidelines for when special circumstances may require appointment of counsel. These include cases in which a parolee or probationer makes a request for counsel based on the claim that he denies the alleged violation or that the mitigating factors exist to make revocation inappropriate. The revocation agency was also called upon to consider whether the defendant "appears to be capable of speaking effectively for himself." *Id.* at 790-91. *See supra* notes 33-40 and accompanying text.

76. Vitek v. Jones, 445 U.S. 480 (1980).

77. NEB. REV. STAT. § 83-180(1) (1976) provides that when a psychologist or designated physician finds that a prisoner "suffers from a mental disease or defect" and cannot receive proper treatment in prison, the Director of Correctional Services may transfer the prisoner to another institution where treatment is available.

78. 445 U.S. at 491.

79. *Id.* at 493-94.

80. *Id.* at 494. Exclusive of the issue regarding counsel, the procedural protections include notice, a hearing on the evidence, an opportunity to present and confront witnesses, an independent decision-maker, a written statement of the findings, and notice of all of these rights. *Id.* at 494-96.

81. Four Justices dissented, believing that the case was not justiciable either for mootness or lack of ripeness. *Id.* at 500-06.

82. *Id.* at 496-97.

need not in all cases be an attorney.[83] The plurality opinion therefore recognized liberty interests (apart from the freedom from physical restraint) which required the procedural protection of appointed counsel.

Subsequent to the *Gault* decison in 1967, legislatures, state and lower federal courts, and commentators examined the due process requirements for the area of civil litigation involving the state's interference with the integrity of the family.[84] Some courts[85] and commentators[86] expressed the opinion that the civil-criminal distinction was fading and that an indigent civil defendant in a government case should be entitled to appointed counsel based on the fourteenth amendment's guarantee of procedural due process.

In termination of parental rights hearings, indigent parents were statutorily afforded counsel in thirty-three states by the time *Lassiter* was decided.[87] Court opinions involving the parents' right

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83. *Id.* at 497, 500.

84. See *supra* notes 85-88 and accompanying text for examples of the activity in this area.

85. *E.g.*, Davis v. Page 618 F.2d 374 (5th Cir. 1980), *aff'd. in relevant part on rehearing*, 640 F.2d 599 (5th Cir. 1981); Crist v. New Jersey Div. of Youth and Family Serv., 128 N.J. Super. 402, 320 A.2d 203 (1974); *In re* Adoption of R.I., 455 Pa. 29, 312 A.2d 601 (1973).

86. *See* Comment, *The Indigent Parent's Right to Appointed Counsel in Actions to Terminate Parental Rights*, 43 U. CIN. L. REV. 635, 639 (1974); Note, *Heller v. Miller*, 49 U. CIN. L. REV. 664, 668 (1980); Comment, *Indigent Parents' Right to Counsel in Child Neglect Cases*, 46 TENN. L. REV. 649, 654 (1979).

87. Brief for Petitioner, App. B, at 17a-26a, Lassiter v. Department of Social Serv. of Durham County, N.C., 101 S. Ct. 2153 (1981); ALA. CODE § 12-15-63 (1975); Alaska Children's Rules, Rule 15, Alaska Rules of Court Procedure and Administration (1977); ARIZ. REV. STAT. ANN. § 8-225 (Supp. 1980); CAL. CIV. CODE § 237.5 (West Supp. 1980); COLO. REV. STAT. § 19-11-103(2) (1973); CONN. GEN. STAT. ANN. § 46b-136 (West Supp. 1981); IDAHO CODE § 16-2009 (1979); ILL. REV. STAT. ch. 37, § 701-20 (1979); IND. CODE § 31-6-7-2(b) (1981); IOWA CODE ANN. § 232.89 (West Supp. 1981-82); KAN. STAT. ANN. § 38-820 (1981); KY. REV. STAT. § 199.600(7) (1977); LA. REV. STAT. ANN. § 13:1602(c) (West Supp. 1982); ME. REV. STAT. ANN. tit. 22 § 4005(2) (Supp. 1981-82); MD. CTS. & JUD. PROC. CODE ANN. § 3-821 (1980); MASS. GEN. LAWS ANN. ch. 119, § 29 (West Supp. 1981); Mich. Juv. Ct. Rule 6.3(A)(2)(b); MINN. STAT. ANN. § 260.155 (West 1971 & Supp. 1982); MISS. CODE ANN. § 43-21-17 (repealed 1981); MO. ANN. STAT. § 211.462 (Vernon Supp. 1982); MONT. CODE ANN. § 41-3-607(2) (1981); NEB. REV. STAT. § 43-209 (1978); NEV. REV. STAT. § 128.100 (1981); N.H. REV. STAT. ANN. § 170-C:10 (1977); N.J. STAT. ANN. § 9:6-8.43 (West 1977 & Supp. 1981-82); N.Y. Soc. Serv. Law 384-b(3)(e) (McKinney Supp. 1981-82); N.D. CENT. CODE § 27-20-26 (1974); OHIO REV. CODE ANN. § 2151.352 (Page 1973); OKLA. STAT. ANN. tit. 10, § 1109 (West Supp. 1981-82); R.I. GEN. LAWS § 14-1-31 (1981); UTAH CODE ANN. § 55-10-96 (1953); WASH. REV. CODE ANN. § 13.34.090 (West Supp. 1981); WISC.

