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Abstract

An impoverished mother has no constitutional right to a lawyer’s help in resisting a state’s attempt to take her child away permanently. .

KEYWORDS: baby, court, social services

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> An impoverished mother has no constitutional right to a lawyer's help in resisting a state's attempt to take her child away permanently. . . .[1]

The preceding quote illustrates the press' view of the Supreme Court's decision in *Lassiter v. Department of Social Services.*[2]

In its five-four decision the majority held that court-appointed counsel is not a matter of right in state proceedings to permanently remove a child from his parent's custody. This decision is Justice Potter Stewart's legacy to the nation.

The Supreme Court has recognized a constitutional obligation to provide counsel in criminal cases but it has not yet extended that obligation to include non-juvenile civil proceedings.[3] The constitutional source of the obligation is found in the fourteenth amendment which provides "no state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."[4] In criminal cases one's life or liberty is in danger of deprivation. In civil cases one's money or property is usually endangered. Between the extremes of loss of life or liberty and loss of money or property, lies the loss of one's parental rights. The issue in *Lassiter*, which focused on this intermediate gray area, was whether due process is violated when the state attempts to judicially terminate parental rights without appointing counsel for the parent.

It is necessary to review the Court's factual account given in

1. Miami Herald, June 2, 1981, at 4a, col. 1.
2. ___ U.S. ___, 101 S. Ct. 2153 (1981).
3. Note, *Court Appointment of Attorneys in Civil Cases; The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 382 (1981).
4. U.S. CONST. amend. XIV, § 1.

Lassiter and the historical development of the right to counsel as well as other due process considerations in civil contexts in order to understand not only the significance of *Lassiter* but also the opposing conclusions reached by the majority and dissenting justices. It appears, from the constitutional standards applied by the *Lassiter* Court that the majority considered loss of a child more nearly akin to loss of property than to loss of liberty.[5] Therefore, the differing standards used by the justices in deciding the nature of the process due, will also be examined.

I. The Court's Narration of the Facts

The facts of *Lassiter* are important because Ms. Lassiter was an atypical petitioner in this civil case. In addition, Justice Stewart, for the majority, and Justice Blackmun, for the minority, differed significantly in their interpretation of the relevant events.

In 1975, the District Court of Durham County, North Carolina, adjudicated petitioner's infant son a neglected child.[6] That court based its decision on evidence that Abby Gail Lassiter had not given her son proper medical care. As a result, the infant was transferred to the custody of the Durham County Department of Social Services. Later, in 1976, Ms. Lassiter was convicted of second degree murder,[7] and sentenced to serve twenty-five to forty years in prison.[8] Two years later, in 1978, the Department of Social Services petitioned the district court to terminate Ms. Lassiter's parental rights,[9] basing its petition on a department evaluation that she "ha[d] not had *contact* with the child since December of 1975."[10] In the majority's opinion, this statement seemed to raise the inference that Ms. Lassiter *chose* not to see her son because of her disinterest in him. In contrast, the dissent pointed out

5. *See* pp. 299-305 *infra*, for discussion of due process standards applied in *Lassiter*.

6. 101 S. Ct. at 2156.

7. This conviction stemmed from stab wounds Ms. Lassiter inflicted upon an individual whom her mother was beating with a broom when Ms. Lassiter entered her mother's apartment. *Id.* at 2156 n.1.

8. *Id.* at 2156.

9. *Id.* at 2156-57.

10. *Id.* at 2157 (emphasis supplied).

that Ms. Lassiter did not voluntarily neglect to contact her son, but was *unable* to do so because she was in prison."[11]

According to Justice Stewart, who wrote the opinion for the majority, Ms. Lassiter was notified that the Department of Social Services had a hearing date to seek to terminate her parental rights.[12] Although Ms. Lassiter's mother had retained counsel to assist in efforts to invalidate her murder conviction, Ms. Lassiter never mentioned the termination proceeding to him; she only mentioned it to " 'someone' " at the prison.[13] The majority implied this omission signified Lassiter was indifferent to her rights regarding her son. The dissent, however, related this incident in a different light. Justice Blackmun stated that when Lassiter was advised of the pending termination proceeding "[she] immediately expressed strong opposition to that plan and indicated a desire to place the child with his grandmother."[14] Justice Blackmun also noted Lassiter was not informed she had a right to be represented by counsel at the termination hearing.

Ms. Lassiter was brought from prison to the hearing on Aug. 31, 1978.[15] The Department of Social Services'[16] sole witness was a social worker who detailed the medical neglect of the infant and stated the child should not be placed with his grandmother, who was caring for Ms. Lassiter's four other children. Following this testimony the court advised Ms. Lassiter to cross-examine the witness. Justice Stewart described this event:

> Ms. Lassiter *conducted a cross-examination* of the social worker, who firmly reiterated her earlier testimony. The judge explained several times, with varying degrees of clarity, that Ms. Lassiter should only ask questions at this stage; many of her questions were disallowed because they were not really questions, but arguments.[17]

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11. *Id.* at 2173.
12. *Id.* at 2157.
13. *Id.*
14. *Id.* at 2173.
15. *Id.* at 2157.
16. It is interesting to note that in the majority opinion Lassiter's adversary is called "Department" while in the dissent it is called the "State." *See, e.g., id.* at 2157, 2168.
17. 101 S. Ct. at 2157 (emphasis added).

