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Lassiter v. Department of Social Services: The Right to Counsel in Parental Termination Proceedings

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CASENOTES

Lassiter v. Department of Social Services: The Right to Counsel in Parental Termination Proceedings

In Lassiter v. Department of Social Services, *the Supreme Court of the United States held that due process mandates only a case-by-case analysis for determining when a court should appoint counsel for an indigent parent in an action to terminate parental rights. The author analyzes* Lassiter *in relation to the historical development of an indigent's right to counsel in criminal and civil proceedings. The author argues that a case-by-case analysis is unlikely to afford adequate protection for a parent's right to child custody and is also inconsistent with the Supreme Court's previous decisions establishing an absolute right to counsel in criminal prosecutions.*

In 1975 the District Court of Durham County, North Carolina, removed an infant, William Lassiter, from the custody of his mother, Abby Gail Lassiter, because she had not provided him with proper medical care. The following year, Ms. Lassiter began serving a prison sentence for second-degree murder. In 1978 the Durham County Department of Social Services, to whose custody the court had transferred the child, petitioned the court to terminate Ms. Lassiter's parental rights. The Department alleged that Ms. Lassiter had not maintained contact with William since 1975, had not made significant progress toward correcting the conditions that led to his removal, and had failed to assist the Department in its efforts to improve her relationship with the child and plan for his future.

The court initiated the termination hearing by considering whether Ms. Lassiter should have more time to retain an attorney. Concluding that Ms. Lassiter had already had ample time to seek counsel, the court refused to delay the proceedings. The state had arranged for her to attend the hearing, where, acting pro se, she cross-examined the state's only witness, a social worker from the Department of Social Services, and testified in her own defense.

The court terminated Ms. Lassiter's status as William's parent after finding that she had willfully neglected her child.

Ms. Lassiter appealed to the North Carolina Court of Appeals, arguing for the first time that the fourteenth amendment's due process clause[1] entitled her to the assistance of appointed counsel because she was indigent.[2] The trial court, she claimed, had thus erred in failing to provide her with an attorney. The appellate court held that although a parental termination proceeding invaded the constitutionally protected area of individual privacy, the intrusion was not sufficiently unreasonable to require the appointment of counsel for indigent parents.[3] The Supreme Court of North Carolina subsequently denied Ms. Lassiter's petition for discretionary review.[4] She then appealed to the Supreme Court of the United States, which granted certiorari to consider her due process claim. The Supreme Court *held*, affirmed: The United States Constitution does not mandate the appointment of counsel for indigent parents in every parental termination proceeding, and the determination of whether due process requires appointed counsel in a particular case should be left to the trial court, subject to appellate review. *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

In both civil and criminal cases, the United States Supreme Court has often considered the extent to which the Constitution requires courts to appoint counsel for indigent litigants. The Court established an indigent's right to counsel in criminal prosecutions before it confirmed that an indigent may have a right to counsel in a civil proceeding. This development is not surprising, for in contrast to most adverse civil judgments, criminal convictions frequently affect a defendant's life and liberty. Furthermore, the extreme disadvantage that an unrepresented indigent suffers in a court proceeding is most apparent in a criminal trial.[5] Fifty years

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1. The fourteenth amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

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

3. *Id.* at 527, 259 S.E.2d at 337.

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

5. An indigent litigant is particularly disadvantaged if he lacks the education and sophistication needed to understand the law and proceedings. The Supreme Court also has recognized that even a well-educated layman can be disadvantaged by a lack of counsel:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not

ago, in *Powell v. Alabama*,[6] the Court held that an indigent defendant, prosecuted for a capital offense in a state court, had a constitutional right to appointed counsel. But in *Betts v. Brady*,[7] the Court declined the opportunity to extend this right to crimes that were not punishable by death. The *Betts* Court held that due process did not require state courts to appoint counsel for an indigent defendant in every criminal prosecution; rather, courts should determine when counsel is necessary to ensure a fair trial based on the facts of each case.[8]

In the forty years since *Betts*, the Supreme Court has rejected this case-by-case approach and has established an absolute right to counsel in most criminal prosecutions. In *Gideon v. Wainwright*,[9] the Court overruled *Betts* and held that the sixth amendment's guarantee of counsel in criminal prosecutions[10] was a fundamental right made binding on the states by the fourteenth amendment.[11] In *Argersinger v. Hamlin*,[12] the Court further extended this right, holding that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[13] Relying on the explicit language of the sixth amendment, the Court has also held that an indigent defendant has a right to appointed counsel not only at the trial itself, but also at other stages of a criminal prosecution.[14]

In contrast to an indigent's established right to counsel in criminal prosecutions, the Supreme Court has been reluctant to establish an indigent's right to counsel in civil proceedings. There are two reasons for this result. First, before a court can apply the four-

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know how to establish his innocence.