to appointed counsel in neglect, dependency, and termination of rights hearings reflected concerns for the adversary nature of the hearings, the serious consequences at stake (including possible criminal charges in certain cases), the imbalance in skill between the defendant/parent and the public prosecutor, and the possibly complex issues.[88] It appears, therefore, that *Gault* was viewed as opening the door to an extension of the right to appointed counsel. With no contrary indication from the Supreme Court, some states applied this extension to an indigent parent facing the temporary or permanent deprivation of the custody and companionship of his or her child.

With these decisions (both in the criminal and civil areas) serving as the backdrop, the Court addressed the case of *Lassiter v. Department of Social Services of Durham County, North Carolina.*[89] *Lassiter* intermixed some of the distinguishing features of both the criminal and civil cases: an important liberty interest, though not a personal physical liberty; an adversary judicial proceeding with the rules and procedures of evidence; and the State as the opponent, represented by counsel.

THE FACTS OF *Lassiter*

The petitioner, Abby Gail Lassiter, is the natural mother of five children.[90] In May of 1975, the District Court of Durham County adjudicated one of her children, William, a neglected minor and transferred his custody to the respondent, the Durham County Department of Social Services.[91] The following year, Ms.

STAT. ANN. § 48.42(4)(c) (West Supp. 1981-82).

Since the *Lassiter* decision, North Carolina itself has amended its statutes to provide counsel for indigent parents at termination of parental rights hearings. Act of July 19, 1981, ch. 966, 1981 N.C. Adv. Legis. Serv. No. 8 at 721 (to be codified at N.C. GEN. STAT. §§ 7A-289.23, -289.27, -289.30, -451(1)).

88. *See, e.g.*, Danforth v. State Dep't of Health and Welfare, 303 A.2d 794 (Me. 1973); Crist v. New Jersey Div. of Youth and Family Serv., 128 N.J. Super. 402, 320 A.2d 203 (1974); *In re* B., 30 N.Y.2d 352, 285 N.E.2d 288 (1972); *In re* Adoption of R.I., 455 Pa. 29, 312 A.2d 601 (1973); *In re* Welfare of Myricks, 85 Wash. 2d 252, 533 P.2d 841 (1975); State *ex rel.* Lemaster v. Oakley, 203 S.E.2d 140 (W. Va. 1974).

89. 101 S. Ct. 2153 (1981).

90. 101 S. Ct. at 2172 (Blackmun, J., dissenting).

91. The basis for the neglect petition and finding was failure on the part of the petitioner to provide proper medical care. *Id.* at 2156. William was eight months old at the time of the neglect finding and was placed in foster care. *In re* Lassiter, 43 N.C. App. 525, 526, 259 S.E.2d 336, 337 (1979). Ms. Lassiter was noti-

Lassiter was convicted of second-degree murder and began serving a sentence of 25 to 40 years of imprisonment.[92] William remained in foster care[93] and Ms. Lassiter, at some point, arranged for the other four children to reside with their grandmother, Mrs. Lucille Lassiter.[94] In 1978, the Department petitioned[95] the District Court of Durham County to terminate the parental rights of the petitioner.[96] Ms. Lassiter received notice of the termination hearing while in prison, did not obtain counsel, and was brought in for the

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fied of the hearing but did not appear in court nor was she represented by counsel. 101 S. Ct. at 2172 (Blackmun, J., dissenting).

92. 101 S. Ct. at 2156. Justice Blackmun (joined by Justices Brennan and Marshall, dissenting) criticized the majority opinion for "not confin[ing] itself to the issue at hand" when it recounted details of the offense leading to Ms. Lassiter's conviction set forth in an unreported state appellate opinion. *Id.* at 2175 n.26 (Blackmun, J., dissenting). The Court apparently found it relevant to point out that an altercation had begun between the victim and Ms. Lassiter's mother. Ms. Lassiter entered the room while her mother was using a broom to beat the victim who had been knocked to the floor. The petitioner obtained a butcher knife from the kitchen and stabbed the victim seven times. Both Ms. Lassiter and her mother were indicted for first-degree murder; however, the mother's motion for non-suit was granted. One of Ms. Lassiter's contentions on appeal of her second degree murder conviction was that her counsel was ineffective in eliciting the statement made by the mother that "And I did it, I hope she dies." *Id.* at 2156 n.1.