In contrast Justice Blackmun pointed out that the testimony of the Department's sole witness consisted of inadmissible hearsay evidence, to which Ms. Lassiter made no objection. Justice Blackmun aptly noted that while "[t]he court gave petitioner an *opportunity* to cross-examine the social worker, . . . she apparently *did not understand* that cross-examination required questioning rather than declarative statements."[18]

Ms. Lassiter testified she had properly cared for her son and expressed her desire that he live with his grandmother, brothers and sisters.[19] On appeal from the termination of parental rights, Lassiter's only argument was that the trial court erred in failing to appoint counsel for her.[20]

The differing versions of the facts may perhaps be explained by the effect petitioner's character had upon the Court: She was not merely an ineffective parent, but a convicted murderess. The majority implied termination of parental rights was the only proper outcome in this particular case, and it is arguable that the Court's preoccupation with this result prompted a misapplication of logic and law. Throughout the majority opinion petitioner's character seemingly hangs like a shadow over the logic of the Court. A more "worthy" petitioner might have fared better.[21]

Given the facts in this case the Court's grant of *certiorari* was itself questionable. Justice Burger, concurring in the majority opinion, stated: "Given the record in this case, which involves the parental rights of a mother under lengthy sentence for murder who showed little interest in her son, the writ might well have been a 'candidate' for dismissal as *improvidently granted*."[22] Neither Justice Burger nor the

18. *Id.* at 2173 (footnotes and citations omitted) (emphasis added). At this point the dissent includes testimony from the termination hearing which demonstrates that Ms. Lassiter had no notion as to the nature of cross-examination. The judge was impatient and discourteous to her, and all opportunity to present a meaningful defense was lost. *Id.* at 2173 n.22.

19. *Id.* at 2157-58.

20. *Id.* at 2158.

21. Perhaps a more "worthy" petitioner would not be a convicted murderess, have had a number of children out of wedlock, or be imprisoned for several decades and unable to personally care for her child. In *Lassiter*, all these factors combined to make the petitioner particularly unappealing.

22. 101 S. Ct. at 2163 (emphasis added).

other justices explain why *certiorari* was granted.

II. Historical Development of Right to Counsel[23]

The Supreme Court had never before heard a case involving the right to counsel in the context of parental rights termination.[24] Since the Court had not extended the right to court-appointed counsel to non-juvenile civil cases,[25] it was necessary for the *Lassiter* Court to consider both the right to counsel in criminal cases and the due process given in civil cases.

The extension of fourteenth amendment due process guarantees to include the right to state appointed counsel is a recent development. In 1932 the Court, in *Powell v. Alabama*[26] determined due process required courts to assign counsel for indigent defendants in capital cases. However, the *Powell* Court declined to determine whether that right extended to other criminal prosecutions.[27]

Addressing the appointment of counsel in *Lassiter* the Court's analysis began with *Betts v. Brady*.[28] In *Betts*, the Court refused to extend the automatic right to counsel for indigents charged with non-capital criminal offenses, deciding that state courts had the power to appoint counsel, or not, as they deemed proper.[29] *Betts* held sway for over twenty years, until the case-by-case approach was overruled in the landmark decision *Gideon v. Wainwright*.[30]

In *Gideon* the Court expanded the automatic right to counsel to include all non-capital felony cases. This shift from *Betts* demonstrated the Court's concern for fundamental fairness: "[R]eason and reflection require us to recognize that in our adversary system of criminal justice,

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23. The historical development of the right to counsel is also treated in Note, *Constitutional Law - Due Process - Indigent Parents' Right to Counsel in Child Neglect Cases*, 46 TENN. L. REV. 649 (1979).

24. The Supreme Court denied certiorari in a case similar to *Lassiter* in Kaufman v. Carter, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678, *cert. denied*, 402 U.S. 964 (1971). *See* discussion at p. 295 *infra*.

25. *See* note 3 *supra*.

26. 287 U.S. 45 (1932).

27. *Id.* at 71.

28. 316 U.S. 455 (1942).

29. *Id.* at 473.

30. 372 U.S. 335 (1963).

any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[31]

In the twenty years since *Gideon*, the Court decided several cases specifically bearing on *Lassiter*. The Court found the right to appointed counsel existed in juvenile proceedings where a child faced institutionalization in a juvenile detention facility.[32] In addition the Court found the right to counsel exists in any prosecution threatening any length of imprisonment.[33] Of the five justices reaching the merits in *Vitek v. Jones*,[34] four concluded counsel must be appointed for a prisoner in a proceeding to transfer him from prison to a mental hospital.[35]

Further expansion of the right to counsel was later inhibited by *Morrisey v. Brewer* and *Gagnon v. Scarpelli*.[36] In *Morrisey*, the Court held an informal pre-revocation hearing must precede parole revocation, but declined to decide whether the parolee was entitled to assistance of counsel, whether retained or appointed.[37] In *Gagnon*, the Court admitted that counsel might be necessary to assure due process in parole revocation proceedings, but decided a case-by-case approach was adequate to determine whether counsel should be appointed.[38] The

31. *Id.* at 344.

32. In re Gault, 387 U.S. 1 (1967). Although a juvenile proceeding is not a criminal trial, the Court reasoned that the danger of incarceration in a juvenile detention institution was comparable to imprisonment. The penalty of incarceration, rather than the nature of the proceeding, made the presence of counsel requisite. *Id.* at 12-31.

33. Argersinger v. Hamlin, 407 U.S. 25 (1972). The Court held "that absent 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." *Id.* at 37. In any proceeding — no matter how minor — where incarceration might result, the right to counsel was definitively assured.

34. 445 U.S. 480 at 497 (1980).

35. *Id.* The fifth justice concluded that some independent assistance should be provided to an inmate in such a proceeding, but that assistance need not necessarily be a licensed attorney.

36. 408 U.S. 471 (1972); 411 U.S. 778 (1973).

37. 408 U.S. at 489.