Powell v. Alabama, 287 U.S. 45, 69 (1932).

6. 287 U.S. 45 (1932). The *Powell* Court reasoned that the inability of most laymen to understand and present even a simple defense makes a meaningful hearing impossible when conducted without legal assistance. A conviction under these circumstances could therefore be a deprivation of life, liberty, or property without due process of law. *Id.* at 69.

7. 316 U.S. 455 (1942).

8. *Id.* at 462.

9. 372 U.S. 335 (1963).

10. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

11. 372 U.S. at 339.

12. 407 U.S. 25 (1972).

13. *Id.* at 37 (footnote omitted).

14. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing to determine whether to send a case to the grand jury); United States v. Wade, 388 U.S. 218 (1967) (post-indictment lineup); *see also* Douglas v. California, 372 U.S. 353 (1963) (extending the right to counsel to appeals of right). *But cf.* Ross v. Moffitt, 417 U.S. 600 (1974) (no right to counsel for discretionary appeals).

teenth amendment's guarantee of due process in a civil proceeding, it must find that an adverse decision may deprive the defendant of a substantive right that is "fundamental" to the concept of life, liberty, or property.[15] Second, a court can determine whether appointment of counsel is necessary to ensure procedural due process only by balancing the defendant's rights against the state's interest in refusing counsel.[16] To achieve "fundamental fairness" in the proceedings, procedural due process requires that a defendant have a "meaningful opportunity to be heard."[17] If a state does not appoint counsel when a defendant's fundamental rights are at stake,[18] the defendant may be denied a "meaningful opportunity to be heard," violating procedural due process.[19]

Before *Lassiter*, several state courts and a few United States courts of appeals had considered whether the Constitution re-

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15. Due process protects only fundamental rights. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (due process applies only when the interest falls within the fourteenth amendment's liberty and property protections). Deciding whether a particular interest is fundamental requires a court to examine the type of interest involved, rather than its weight or the seriousness of the loss. *See* Goss v. Lopez, 419 U.S. 565, 575 (1975) (public school suspension conducted without hearing); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (requirements of due process depend on the type of interest).

16. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Davis v. Page, 618 F.2d 374 (5th Cir. 1980), *aff'd in part*, 640 F.2d 599 (5th Cir. 1981) (rehearing en banc).

17. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 786-88 (1973).

18. A parent's right to the care, upbringing, and custody of children is implicit in the fourteenth amendment's concept of liberty. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 651 (1972); Griswold v. Connecticut, 381 U.S. 479, 495 (1965); May v. Anderson, 345 U.S. 528 (1952); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923). *Meyer* interpreted the term "liberty" in the fourteenth amendment as "not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children . . . ." *Id.* at 399.

19. In a case mentioned in *Lassiter* only by the dissent, 452 U.S. at 58-59 (Blackmun, J., dissenting), the Supreme Court acknowledged that unobstructed access to a court is essential to a meaningful opportunity to be heard. Boddie v. Connecticut, 401 U.S. 371 (1971). In *Boddie* the Court held that a state violated due process by denying an indigent access to a divorce court solely because of the indigent's inability to pay court filing fees. *Id.* at 382-83. Because divorce courts are the only available avenue for marital dissolutions, the Court reasoned that a state may not limit an indigent's access to its divorce courts by erecting financial barriers. The state's interest in collecting filing fees does not outweigh the indigent's right to obtain a divorce. *Id.* at 381.