93. *Id.* at 2162 n.7.

94. *Id.* at 2172 (Blackmun, J., dissenting).

95. N.C. GEN. STAT. § 7A-289.32 delineates the grounds for termination of parental rights. The sections applicable to the allegations, brought against the petitioner are:

> (1) The parent has *without cause* failed to establish or maintain *concern or responsibility* as to the child's welfare [Repealed by Session Laws 1979, c. 669, s.2]
>
> . . . .
>
> (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,* a child-caring institution or licensed child-placing agency 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.

(Emphasis added by Justice Blackmun, dissenting, 101 S. Ct. at 2169.)

96. 101 S. Ct. at 2156. The petition also sought to terminate the parental rights of the putative father who had denied paternity. The trial court terminated this alleged parental status. *Id.* at 2158 n.2.

hearing "[a]t the behest" of the Department's attorney.[97] The court considered whether the petitioner should have more opportunity to obtain counsel and decided not to postpone the hearing since her failure to obtain an attorney was "without just cause."[98] The petitioner "did not aver that she was indigent" and the hearing took place that day without counsel being appointed.[99]

The only witness for the State was a social worker from the Department of Social Services who had not been assigned to William's case until August of 1977.[100] The social worker gave testimony of the events leading up to the neglect finding and of the minimal contact between William and his mother and grandmother since that time.[101] Ms. Lassiter then attempted cross-examination, however, "she apparently did not understand that cross-examination required questioning rather than declarative statements."[102] Ms. Lassiter then testified that she had "properly cared for William" and that she wanted him to be placed with his siblings in the custody of her mother.[103] The grandmother was the final witness and she denied both filing a complaint about her daughter's neglect of William and having expressed an unwillingness to have custody of him.[104] The court found the allegations in

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97. *Id.* at 2157.

98. *Id.*

99. *Id.*

100. *Id.* at 2173 (Blackmun, J., dissenting). William had been in the custody of the respondent Department since May of 1975. Ms. Lassiter was sentenced on her conviction in July of 1976. As indicated, the testifying social worker became involved in the case in August of 1977. She met with the petitioner in prison on one occasion in December of 1977, informing her of the planned termination proceedings to which Ms. Lassiter expressed objection. The termination hearing occurred in August of 1978. *Id.* at 2172-73 (Blackmun, J., dissenting).

101. *Id.* at 2157. Justice Blackmun pointed out in his dissent that the social worker represented that events prior to her own involvement in the case were recorded in the agency record. There was no indication that the petitioner was afforded the opportunity to review the agency record, nor that the record was in the courtroom or introduced as evidence. The social worker also testified as to the opinion of members of the community (with whom she had had discussions) that the grandmother would be unable to handle the additional responsibility of caring for William. Justice Blackmun indicated that this hearsay testimony was admitted without justification by the county attorney and without objection from the petitioner. *Id.* at 2173 (Blackmun, J., dissenting).

102. *Id.* Justice Blackmun concluded that during the process of cross-examination "the judge became noticeably impatient with petitioner." *Id.* at 2173 & n.22 (Blackmun, J., dissenting).

103. *Id.* at 2157-58.

104. *Id.* at 2158. Ms. Lassiter was not given the opportunity by the court to

the petition to be true[105] and determined that the best interests of William would be served by terminating Ms. Lassiter's parental status.[106]

The sole issue on appeal was whether the trial court erred in not appointing counsel for Ms. Lassiter, an indigent, in violation of the due process clause of the fourteenth amendment.[107] The Court of Appeals of North Carolina concluded that there was no trial court error and that procedural and substantive due process requirements had been met.[108] Ms. Lassiter's application for discretionary review was summarily denied by the Supreme Court of North Carolina.[109]

The United States Supreme Court held that the Constitution does not require the appointement of counsel for indigent parents in every parental termination hearing.[110] The Court adopted a case-by-case approach to determine when circumstances call for the due process requirement of appointed counsel.[111] The case was analyzed in two lengthy opinions[112] with Justice Stewart writing

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question her mother who had testified in response to questions by the judge and county attorney. *Id.* at 2174 (Blackmun, J., dissenting). In dissent, Justice Blackmun pointed out that the trial judge "expressed open disbelief" and "exasperation" during the petitioner's case. *Id.* at 2174 & nn.23-25 (Blackmun, J., dissenting).

105. 101 S. Ct. at 2158. *See supra* note 95.

106. 101 S. Ct. at 2158. N.C. GEN. STAT. § 7A-289.31 requires, with regard to disposition, that once any one or more of the conditions for termination are found to exist, "the court shall issue an order terminating the parental rights of such parent with respect to the child unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated."

107. 101 S. Ct. at 2158; *In re* Lassiter, 43 N.C. App. at 526, 259 S.E.2d at 337.