38. 411 U.S. at 790. The Court reasoned that revocation of parole or probation was not part of a criminal trial and therefore the full due process protections of criminal trials did not apply. *Id.* at 781. It is interesting to note that in In re Gault, the nature of the punishment was the determining factor in requiring the appointment of counsel, even though the juvenile proceeding was not considered a criminal one. In

Lassiter Court relied on these cases to justify its affirmation of the case-by-case approach in deciding whether counsel need be appointed.

In the civil arena, the Supreme Court had not, before *Lassiter*, reached the merits of the right to counsel issue in termination of parental rights proceedings. The opportunity presented itself in 1971, when *Kaufman v. Carter*,[39] a case remarkably similar to *Lassiter*, came before the Court. The Court denied *certiorari*,[40] refusing to decide whether an indigent mother was entitled to court-appointed counsel in a state initiated civil suit seeking to declare her an unfit mother and obtain custody of five of her seven children. Justice Black, dissenting from the denial of *certiorari*, argued the Court should have heard the case and counsel should have been appointed:

> The necessity of state-appointed counsel is particularly acute in cases like one of those before us, *Kaufman v. Carter*, where the state initiates a civil proceeding against an individual to deprive her of custody of her children. Here the state is employing the judicial mechanism it has created to enforce society's will upon an individual and take away her children. *The case by its very nature resembles a criminal prosecution.* The defendant is charged with conduct—the failure to care properly for her children—which may be criminal and which in any event is viewed as reprehensible and morally wrong by a majority of society. And the cost of being unsuccessful is dearly high—loss of the companionship of one's children.[41]

Davis v. Page,[42] a fifth circuit case, also involved the right to court-appointed counsel in a parental rights proceeding. In *Davis*, the

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Gagnon, on the other hand, the fact that the revocation of parole or probation was not part of a criminal proceeding seems to be the determining factor in not requiring appointment of counsel, even though the result, as in *In re Gault*, might be incarceration.

39. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971), discussing denial of certiorari in *Kaufman*, 402 U.S. 964 (1971).

40. *Id.* at 964. Although Justice Black's dissent to denial of certiorari in *Kaufman* seems directly related to the issues in *Lassiter*, the Court makes no mention of his opinion in *Lassiter*.

41. *Id.* at 959 (emphasis added).

42. 618 F.2d 374 (5th Cir. 1980), *modified*, 640 F.2d 599 (5th Cir. 1981) (en banc), *petition for cert. filed, sub nom.* Chastain v. Davis, 50 U.S.L.W. 3109 (U.S. May 7, 1981) (No. 80-1888).

hearing concerned removal of the child from the parent's custody[43] while in *Lassiter* the hearing concerned the final termination of all parental rights.[44] Unlike Ms. Lassiter, the parent in *Davis* had no criminal record. The fifth circuit determined the parent was indeed entitled to a court appointed attorney to assure compliance with due process.[45]

Lassiter may have a negative effect on the decision in *Davis*, since *Davis* will probably be vacated and remanded for reconsideration in light of *Lassiter*.[46] It is interesting to speculate whether the Supreme Court would have overruled the fifth circuit decision in *Davis*, had *Davis* come before the Court prior to *Lassiter*.

Since decisions specifically involving the right to appointed counsel have been mainly limited to criminal cases, the *Lassiter* Court was compelled to analyze due process requirements in civil cases generally, rather than the right to counsel specifically. The right to counsel is one aspect of due process. In deciding what process was due in *Lassiter*, the Court relied on its decision in *Mathews v. Eldridge*.[47]

Since 1976 when *Eldridge* was decided, it has been the tool with which the Court decides due process issues.[48] *Eldridge* articulated a three-pronged test to be applied in due process determinations: "First, the *private interest* that will be affected by the official action; second, *the risk of erroneous deprivation* of such interests, through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally *the Government's interest*, . . ."[49]

The guideposts of *Eldridge* were generated by the Court's earlier decisions in civil due process cases.[50] In *Cafeteria Workers v. McElroy*

43. *Id.* at 375.

44. 101 S. Ct. at 2156, 2157.

45. 640 F.2d at 604.

46. *See* note 42 *supra*. If *Davis* should be remanded, the case-by-case approach mandated by *Lassiter* would be applied. However, the lower court could still decide that in this particular case the parent is entitled to a court appointed attorney.

47. 101 S. Ct. at 2159 citing 424 U.S. 319 (1976).

48. *See* Dixon v. Love, 431 U.S. 105 (1977); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Little v. Streater, ___ U.S. ___, 101 S. Ct. 2202 (1981). In these cases the *Eldridge* factors were applied to evaluate the procedural due process necessary when a drivers license was to be revoked, utilities were to be shut-off, and paternity to be adjudicated.

49. 424 U.S. at 335 (emphasis added).

50. *See* Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) (right to a hearing

the Court considered the litigant's private interests—loss of government employment.[51] In *Goldberg v. Kelly*,[52] the Court considered the importance of the private interest in determining the timing of a hearing for termination of welfare benefits,[53] and found the private interest important enough to require a pre- rather than post-termination hearing be afforded.[54] *Goldberg* evaluated and weighed the government's interest in protecting the poor and avoiding increased fiscal burdens.[55]

In both *Richardson v. Perales*[56] and *Kelly* the Court considered the risk of erroneous deprivation as part of the due process issue. In *Perales* physicians' reports were deemed sufficient evidence for finding nondisability in a claim for Social Security disability benefits.[57] The procedure carried with it a low risk of erroneous deprivation, and it can be inferred from the Court's reasoning that the low risk was a factor in the decision.[58] In *Kelly* however, the evidence relied on in terminating welfare benefits was severely subject to "honest error or irritable misjudgment. . . ."[59] Since the risk of erroneous deprivation was great, the Court required a pre-termination hearing in this case.[60]