Although many analogies can be drawn between *Boddie* and *Lassiter*, the *Lassiter* Court refused to extend *Boddie* to guarantee an indigent a right to counsel in a parental termination proceeding. Indeed, the *Boddie* Court restricted its holding to the facts of the case. 401 U.S. at 382. Additionally, more recent Supreme Court decisions have limited *Boddie's* significance. *See, e.g.*, United States v. Kras, 409 U.S. 434 (1973) (due process does not invalidate bankruptcy filing fees, because bankruptcy is not a fundamental right nor the only means of erasing debts); Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam) (due process not violated by requiring indigents to pay filing fees when appealing adverse welfare agency decisions).

quired a state to provide counsel for an indigent parent when it initiated an action to acquire custody of a child.[20] Courts generally conduct two distinct proceedings that can affect a parent's right to child custody: 1) "dependency" proceedings[21] and 2) "termination" proceedings.[22] In a dependency proceeding, the state seeks to assume temporary custody of an abandoned, neglected, truant, abused, or delinquent child.[23] Such an adjudication usually results in the parent losing some rights to the care and custody of a child, but rarely terminates the entire parent-child relationship.[24] In contrast to dependency proceedings, when a state initiates a termination proceeding, it is seeking a total and permanent severance of the parent-child relationship.[25] The parent loses all rights to visit or communicate with the child, and also loses the right to participate in, or even know about any subsequent decisions affecting the child's life.[26]

Some courts distinguish between these two proceedings and appoint counsel for indigent parents only in termination proceedings.[27] The *Lassiter* Court noted this distinction and implied that in deciding whether to appoint counsel, courts should consider the severe deprivation that may result from a termination.[28] Because termination proceedings are more intrusive than dependency proceedings, an indigent's right to appointed counsel, if the right ex-

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20. The *Lassiter* Court noted that courts have generally held that a state must provide appointed counsel for parents at termination proceedings. 452 U.S. at 30; *e.g.*, State *ex rel.* Heller v. Miller, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980); *In re* Chad S., 580 P.2d 983 (Okla. 1978). The majority also observed that some courts have held that a right to counsel also exists in child dependency or neglect proceedings. 452 U.S. at 30 n.6; *e.g.*, Davis v. Page, 618 F.2d 374, 386 (5th Cir. 1980), *aff'd in part*, 640 F.2d 599 (5th Cir. 1981) (rehearing en banc); Cleaver v. Wilcox, 499 F.2d 940, 945 (1974) (case-by-case determination).

21. Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 225 (1979). Some courts refer to these actions as "neglect" proceedings. *Id.*

22. *Id.* at 230.

23. *Id.* at 225.

24. *Id.*

25. *Id.* at 230.

26. Lassiter v. Department of Social Servs., 452 U.S. 18, 39 (1981) (Blackmun, J., dissenting).

27. *See, e.g., In re* D.B., 385 So. 2d 83 (Fla. 1980). In this decision the Supreme Court of Florida held that courts should appoint counsel only when parental rights are permanently terminated or when a parent could face criminal charges arising from the case. If no permanent termination is likely, a court should decide whether to appoint counsel on a case-by-case basis. *Id.* at 91. The court observed that the "extent of procedural due process protections varies with the character of the interest and the nature of the proceeding involved." *Id.* at 89 (citing Morrisey v. Brewer, 408 U.S. 471 (1972)).

28. 452 U.S. at 30.

ists, is more likely to apply in termination rather than dependency proceedings.

Other courts have avoided the distinction between termination and dependency proceedings in determining an indigent parent's right to appointed counsel, and instead focus on the extent of custody loss, rather than the type of proceeding. In *Cleaver v. Wilcox*,[29] for example, the United States Court of Appeals for the Ninth Circuit adopted a case-by-case analysis for determining when an indigent had a right to counsel in dependency proceedings.[30] The *Cleaver* analysis requires a court to weigh three important interests: 1) society's interest in maintaining family integrity; 2) the state's interest in efficient and informal dependency proceedings; and 3) the parent's interest in avoiding an erroneous loss of child custody.[31] In weighing the parent's interests, the *Cleaver* court suggested that a trial judge should consider the length of the potential loss of custody, the presence or absence of parental consent to the separation, the existence of disputed facts, and the parent's ability to understand the complexities of the proceedings without the assistance of counsel.[32]

More recently, however, in *Davis v. Page*,[33] the United States Court of Appeals for the Fifth Circuit rejected *Cleaver*'s case-by-case approach and held that indigent parents have an absolute right to counsel in all dependency hearings.[34] Because even a temporary loss of custody could become effectively permanent by continuing until the child reached majority,[35] the *Davis* court reasoned that a state's intrusion into family integrity is always sufficient to require the appointment of counsel.