108. *In re* Lassiter, 43 N.C. App. at 526, 259 S.E.2d at 337. The Court of Appeals analyzed the requirements of procedural due process to include notice and an opportunity to be heard. Substantively, the court found "no unreasonableness or arbitrariness" in the State's exercise of its police power. The court stated that: "While this State action does invade a protected area of individual privacy, the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated."

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

110. *Lassiter,* 101 S. Ct. at 2162.

111. *Id.*

112. Chief Justice Burger and Justice Stevens filed short concurring and dissenting opinions, respectively. *Id.* at 2163, 2176. Chief Justice Burger joined in the Court's opinion and "narrow holding," taking the opportunity to point out to the dissenters that the purpose of a termination hearing is not "punitive" but rather

for the Court and Justice Blackmun filing a dissenting opinion.[113]

ANALAYSIS OF THE COURT'S OPINION

The *Lassiter* Court acknowledged that the notion of due process is flexible and difficult to define, but requires "fundamental fairness."[114] The majority sought to discover what would be fundamentally fair in the case before it by first examining the Court's precedents on the right to appointed counsel.[115] In viewing the *Gideon—Argersinger—In re Gault* line of cases,[116] the Court generalized that the right to appointed counsel attaches only when "the litigant may lose his physical liberty if he loses the litigation."[117] The Court supported this conclusion by pointing out that when a litigant is threatened with, but does not suffer the loss of his personal liberty (as in the authorized but not imposed prison sentence in *Scott*)[118] or when that liberty has already been limited (as in the parole and probation revocation hearings in *Morrissey* and *Gagnon*),[119] the constitutional right to counsel does not exist for every defendant.[120] From this, the Court drew the "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[121]

"protective of the child's best interests." *Id.* at 2163 (Burger, C.J., concurring). Justice Stevens viewed a termination of parental status as both a deprivation of liberty and property (because of the possible destruction of statutory rights of inheritance). While agreeing with Justice Blackmun's conclusions, Justice Stevens believed that "fundamental fairness" requires the appointment of counsel (as in criminal cases) without regard to the weight of the costs to the state. *Id.* at 2176 (Stevens, J., dissenting).

113. *Id.* at 2163. [References in the text to "the dissent" indicate Justice Blackmun's opinion.]

114. *Id.* at 2158. The dissent deems due process as "perhaps the last frozen concept of our law." *Id.* at 2175 (Blackmun, J., dissenting) (quoting Griffin v. Illinois, 351 U.S. 12, 20 (1956) (concurring opinion)). Previously, the Supreme Court has found due process to require notice and the opportunity to be heard "at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552 (1965), "appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). *Accord* Mathews v. Eldridge, 424 U.S. 319 (1976); Boddie v. Connecticut, 401 U.S. 371 (1971).

115. 101 S. Ct. at 2158.

116. *See supra* notes 37-44, 53-58 and accompanying text.

117. 101 S. Ct. at 2158-59.

118. *See supra* notes 45-48 and accompanying text.

119. *See supra* notes 68-75 and accompanying text.

120. 101 S. Ct. at 2159.

121. *Id.* The Court stated its presumption regarding appointed counsel in

The Court then added a significant statement, absent citation: "It is against this presumption that all other elements in the due process decision must be measured."[122] The inclusion of the "presumption" in the due process analysis is particularly noteworthy, for the Court immediately went on to state that *Mathews v. Eldridge*[123] "propounds the three elements to be evaluated in deciding what due process requires . . . ."[124] The *Eldridge* factors to be considered are (1) the private interests at stake, (2) the government's interest, and (3) the risk of erroneous decison utilizing the procedure in question.[125]

The dissent maintained that by formulating the presumption, the Court had effectively added "an unnecessary and burdensome new layer of analysis onto its traditional three-factor balancing test."[126] Moreover, in analyzing the applicable precedent, the dissent did not reach the same conclusion that the presumption (for appointed counsel only in physical liberty cases) even existed.[127] The dissent pointed out that the loss of physical liberty has not always been the controlling factor when the Court has decided whether there is a constitutional right to appointed counsel.[128] In

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terms of whether the losing litigant *may* lose his physical liberty. However, it appears that if the Court is going to rely on *Scott v. Illinois* as one of the cases dictating this presumption, then the presumption would turn on whether the losing litigant *will* be deprived of his physical liberty. *See supra* notes 45-48 and accompanying text.

122. 101 S. Ct. at 2159.

123. 424 U.S. 319 (1976) (delineating what procedures due process requires when social security disability benefits are terminated).

124. 101 S. Ct. at 2159.

125. *Id.* In their original form the *Eldridge* factors are stated in a slightly different and more elaborate way:

> 1) The private interest that will be affected by the official action; 2) The risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; 3) The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Eldridge, 424 U.S. at 335.