In *Eldridge* the Court adroitly interwove and balanced these considerations to formulate the factors necessary for fulfillment of due process requisites. As the culmination of a long line of due process deci-

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for firing); Goldberg v. Kelly, 397 U.S. 254 (1970) (timing of hearing for termination of welfare benefits); Bell v. Burson, 402 U.S. 535 (1971) (nature of hearing required for suspension of drivers license); Richardson v. Perales, 402 U.S. 389 (1971) (type of procedure required for claim of Social Security disability benefits); Fuentes v. Shevin, 407 U.S. 67 (1972) (timing of hearing in seizure of property in replevin); Stanley v. Illinois, 405 U.S. 645 (1972) (right to a hearing for unwed father's custody of child); Arnett v. Kennedy, 416 U.S. 134 (1974) (timing of hearing for firing); Fusari v. Steinberg, 419 U.S. 379 (1975) (nature of procedure for eligibility for unemployment compensation).

51. 367 U.S. at 895-96. In addition, the Court made reference to the government's interest in security. *Id.* at 899.

52. 397 U.S. 254.

53. *Id.* at 264.

54. *Id.*

55. *Id.* at 264-65.

56. 402 U.S. 389.

57. *Id.* at 404.

58. *Id.* at 405.

59. 397 U.S. at 266 citing Kelly v. Wyman, 294 F. Supp. 893 at 904-05.

60. *Id.* at 261.

sions, *Eldridge* provides a clear and useful tool for all due process determinations. Nevertheless, the application of *Eldridge* in *Lassiter* was not without conflict.

Due process considerations in civil cases have usually involved the right to a hearing, the timing of the hearing, or the nature of the hearing or procedure in question.[61] In *Lassiter*, there was no question of entitlement to a hearing, nor was the timing of the hearing at issue. Rather, the *nature* of the hearing was the subject of evaluation, and the Court used the *Eldridge* guideposts to determine whether the hearing in *Lassiter* passed due process muster. The facts in *Lassiter* were an important ingredient under the *Eldridge* due process formula. The stakes were not mere property interests, but the benefits and rights of family life. The Court recognized the magnitude of the parent's interest in the custody of his child.[62]

Although the constitution does not specifically state that familial interests are constitutionally protected, a long line of cases have found such constitutional protection for rights existing within the realm of marriage, sexual matters, and child-rearing.[63] In its treatment of due process issues in familial rights cases the Court has held a right to a hearing exists in a case involving a child custody decree obtained in an *ex parte* divorce action,[64] as well as in a case involving child custody rights of unwed fathers.[65] In *Stanley v. Illinois*,[66] an Illinois statute was construed to mean an unwed father could be denied, without a hearing, custody of his children upon the death of the mother.[67] The unwed father was presumed unfit. The Supreme Court held that a hearing was required before a father could be deprived of his chil-

61. *See* note 50 *supra*.

62. 101 S. Ct. at 2160.

63. Skinner v. Oklahoma, 316 U.S. 535 (1942) (involuntary sterilization); Griswold v. Connecticut, 383 U.S. 479 (1965) (contraception); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry).

64. May v. Anderson, 345 U.S. 528 (1952).

65. Stanley v. Illinois, 405 U.S. 645 (1972).

66. *Id.*

67. ILL. REV. STAT. ch. 37, § § 702-1, 702-4, 701-14. The pertinent language of the statute defines a parent as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child." § 701-14. The definition of parent did not include the natural father of an illegitimate child.

dren.[68] The Court in *Lassiter* considered these cases to underscore the magnitude of parental interest in child custody.[69]

Nevertheless, using the due process considerations enumerated in *Eldridge*,[70] and the historical fact that the right to appointed counsel exists mainly in criminal cases, the majority concluded that Ms. Lassiter did not have a right to appointed counsel.

III. The Majority Rationale

The majority's conclusion must be viewed in light of the facts it found persuasive: Ms. Lassiter repeatedly stabbed another human being, inflicting death; she was convicted for this murder; she was serving a twenty-five to forty year prison sentence; she was, therefore, an unfit mother. The majority implied that Ms. Lassiter could not, and should not have won custody of her son under the circumstances. To some critics the majority's treatment of the general issue of whether a parent was entitled to court-appointed counsel appears subordinate to its interest in a particular result for the particular petitioner.

Cases involving due process issues require a two tier inquiry. First, is the specific interest involved one entitled to fourteenth amendment due process protection? Second, if entitlement is demonstrated, what degree of due process protection is appropriate?[71]

There is no doubt that a parent's interest in raising his child is entitled to some due process protection. In *Stanley*, the Court specifically stated "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment."[72] This point is so well settled that *Lassiter* only addressed the second question and decided the degree of procedural protection due.

Based on its historical analysis of the right to counsel, the majority found a presumption rooted in the criminal context, that "an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[73] The majority presumed no right

68. 405 U.S. at 658.
69. 101 S. Ct. at 2160.
70. *See* discussion at p. 296 *supra.*
71. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 507 (1978).
72. 405 U.S. 645 at 651 (citations omitted).
73. 101 S. Ct. at 2159.

to counsel existed because no loss of physical liberty was at stake in *Lassiter*. This presumption was balanced against the three *Eldridge* elements[74] to decide what process was due. The composite analytic picture was thus comprised of private interests, government interests, and risk of erroneous decisions on the one hand, and the presumption that appointed counsel is not constitutionally guaranteed where incarceration is not threatened, on the other.[75]

Applying the *Eldridge* test, the *Lassiter* majority acknowledged a parent's interest in the custody of his child is great[76] and then rapidly proceeded to evaluation of the state's interest. According to the majority the state's interest is not only the child's welfare,[77] but also the desire to make judicial decisions in the most economical manner.[78] The majority wanted to avoid imposing upon the states the expense of court-appointed counsel,[79] as well as the added costs of the lengthened and more complex proceeding likely to result from the assignment of counsel.[80]

While superficially enticing, the soundness of this reasoning seems debatable. In a case-by-case approach the lower court will have to determine whether counsel need be appointed in a particular case. *Cleaver v. Wilcox*[81] suggested three factors to be considered when deciding whether to appoint counsel to fulfill due process requirements in

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74. The Court in *Lassiter* stated that *Eldridge* propounded three elements to be evaluated in deciding the requirements of due process and that the Court must balance these three elements. The majority gave no reason as to why it deemed the *Eldridge* elements proper for application to *Lassiter*, other than that the *Eldridge* elements concern due process. *Id.*

75. *Id.*

76. 101 S. Ct. at 2160.