In evaluating the need for counsel, the *Davis* court applied the balancing test for assessing the requirements of due process formulated by the Supreme Court of the United States in *Mathews v. Eldridge*.[36] This test requires a court to weigh three factors that

29. 499 F.2d 940 (9th Cir. 1974).

30. *Id.* at 944. The *Cleaver* court recognized that a parent's relationship with his or her child is a "fundamental" interest, but nevertheless held that the "requisites of due process vary according to specific factual contexts." *Id.*

31. *Id.* at 944-45.

32. *Id.* at 945.

33. 618 F.2d 374 (5th Cir. 1980), *aff'd in part*, 640 F.2d 599 (5th Cir. 1981) (rehearing en banc).

34. *Id.* at 386.

35. *Id.* at 376.

36. 424 U.S. 319 (1976). *Eldridge* involved the question whether due process requires a court to conduct an evidentiary hearing before the government could terminate a person's social security benefits.

are similar to those established by the Ninth Circuit in *Cleaver*. The *Eldridge* factors are: 1) the private interest that the official action affects; 2) the risk of an erroneous deprivation of this interest and the value of additional or alternative procedural safeguards; and 3) the government's interests, including the nature of the government function and the extent to which additional or alternative safeguards may impose a financial or administrative burden on the government.[37] Justice Stewart, writing for the *Lassiter* majority, also relied on the *Eldridge* factors, but in contrast to the *Davis* court, he concluded that due process did not mandate an absolute right to counsel.[38]

Lassiter is significant for several reasons. First, the Court resolved a conflict between the Fifth and Ninth Circuits.[39] Second, the Court confronted the trend among state courts toward finding that indigent parents have a constitutional right to appointed counsel in dependency and termination hearings.[40] Third, *Lassiter*'s case-by-case approach established a precedent that discourages courts from extending an absolute right to counsel to other civil cases in which a litigant's physical liberty is not at stake.[41]

The *Lassiter* Court reasoned that determining the right to counsel through a case-by-case analysis was consistent with the requisites of due process and the Court's previous decisions in right-to-counsel cases. The majority set the tone for its analysis by observing that "[f]or all its consequence, 'due process' has never been, and perhaps can never be, precisely defined."[42] Rather, the due process requirement of fundamental fairness can only be defined by assessing the interests at stake, particularly individual physical liberty, and considering any relevant precedents.[43] Among these precedents, the majority considered *Gideon v. Wainwright*[44] and *Argersinger v. Hamlin*,[45] which relied on the sixth and four-

37. *Id.* at 335.

38. 452 U.S. at 31.

39. *See supra* notes 29-35 and accompanying text.

40. *See supra* note 20. The *Lassiter* majority noted that many authorities believe that a court should appoint counsel to represent indigent parents in dependency and termination proceedings. The majority acknowledged that providing an attorney for an indigent parent may be a sound public policy, but concluded that the Constitution did not require such a policy. 452 U.S. at 33-34.

41. *See infra* notes 46-57 and accompanying text.

42. 452 U.S. at 24.

43. *Id.*

44. 372 U.S. 335 (1963); *see supra* notes 9-12 and accompanying text.

45. 407 U.S. 25 (1972); *see supra* notes 12-13 and accompanying text.

teenth amendments to establish an indigent defendant's right to counsel in criminal prosecutions. The *Lassiter* majority reasoned that the importance of protecting a defendant's physical liberty necessitated an absolute right to counsel in both criminal and civil litigations which jeopardize that liberty.[46]

The majority found support for this assertion in several of the Court's previous decisions. In *Scott v. Illinois*,[47] the Court held that the right to counsel does not arise in every criminal prosecution, but only to those in which a court imprisons a convicted defendant.[48] The Court has also established an indigent's right to counsel in civil cases, where the sixth amendment is inapplicable.[49] In a 1960 decision, *In re Gault*,[50] the Court upheld an indigent's right to counsel in a juvenile delinquency proceeding solely on the basis of the fourteenth amendment's due process protection of liberty.[51] The *Gault* Court noted that delinquency proceedings, although denominated as "civil," can have a functionally "criminal" impact because a juvenile court has the power to commit a delinquent child to an institution for several years. This penalty is comparable in severity to the sentence that a criminal court may impose on a convicted felon.[52] In determining a litigant's right to appointed counsel, the civil-criminal distinction thus becomes useless, and liberty becomes the important consideration.[53]

As a litigant's interest in personal liberty diminishes, so does his right to appointed counsel.[54] In *Gagnon v. Scarpelli*,[55] the Court adopted a case-by-case approach for determining the right

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46. 452 U.S. at 25.