Even before this 1976 decision, due process requirements were analyzed by balancing like components. *See* Goss v. Lopez, 419 U.S. 565, 579-80 (1975); Gagnon v. Scarpelli 411 U.S. 776, 785-87 (1973); Stanley v. Illinois, 405 U.S. 645, 650-65 (1972); Goldberg v. Kelly, 397 U.S. 254, 263-66 (1970); Cafeteria Workers v. Mc Elroy, 367 U.S. 886, 895 (1961).

126. 101 S. Ct. at 2167 n.9 (Blackmun, J., dissenting).

127. *Id.* at 2166-67 (Blackmun, J., dissenting).

128. *Id.* The dissent compared *Gagnon* and *Morrissey* (where counsel was

determining whether due process should include the appointment of counsel in termination of parental rights hearings, the dissent confined itself to balancing the *Eldridge* factors.[129] The Court also analyzed these elements and "then set their net weight . . . against the presumption" that there is no right to counsel if physical liberty is not at stake.[130]

Turning to the first *Eldridge* factor, the Court and the dissent agreed that the parental interest in the care and custody of his or her child and in maintaining the parent-child relationship is one of a high magnitude.[131] Secondly, the Court found that the state

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not provided to probationers and parolees facing a loss of physical liberty through a revocation hearing) with *Vitek* (where appointed counsel was granted to a prisoner facing a transfer to a mental hospital but not a new loss of physical liberty) to reach this conclusion. *See supra* notes 68-83 and accompanying text.

The dissenting opinion also analyzed the criminal and civil line of right-to-counsel cases (*See supra* notes 37-44, 63-83 and accompanying text) as standing for the proposition that where the litigant's liberty interest is slight or where the proceeding is informal and non-adversarial, due process does not require appointed counsel. On the other hand, this analysis implies that if the interest at stake is significant and the state action seeking to deprive that interest is conducted in a formal and adversary forum, the right to counsel may be a necessary ingredient of due process. 101 S. Ct. at 2164-65 (Blackmun, J., dissenting).

129. 101 S. Ct. at 2165-70 (Blackmun, J., dissenting).

130. *Id.* at 2159.

131. *Id.* at 2160, 2162, 2165-67 (Blackmun, J., dissenting). Recognizing this parental right "now made plain beyond the need for multiple citation," the Court noted that in the instant case "the State has sought not simply to infringe upon that interest, but to end it. If the State prevails, it will have worked a unique kind of deprivation." *Id.* at 2160. The dissenting opinion emphasized the parental interest at greater length and was willing to delineate the multiple citations summarily referred to by the Court. The dissent concluded that "there can be few losses more grevious than the abrogation of parental rights" and disagreed with the Court that this interest is of less importance because the parent's physical liberty is not in jeopardy. *Id.* at 2166 (Blackmun, J., dissenting). While the majority opinion never expressly compared the two interests, the conclusion drawn by the dissent (that the Court found the physical liberty interest to be of greater magnitude than the parental interest) is implied in the Court's finding of the previously asserted "presumption" factor. *See supra* text accompanying notes 116-22.

State and lower federal court opinions, in interpreting the Supreme Court's previous indications supporting the fundamental family interest, have aligned themselves with the dissent's view that the parental interest does not pale in comparison to one's personal liberty interest. *See* Davis v. Page, 618 F.2d at 379 ("Indeed it is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children."); Danforth v. State Dep't of Health and Welfare, 303 A.2d at 800 (loss of one's child may be viewed as a sanction more severe than imprisonment); Crist v. New Jersey Divi-

shares with the parent an interest in an "accurate and just decision"[132] and suggested that, in the adversary system, the child's welfare might best be served when both the parent and the state have counsel.[133] The dissent and Court concurred that the state's pecuniary interest in avoiding the added expense of appointed counsel is insignificant in light of the possible consequences of the proceedings.[134] However, while the majority believed the state at times to have a "possibly stronger interest [than the parent] in informal procedures,"[135] Justice Blackmun strongly rejected this notion.[136] The final *Eldridge* factor evaluated was the risk that a parent may erroneously be deprived of his child for lack of counsel. The Court considered the respondent Department's arguments that the subject matter of a termination hearing is one of which a

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sion of Youth and Family Serv., 320 A.2d at 211 (difficult to conceive of many consequences of greater magnitude than the loss of one's child); State *ex rel.* Lemaster v. Oakley, 203 S.E.2d at 144 (loss of one's child may be more severe than imprisonment).

132. 101 S. Ct. at 2160.

133. *Id.* The Court made a seemingly inconsistent statement when it stated that in termination hearings the state's counsel is acting in the *child's* interest and then gives North Carolina credit for statutorily equalizing the balance between the parties by providing a guardian ad litem for the *child* when a written denial of the petition is filed. Presumably, an indigent parent could file an answer, not be appointed counsel, and face two adversaries, the state's and child's attorneys.