77. *Id.*

78. *Id.*

79. *Id.* According to the majority in *Lassiter*, thirty-three states and the District of Columbia have statutes which already provide for the appointment of counsel in termination of parental rights and child dependency cases. *Id.* at 2163. It appears the majority declined to impose upon the states that which the majority of states have seen fit to impose upon themselves.

80. *Id.* at 2160.

81. 499 F.2d 940 (9th Cir. 1974). This was a class action seeking the right to appointment of counsel in child dependency proceedings. An amendment to the California Statutes — CAL. STATS. WELF. & INST. CODE § 600 (Deering) *see also* § 318.5, now provides for counsel as a matter of right in this type of proceeding.

a child dependency proceeding: (1) length of probable parent-child separation; (2) presence or absence of parental consent or disputed facts; (3) the parent's ability to handle relevant documents and examination of witnesses at the proceeding.[82] The preceeding factors will necessarily vary and warrant individualized evaluation in each case, although each state may create its own guidelines. To use this method, the judge needs to investigate each case, familiarize himself with the abilities of the parents, and determine their capacity to proceed *pro se*. Is it more economical to allot a judge's time to these inquiries, than to require automatic appointment of counsel upon determination of indigency? If judicial economy is a valid state interest it appears the *Wilcox* case-by-case approach defeats rather than serves this interest. The majority admitted, however, the state's pecuniary interests in *Lassiter* were insufficient to overcome the parental interests represented in the case.[83]

The third *Eldridge* factor concerns the possibility that erroneous decisions will result from the procedures currently used. This factor requires the court to consider whether the proposed procedure will significantly affect the outcome in a particular case. In *Lassiter*, the Court framed the inquiry as whether "a parent will be erroneously deprived of his or her child because the parent is not represented by counsel."[84] In answering the question the majority acknowledged in some cases parents might risk erroneous deprivation since, without counsel, they could not adequately represent their interests.[85] However, this would not necessarily occur in every situation.[86]

The majority stated that the weight of the *Eldridge* factors might rebut the presumption against appointed counsel in some cases but not in others.[87] For example, in a particular case where state's interests are strong, private interests weak, and risk of erroneous decision slight, the presumption against appointed counsel would not be rebutted. However, where the state's interests are slight, private interests great, and risk of error high, the presumption might be rebutted.[88] Since the

82. *Id.* at 945.
83. 101 S. Ct. at 2160.
84. *Id.*
85. *Id.* at 2161.
86. *Id.* at 2162.
87. *Id.*
88. *Id.*

weight of the *Eldridge* factors differ in each case, the majority adopted the case-by-case approach established in *Gagnon* as the proper method for deciding when counsel should be appointed.[89]

The application of this balancing test will be troublesome for lower courts. The majority did not explain the circumstances under which state interests could outweigh parental interest. Nor does the majority explain why courts should not defer to *any* risk of error where potential loss is great and the parent unrepresented.

Applying the case-by-case approach to *Lassiter* the majority concluded Ms. Lassiter had no right to counsel. In the majority's view the risk of error was slight because "the case presented no specially troublesome points of law, either procedural or substantive,"[90] and "that counsel for Ms. Lassiter could not have made a determinative difference."[91] Since the majority believed the presence of counsel could not have changed the outcome in *Lassiter*, it did not evaluate the need for counsel in termination proceedings generally.

IV. The Dissent's Counterpoint

Writing for the dissent, Justice Blackmun recognized his brethren's failure to look beyond petitioner's character in the *Lassiter* decision. "[T]he issue before the Court is not petitioner's character; it is whether she was given a meaningful opportunity to be heard. . . ."[92]

Justice Blackmun did not question the propriety of the application of *Eldridge* but applied them himself, to reach the opposite conclusion: due process required the appointment of counsel for an indigent parent threatened with judicial termination of parental rights.

Evaluating the *Eldridge* test, Justice Blackmun, like the majority, acknowledged the importance of the first factor—parental interest. He emphasized, however, the magnitude of this interest to a greater extent than the majority.[93] Evaluating the second *Eldridge* factor—state interests—Justice Blackmun easily dismissed the state's financial interest

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 2175.
93. *Id.* at 2166.

as a limited one,[94] while admititng the state's interest in the welfare of the child is a legitimate one.[95] The Justice pointed out, however, that the child's protection is not occasioned by unnecessarily removing him from his biological parents.[96] Therefore, it seems the state's interest would best be served by affording procedural protections in termination proceedings so as to assure against unnecessary or erroneous parent-child separations. It seems obvious appointment of counsel would be the very sort of procedural protection aiding the state in its goal of preventing unnecessary separations. Both the dissent and the majority agreed, however, that the state's interest in *Lassiter* was not the dispositive factor that tipped the scales against court-appointed counsel.[97]

The final *Eldridge* factor—possibility of erroneous deprivation—was the factor that caused most divergence between majority and dissenting views. The majority believed in some cases risk of erroneous deprivation would not be "insupportably high."[98] The dissent, on the contrary, stated that risk of error in this type of proceeding assumed "extraordinary proportion."[99] According to Justice Blackmun, the risk of error was great because the legal issues were not simple.[100] "The parent cannot possibly succeed without being able to identify material issues, develop defenses, gather and present sufficient supporting non-hearsay evidence, and conduct cross-examination of adverse witnesses."[101] It would be a rare parent who could perform those adversarial functions successfully. Justice Blackmun called the majority's acknowledgment that these factors "'may . . . overwhelm an uncounselled parent' a profound understatement."[102]

Based on its evaluation of the *Eldridge* factors, the dissent found illogical the majority's conclusion that counsel need not be appointed in every case.[103] But while the opinions' divergence in the factor analysis

94. *Id.* at 2170.
95. *Id.*
96. *Id.*
97. *Id.* at 2170.
98. *Id.* at 2162.
99. *Id.* at 2170.
100. *Id.* at 2169.
101. *Id.*
102. *Id.*
103. *Id.* at 2171.

was not insignificant, the critical difference between majority and dissenting approaches focused on the manner in which *Eldridge* was applied. Justice Blackmun asserted that the case-by-case approach in this context reflected erroneous application of *Eldridge*[104] because it necessitated judicial evaluation of litigants. Rather than evaluating different litigants within a given context, the correct inquiry concerns due process needs arising within different legal *contexts*.[105] Justice Blackmun supported this reasoning: "But 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 to rare exceptions."[106]

The majority's decision in *Lassiter* is most vulnerable on this point. In *Eldridge*, the three-step test was applied to the *proceeding* involved in termination of disability benefits, rather than to the *litigant*, in order to determine constitutional sufficiency of the nature and timing of the procedure.[107] It is clear from the *Eldridge* decision that the Court intended the test to be used in evaluating procedures rather than litigants; the decision turned not on the facts surrounding Mr. Eldridge's loss of benefits but on the termination proceedings in general.[108] Moreover, in the Court's succeeding applications of *Eldridge* it has consistently applied the test to *legal contexts* rather than to litigants.[109] It is amazing if not ironic that in *Little v. Streater*,[110] decided the same day as *Lassiter*, the Court applied *Eldridge* in a manner con-

104. *Id.* at 2171.

105. *Id.*

106. *Id.* citing *Eldridge*, 424 U.S. at 344.

107. 424 U.S. at 336.

108. *Id.*

109. *See* Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 at 494 (1976) (procedures for firing teachers); Ingraham v. Wright, 430 U.S. 651 at 675 (1977) (procedure for inflicting corporal punishment in public schools); Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 at 849 (1977) (procedures for removal of foster children from foster homes); Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 at 86 n.3 (1978) (procedures for dismissal of students for academic deficiencies); Carey v. Piphus, 435 U.S. 247 at 259 (1978) (procedures for suspension of public school students); Memphis Light, Gas & Water Division v. Craft, 431 U.S. 1 at 17-18 (1978) (procedures for terminating utility services); Addington v. Texas, 441 U.S. 418 at 425 (1979) (civil proceeding to commit an individual to a state mental hospital).

110. 101 S. Ct. 2202 (1981).

sistent with previous decisions. It used the three-pronged test to evaluate private interests, state interests, and risk of erroneous deprivation in paternity proceedings in general.[111] The Court in *Little* did not consider Mr. Little's particular situation. Nevertheless, in *Lassiter* the Court specifically stated that each parent-litigant will be evaluated individually.[112] This novel application of *Eldridge* is completely contrary its spirit and seems irreconcilable with the Court's traditional use of that test.

Justice Blackmun also disagreed with the majority's presumption that counsel should be appointed only when loss of physical liberty is threatened.[113] The trend of prior Court decisions indicates there should be no such presumption, though most of those decisions dealt with criminal cases. Dissenting from denial of *certiorari* in *Kaufman*, Justice Black stated "the necessity of state-appointed counsel is particularly acute in [child dependency proceedings]."[114] He found no presumption that court-appointed counsel was limited to cases involving deprivation of physical liberty.

The *Lassiter* dissent also pointed out that loss of liberty was *not* the only threat warranting court-appointed counsel. Justice Blackmun cited *Vitek*, in which a plurality required appointment of counsel even though transfer from prison to a mental hospital did not involve additional confinement.[115] *Vitek* focused on the consideration that "[t]he stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that [require] procedural protections."[116] The *Vitek* Court specifically stated the *stigma* which attaches to mental hospital confinement raised the need for procedural protections.[117] It is arguable that just as great a stigma attaches to parents whose children are taken away by the state. The involuntary loss of parental rights is perhaps even more severe than

111. *Id.* at 2208.
112. 101 S. Ct. at 2162.
113. *Id.* at 2166.
114. 402 U.S. at 959.
115. 101 S. Ct. at 2167.
116. 445 U.S. at 494.
117. *Id.*

involuntary subjection to treatment for mental illness. Hospitalization and treatment may be viewed as a helpful service, rather than a punishment, but loss of parental rights affords no such redemptive aspect for the petitioner. Nevertheless, the majority presumed away the parent's right to an appointed attorney while the prisoner's right was preserved.