134. *Id.* at 2160, 2170.

135. *Id.* at 2162. This conclusion was not expressly developed or substantiated in the Court's initial discussion of the state's interest. *Id.* at 2160. It may have followed by implication from language contained in the "risk of error" analysis. The respondent Department had urged that the risk of error was minimized in a termination hearing since the subject matter—the parent/child relationship—is that with which the parent is uniquely familiar. It was further argued that these proceedings rarely involve evidentiary law problems and that the Department, therefore, sometimes is represented by social workers rather than by lawyers. *Id.* at 2161.

136. *Id.* at 2170 (Blackmun, J., dissenting). Justice Blackmun contended that when the state turns from its purpose of maintaining family integrity (see N.C. Gen. Stat. § 7A-542) and instead marshalls its forces to sever family relationships, it is then not in a position to "seek the informality [acceptible in] a rehabilitative or educative proceeding into which counsel for the parent would inject an unwelcome adversarial edge." 101 S. Ct. at 2170 (Blackmun, J., dissenting). *Cf.* Gagon v. Scarpelli, 411 U.S. at 787, (counsel will alter the rehabilitative role of a probation revocation body); Parham v. J.R., 442 U.S. at 610 (formalized hearing would detract from the treatment of mental health patient); Goss v. Lopez, 419 U.S. at 583 (formal school suspension hearings with counsel would destroy education process of discipline).

parent is "uniquely well informed" and that the hearing itself does not pose difficult points of law.[137] In the end, the majority found that the complexity of the issues and the inability of a parent to adequately represent himself "*may* combine to overwhelm an uncounseled parent."[138] On the other hand, the dissent viewed the proceedings as statutorily adversarial in nature and proffered that "given the gross disparity in power and resources between the State and the uncounseled indigent parent," appointed counsel would diminish the "inherently substantial" risk of error.[139]

After evaluating the *Eldridge* factors, the Court concluded that if "the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel."[140] Believing that these factors will not always be distributed in this fashion and that due process is flexible, the Court reasoned that the Constitution does not always require appointed counsel for every indigent parent.[141] Instead, the *Gagnon* approach of appointment of counsel on a case-by-case basis was adopted.[142] The dissent distinguished the *Gagnon* standard from application in the instant case by point-

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137. 101 S. Ct. at 2161.

138. *Id.* (emphasis added).

139. *Id.* at 2168 (Blackmun, J., dissenting). Justice Blackmun highlighted the legal issues presented in the State's petition (see *supra* note 95) which could have been addressed by a trained lawyer but which went unchallenged. 101 S. Ct. at 2174 (Blackmun, J., dissenting).

The dissent also cited studies (which the Court found "unilluminating," 101 S. Ct. at 2161 n.5) indicating that persons charged with neglect petitions and represented by counsel had a higher rate of dismissals (25% to 7.9%) and a lower rate of neglect adjudications 62.5% to 79.5%) then did uncounseled parents. 101 S. Ct. at 2170 n.15 (citing 4 COLUM. J.L. & SOC. PROB. 230, 241 (1968)). The majority did cite the same study's finding that of the family-court judges questioned who presided over termination hearings, 72.2% agreed that when a parent is unrepresented it is more difficult to conduct a fair hearing (11.1% disagreed); 66.7% found it difficult to develop the facts (22.2% disagreed). 101 S. Ct. at 2161 n.5. The historical view that the judge will look after the interests of the unrepresented litigant seems either impossible or improbable. *Compare supra* note 19 *with supra* notes 102 & 104.

140. 101 S. Ct. at 2162.

141. *Id.*

142. *Id.* Without stating so, the Court returned to a *Betts*-type of "special circumstances" rule for determining when due process requires that the poor defendant be afforded representation by an attorney. *See supra* notes 33-37 and accompanying text.

ing out that *Gagnon* relied heavily on the informal and non-adversarial nature of the revocation hearing and the limited liberty interest of a convicted and sentenced probationer.[143] In addition, the dissenting opinion criticized the majority's departure from the due process analysis by *context* of cases, in favor of one considering "different *litigants* within a given context."[144] The *Mathews v. Eldridge* case, setting forth the elements considered in determining the minimal requirements of due process, noted that: "[P]rocedural 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."[145] According to the dissent, the case-by-case approach also poses dangers and problems when the trial record is reviewed on appeal.[146] It was suggested that it would be an exercise in speculation to determine if the *pro se* parent "suffered an unfair disadvantage" or if the result might have been different had there been counsel present.[147]

After adopting the case-by-case approach, the Court first indi-

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143. 101 S. Ct. at 2171 n.18. The termination hearing appears to possess more of the attributes of a criminal trial (leading to the conclusion that counsel is necessary for "fundamental fairness") than of the revocation hearing. *See supra* note 74 and accompanying text.