The dissent rebutted the majority's use of *Gagnon* in supporting its conclusion that a presumption exists against appointment of counsel.[118] The Court in *Gagnon* held appointed counsel was not required, even though revocation of parole or probation results in loss of physical liberty. The dissent did not read *Gagnon* and *Vitek* as holding loss of physical liberty the *only* factor to consider when determining whether counsel should be appointed.[119] Therefore, according to the dissent, the majority erroneously decided such a presumption exists.[120]

Justice Blackmun offered another criterion for deciding whether counsel should be appointed: the *nature* of the proceeding itself.[121] Compared with *Gagnon*, a termination of parental rights hearing is a formal proceeding. In *Gagnon* technical rules of procedure and evidence did not apply because of the informal nature of the parole revocation hearing,[122] whereas in *Lassiter* the North Carolina statute provided for *formal* and *adversarial* procedures to extinguish parental rights.[123] Justice Blackmun pointed this out: "Indeed, the State here has prescribed virtually all the attributes of a formal trial as befits the severity of the loss at stake in the termination decision—every attribute, that is, except counsel for the defendant parent."[124] A similar view was held in *Kaufman* by Justice Black, who compared dependency proceedings to criminal prosecutions.[125]

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118. 101 S. Ct. at 2166.

119. *Id.*

120. *Id.*

121. *Id.* at 2167.

122. 411 U.S. at 787. N.C. GEN. STAT. § § 7a-289.23; 7a-289.25; 7a-289.27(l); 1a-1 Rule 1 (Supp. 1979); 101 S. Ct. at 2167.

123. *Id.* The government initiates the proceeding by filing a petition and serving a summons on the parent; a judge presides over the hearing and conducts the proceeding pursuant to the formal rules of evidence and procedure.

124. *Id.* at 2168.

125. 402 U.S. at 959.

Another troublesome element of the *Lassiter* majority's reasoning was its application of *Eldridge* at all.[126] Justice Blackmun did not take exception to the application of the *Eldridge* standards to *Lassiter.* However, in his own three-paragraph dissent, Justice Stevens[127] recognized that by employing the *Eldridge* balancing test, the majority chose "an appropriate method of determining what process is due in *property* cases."[128] This, of course, is not necessarily an appropriate test where parental rights hang in the balance. Surely it seems logical that when the Court addressed what due process was requisite when a party stood to lose his Social Security disability payments[129]—a case involving *monetary* losses—it did not calculate or intend that these same criteria be applied when loss of *parental rights* was contemplated.

The majority could have relied on other precedents demonstrating the loss of parental rights cannot be compared with loss of property; the former is a much greater loss. Justice Blackmun acknowledged these precedents, citing a series of cases that show loss of parental rights has been considered a more grievous deprivation than the loss of property.[130] For example, in *May v. Anderson*[131] the Court acknowledged that "[r]ights far more precious . . . than property rights will be cut-off if [a parent] is to be bound by the Wisconsin award of custody [to the other parent.]"[132] The high degree of protection given parental rights was also expressed in *Stanley v. Illinois,*[133] when the Court stated: "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this

126. 101 S. Ct. at 2159.

127. 101 S. Ct. at 2176.

128. *Id.* (emphasis added).

129. 424 U.S. at 349.

130. *Id.* at 2165. *See* May v. Anderson, 345 U.S. 528, 533; Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Kovacs v. Cooper, 336 U.S. 77, 95 (1949); Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977); Moore v. East Cleveland, 431 U.S. 494, 499 (1977); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

131. 345 U.S. 528. The Supreme Court held that a child custody decree of another state need not be given full faith and credit when that decree was obtained in an ex parte divorce action. *Id.* at 534.

132. *Id.* at 533.

133. 405 U.S. 645.

Court with a momentum of respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' "[134]

It seems the standard for what degree of process is due should be higher when the loss is parental rights rather than property rights. In *Goldberg v. Kelly*,[135] the Court tied the applicable standard to the loss suffered: "The extent to which procedural process must be afforded the recipient is influenced by the extent to which he may 'be condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[136] Using this test the majority necessarily would have concluded that loss of parental rights is one of the most grievous losses a human being can suffer: the highest standard of due process should have been applied in *Lassiter*.

Neither the majority nor dissent compared deprivation in *Argersinger v. Hamlin*[137] to deprivation in *Lassiter*, yet the comparison is illuminating. In *Argersinger*, the defendant faced a $1,000 fine and/or six months in jail. He was actually sentenced to ninety days in jail.[138] The mere possibility of that deprivation of liberty mandated appointment of counsel. If the Court had compared the loss in *Lassiter* to the loss in *Argersinger* using the "grievous loss" test, surely the permanent and absolute loss of parental rights would seem more severe than a short term in prison. On this basis, the due process mandated in *Argersinger* should have been extended to cases involving loss of parental rights.

The *Lassiter* Court could have stated simply and logically what universal rules of human experience teach: the loss of a child is among the most severe of all losses and requires the highest standard of procedural protection. As the circuit court noted in *Davis v. Page*: "To offer counsel when a single day in jail may be at stake, but to deny counsel to an indigent when the destruction of his or her family is threatened,

134. *Id.* at 651 (citations omitted).

135. 397 U.S. 254 (1970). The Court determined in *Goldberg* that a pre-termination hearing must be provided prior to termination of financial aid under federally assisted Aid to Families with Dependent Children program.

136. *Id.* at 2162-63. [citations omitted].

137. 407 U.S. at 26.

138. *Id.*

does not accord with our concept of due process."[139] Further justification would hardly seem necessary, yet both the majority and dissent chose instead to weigh due process requisites in light of the *Eldridge* factors. Only Justice Stevens found no reason for weighing factors. He stated, instead, that due process should be applied here as in a criminal case.[140] According to Justice Stevens "[t]he issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits."[141] To this writer, Stevens' proposition seems self-evident.