144. 101 S. Ct. at 2171. (emphasis in original).

145. Mathews v. Eldridge, 424 U.S. at 344. The line of cases supporting a case-by-case analysis are generally informal, administrative-type hearings having the attributes of treatment, rehabilitation or discipline. The decisions opting for appointed counsel by case context are adversarial and risk a substantial liberty interest. *Compare* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation hearing); Goss v. Lopez, 419 U.S. 565 (1975) (school disciplinary proceedings); Parham v. J.R., 442 U.S. 584 (1979) (mental health commitment); Wolff v. McDonell, 418 U.S. 539 (1974) (prison disciplinary proceedings) *with* Gideon v. Wainwright, 372 U.S. 335 (1963) (felony defendants); Argersinger v. Hamlin, 407 U.S. 25 (1972) (misdemeanor defendants deprived of physical liberty); *In re* Gault, 387 U.S. 1 (1967) (juvenile delinquency hearing which may result in loss of physical liberty); Davis v. Page, 618 F.2d 374 (5th Cir. 1980) *aff'd in relevant part on rehearing*, 640 F.2d 599 (5th Cir. 1981) (parents in dependency proceedings risking custody of child).

146. 101 S. Ct. at 2172.

147. *Id. See supra* note 35 (the dissenting view in *Betts*).

The *Lassiter* dissent argued that it is also costly to review trials and pointed out that after the *Betts* decision "innumerable" challenges to trials were evaluated on appeal. 101 S. Ct. at 2172 (Blackmun, J., dissenting). After recapping the trial court proceedings, Justice Blackmun did hypothesize about the legal arguments that could have been utilized in Ms. Lassiter's trial but, for want of an attorney, were left alone. *Id.* at 2172-74 (Blackmun, J., dissenting). See *supra* note 95 for the points of law in the petition that could have been challenged.

cated (as it had in *Gagnon v. Scarpelli*) that it is impossible to set forth guidelines for determining the necessity of counsel appointment.[148] However, in assessing whether due process was given in Ms. Lassiter's hearing, the Court effectively delineated those criteria to which trial judges will look for guidance.[149] Those circumstances which affected the outcome in the *Lassiter* analysis included: (1) the lack of abuse or neglect allegations in the petition upon which criminal charges could be placed, (2) no testimony by expert witnesses, (3) an absence of troublesome points of law, (4) sufficient weight of evidence so that "counsel . . . could not have made a determinative difference," and (5) evidence of parental disinterest in the proceedings regarding the minor.[150] Ms. Lassiter's failure to defeat any of these factors led the Court to determine that due process had not been violated when counsel was not appointed for her.[151] In concluding, the Court stated that a "wise public policy . . . may require that higher standards be adopted" than those that the fourteenth amendment minimally requires.[152] Noting the fact that thirty-three states statutorily require appointement of counsel in termination hearings and that "informed opinion" recommends as much, the Court indicated that these trends are "enlightened and wise."[153] In this manner, the Supreme Court took the opportunity to "send a message to the states" encouraging them (through their legislatures or courts' interpretation of the state constitutions) to provide counsel to indigent parents facing termination of their parental rights.[154]

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148. 101 S. Ct. at 2162.

149. *Id.* at 2162-63.

150. *Id.*

151. *Id.* at 2163. By implication, the presence of any one of these circumstances might have yielded a different result at trial. The problem with this type of approach, as the dissent noted, is that trial court judges will be forced to review the state's evidence in advance of trial in order to determine whether or not counsel is required to be appointed. *Id.* at 2172 n.19. (Blackmun, J., dissenting). The dissent pointed out that the Court ignored consideration of whether the defendant had the ability to adequately represent his own interests at the hearing, a factor relied on in the past. *Id.* at 2175 (Blackmun, J., dissenting). *See supra* notes 31, 33, 43 and accompanying text.

152. 101 S. Ct. at 2163.

153. *Id.*

154. It is interesting to note that in Powell v. Alabama, 287 U.S. at 73, and *In re* Gault, 387 U.S. at 37-41, the Supreme Court utilized state trends and expert opinion to justify a constitutional right to counsel. In *Lassiter*, however, while there are numerous citations to other authorities supporting the appointment of counsel, the Court drew back from this tactic. 101 S. Ct. 2161, 2163.