Having come to the opposite conclusion with regard to due process right to counsel in termination proceedings in general, the dissent examined the implications of the majority's decision in view of *Lassiter*'s facts. Justice Blackmun made it clear that Ms. Lassiter could not handle cross-examination. She did not present a defense; nor was she aided or advised by the judge as to what she could do.[142] In fact, as apparent from the hearing transcript, the judge was quite rude to her.[143]

The majority concluded that presence of counsel could not have made any difference in the outcome because the issues were not troublesome and because Ms. Lassiter had no arguments to present.[144] This is conjecture. Counsel for Ms. Lassiter might have objected to the hearsay testimony offered by the department's only witness. This evidence comprised the major part of the state's case and was geared to convincing the court that Ms. Lassiter's mother was unable to care adequately for an additional child.[145] Ms. Lassiter's mother denied this allegation[146] and counsel might have stressed both the denial and Ms. Lassiter's interest in having her son returned to his brothers, sisters and grandmother. It is possible that expert witnesses provided by defense counsel might have testified that child rearing among family members was eminently preferable to rearing in foster homes. Ms. Lassiter had no real opportunity to present her case. Nevertheless the majority casu-

139. 640 F.2d at 604.
140. 101 S. Ct. at 2176.
141. *Id.*
142. *Id.* at 2174.
143. *Id.* at 2174 nn.24 and 25.
144. *Id.* at 2162-63.
145. *Id.* at 2173. The social workers hearsay came from unidentified community members.
146. *Id.* at 2173.

ally observed that the outcome would not have been different if counsel had assisted.

Further, it is apparent the majority neglected the sage reasoning of *Armstrong v. Manzo*,[147] where the Court stated due process required litigants have an opportunity to be heard "at a meaningful time and in a meaningful manner."[148] It is inconceivable that the majority actually perceived Ms. Lassiter's opportunity as meaningful.

The circuit court in *Davis* eloquently described the infirmities inherent in denying appointment of counsel in a case like *Lassiter*:

> The State is represented by the State Attorney; it has access to public records concerning the family and to the service of social workers, psychiatrists, and psychologists. Those representing the state have experience in legal proceedings and the ability to examine witnesses, present evidence, and argue skillfully that the child should be adjudicated dependent. Unrepresented parents, in contrast, will normally not cross-examine witnesses, submit evidence, call witnesses, or present a defense. They do not understand the rules of procedure or substantive law. They do not object to improper questions or move to strike improper testimony. . . . [T]hey may not even understand the legal significance and effect of the proceedings.
>
> Unless the indigent parent has the tools necessary to oppose the state's expert presentation, a finding of dependency could be based partially upon inadmissible hearsay, improper opinion evidence, or evidence irrelevant to the issue of dependency, a determination of dependency might be founded upon testimony that a skilled attorney would expose as biased or untrue. The parent may have a defense sufficient to prevent an adjudication of dependency, which he or she is unable adequately to present.[149]

The circumstances which Judge Tuttle described in *Davis* were precisely what occurred in *Lassiter*. The basic truth of the fifth circuit's words in *Davis* were self-evident and seemingly unassailable, yet the

147. 380 U.S. 545. The Court held in this case that failure to give notice to a divorced parent that an adoption was pending deprived him of his parental rights without due process.

148. *Id.* at 552.

149. 618 F.2d at 380-81.

majority in *Lassiter* chose to ignore the import of this argument.

Finally, Justice Blackmun referred to *Little v. Streater*,[150] finding it ironic that the same day the Court decided a parent had no right to appointed counsel in *Lassiter*, it also found an indigent man had a right to state-paid blood-grouping tests taken in order to refute a charge of paternity.[151] In *Little* too the Court applied the *Eldridge* test but came to a result opposite to *Lassiter*. The Court reasoned that absent the blood-grouping tests the petitioner might erroneously be adjudged a father:

> Assessment of the *Mathews v. Eldridge* factors indicates that appellant did not receive the process he was constitutionally due. Without aid in obtaining blood test evidence in a paternity case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, 'lacks a meaningful opportunity to be heard.' "[152]

Was Ms. Lassiter in less danger of an erroneous outcome than Mr. Little? Blood group tests are often inconclusive with regard to paternity.[153] Whether or not the tests were performed Mr. Little might have remained in the same position. In *Lassiter* it is clear damaging hearsay evidence was admitted which may have prejudiced the outcome. The majority nonetheless ignored the import of the erroneous decision element and allowed greater procedural due process protection for Little than for Lassiter. If the holdings of *Little* and *Lassiter* are suggestive of the Court's hierarchy of values it may be argued the *Lassiter* majority believed a higher standard of due process should be afforded when parenthood is imputed than when it is terminated.

Conclusion

It is indeed unfortunate that an important issue—whether due process requires the appointment of counsel for indigents in termination of

150. *Id.* at 2175 citing Little v. Streater, 101 S. Ct. 2202 (1981).
151. *Id.*
152. Little v. Streater, 101 S. Ct. at 2210 (citations omitted).
153. *Id.* at 2206.

parental rights proceedings—was represented by a convicted murderess. It is fascinating to speculate whether the majority would have decided an obvious constitutional right to court-appointed counsel existed in termination proceedings had this question been presented by a non-felonious, hard-working, and exemplary petitoner. The Court should have recognized that any petitioner, no matter how unappealing, has the right to representation in this situation, in order to protect the right to a meaningful hearing. When parents' rights to their children are threatened the highest standards of procedural protection should be afforded without question, because the loss of a child is one of the most tragic of all.

To those of us reaching adulthood in the post-*Gideon* generation, a criminal trial without representation seems the most flagrant violation of constitutional rights. The right to court-appointed counsel seems basic and its non-existence unimaginable; its hard-fought history is practically forgotten. The need for counsel in cases involving termination of parental rights seems no less compelling than the need for counsel in criminal cases. The Court's five-four decision in *Lassiter* makes it clear that this compelling need, for the present, will remain unfulfilled.

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* Professor Michael Masinter, Nova University Law School, graciously provided the fifth circuit appellate briefs for *Davis v. Page*, as well as his invaluable guidance.