THE IMPACT OF *Lassiter*

The holding in *Lassiter*—that a parent in a parental rights termination hearing does not always have a constitutional guarantee to counsel—appears consistent with precedent holding that counsel is only required when physical liberty is at stake. This, however, may be a surface consistency. When the rationale behind the cases originating out of the criminal law context is examined and compared to the reasoning used in non-criminal cases, the analogy is weakened by what the Court chose not to consider from its precedent. This is where the Court and dissent differed in seeking guidance from these former decisions. The Court separated the right-to-counsel cases into two groups: physical liberty cases and all other liberty cases.[155] The dissent's line was drawn between formal, adversary proceedings and informal, administrative hearings.[156] To the extent that the type of hearing and the permanency of the liberty interest deprivation are taken into account, *Lassiter* is not consistent with the rationale of prior cases.

More importantly, the "rebuttable presumption" test established in *Lassiter*[157] signals a departure from the pure *Eldridge* test of balancing the private interests, the government's interests, and the risk of error, and has implications for future due process analyses.[158] Inherent in the presumption is the belief that physical liberty is more valuable than any other liberty interest—a judgment questioned by the Court in the past.[159] With the presumption against appointed counsel in force and the termination of a parental liberty unable to overcome the presumption, it is difficult to imagine any non-physical liberty interest which would lead to a categorical, constitutional guarantee of counsel. By its decision, the

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155. *See supra* notes 116-21 and accompanying text.

156. *See supra* notes 127-28 and accompanying text.

157. *See supra* notes 122-26, 130 and accompanying text.

158. The dissent warned that the new test "sets a dangerous precedent that may undermine objective judicial review regarding other procedural safeguards." 101 S. Ct. at 2167 n.8.

159. *Cf.* Gideon v. Wainwright, 372 U.S. at 349, (Justice Clark in a concurring opinion pointed out that life and liberty are both protected interests and questioned whether the deprival of life could be deemed more onerous than the deprival of liberty). *See supra* note 43 (Justices Powell and Rehnquist, concurring in *Argersinger*, hypothesize that a revoked driver's license may be more serious than a short incarceration).

See also supra note 131 for examples of how state and lower federal courts have interpreted the relative importance of physical liberty and the liberty to maintain the custody of one's child.

Court has effectively circumscribed the right to counsel in other civil areas—particularly between private litigants.

The *Lassiter* Court has encouraged states to provide counsel to indigent parents; by adopting the case-by-case approach the Court avoids a constitutional mandate for counsel in every case. It is conceivable that the Court is "testing the state waters" with this decision by recognizing circumstances under which due process would require counsel.[160] Conceivably, the Court could wait for the remaining state governments to assess the need to provide counsel based upon state laws or interpretations of state constitutions. In this manner, the Court will avoid a federal mandate until and unless it is forced to reconsider the larger question by state abuses in practice or delays in counsel provisions. If the states continue in their trend toward providing appointed counsel for indigent parents, a constitutional mandate at a later date will have minimal, if any, intrusionary effect. If the post-*Lassiter* history is anything like that following *Betts*, one might suspect that "special circumstances" will be found and enlarged upon until the discretionary approach is finally eroded. From a practical stand-point, in those states which do not already provide parents with counsel, the *Lassiter* decision provides trial court judges with the authority to use their discretion to appoint counsel. Following the *Lassiter* guidelines,[161] it is unlikely that another parental custody fact situation would fail to yield the presence of at least one of the criteria which could lead to a reason justifying counsel appointment. Although the *Lassiter* decision may have a minimal practical effect on whether a particular indigent parent receives counsel, its ramification will more likely be felt in the Court's future due process analyses.

CONCLUSION

The *Lassiter* decision considered the issue of whether the right to appointed counsel for the parent in a termination of rights hearing is a fourteenth amendment due process guarantee. The Court decided that it was not and identified a rebuttable presumption that counsel is provided only when physical liberty is in jeopardy. All other due process factors—the private interest at stake,

160. A similar approach of slowly extending the right to counsel in criminal cases as the states assimilated each previous Constitutional mandate is suggested by KRANTZ, *supra* note 26, at 23.

161. *See supra* notes 150-51 and accompanying text.

the governmental interest, and the risk of error—are weighed and set against the presumption to determine if it is rebutted. In the *Lassiter* case, Ms. Lassiter was not able to overcome this presumption and therefore no error was committed by not providing her with appointed counsel. In the future, decisions regarding an indigent's right to counsel in these hearings will be left to the trial court's discretion, subject to review. By this decision, the Court returned to a case-by-case approach of determining what due process requires—an approach rejected in *Gideon v. Wainwright* for criminal defendants nearly twenty years ago. While the method was revived in *Gagnon v. Scarpelli* in 1973, its use was partially justified on the grounds that the forum was non-adversarial. The elements of *Lassiter,* however, combined an adversary proceeding with a significant private liberty interest, and nevertheless adopted the case-by-case analysis. From a practical outlook, trial courts may find the circumstances (lacking in *Lassiter*) to justify the appointment of counsel. However, from a constitutional standpoint the right to counsel in this and other civil areas has been curtailed.

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