47. 440 U.S. 367 (1979).

48. *Id.* at 373-74. The trial court convicted Scott of shoplifting and fined him fifty dollars. Although the trial judge could have sentenced Scott to one year in prison for this offense, the Supreme Court reasoned that the mere possibility of imprisonment was insufficient to invoke the right to counsel. Rather, the Court adopted "actual imprisonment as the line defining the constitutional right to the appointment of counsel." *Id.* at 373.

49. *See* U.S. CONST. amend. VI.

50. 387 U.S. 1 (1967).

51. *Id.* at 41; *see* U.S. CONST. amend. XIV.

52. 387 U.S. at 36. *Gault* emphasized that the "awesome prospect of incarceration" confronts both a juvenile in a delinquency proceeding and an adult in a criminal proceeding. *Id.*

53. *Id.* at 49-50. Some jurisdictions have, however, relied on the civil-criminal distinction in refusing to recognize a right to counsel in termination proceedings. *See* Comment, *Appointment of Counsel Is Required for Indigent Parents Faced with a Dependency-Neglect Proceeding*, 6 RUT.-CAM. L.J. 623, 633 n.70 (1975). But a majority of states statutorily require appointed counsel for indigent parents at termination proceedings. *See* 46 TENN. L. REV. 649, 651 n.10 (1979).

54. *See Lassiter*, 452 U.S. at 26.

55. 411 U.S. 778 (1973).

to counsel in probation revocation hearings. The *Gagnon* Court reasoned that revocation did not deprive a probationer of an unfettered right to liberty, but only a liberty dependent on the observance of special restrictions. The Court therefore limited the right to counsel to hearings in which the issues are too complex for a layman to understand, or to those in which the probationer is incapable of speaking for himself.[56]

From these precedents the *Lassiter* majority derived a presumption that fundamental fairness requires a court to appoint counsel for an indigent litigant "only when, if he loses, he may be deprived of his physical liberty."[57] A court must, therefore, weigh the factors in a due process analysis against this presumption when determining whether to appoint counsel in a proceeding that does not threaten a litigant's freedom. For this analysis the *Lassiter* majority adopted the three *Eldridge* factors: the private interest, the risk of error, and the government's interest.[58]

The Constitution protects a parent's right to the care, upbringing, and custody of children from unreasonable governmental interference.[59] This is particularly true when a state is not simply infringing on the right, but seeking to terminate it. Because a termination proceeding may result in a "unique kind of deprivation,"[60] the *Lassiter* majority reasoned that parents have a "commanding" interest in an accurate and just decision.[61]

The risk of error varies with the complexity of the proceedings. Although a parent is undoubtedly familiar with the subject of a termination hearing, these hearings often present difficult legal issues which a court must resolve. The majority reasoned that the expert medical and psychiatric testimony presented at these hearings, the parent's lack of education, and the stressful atmosphere of the hearing may combine to "overwhelm an uncounseled parent."[62]

The state has two conflicting interests in a termination proceeding: justice and efficiency. The state is concerned with protecting the child's welfare and therefore shares the parent's desire for

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56. *Id.* at 790-91.

57. 452 U.S. at 27.

58. *See supra* note 37 and accompanying text.

59. *See supra* note 18.

60. *Lassiter*, 452 U.S. at 27.

61. *Id.* Some parents may have an additional interest, because petitions to terminate parental rights often allege criminal conduct. These parents may need an attorney to help them understand the problems that these allegations may create. *Id.* at 27 n.3.

62. *Id.* at 30.

a just decision. The state might best serve this interest by appointing counsel for the parent.[63] But the state also has an interest in informal, efficient, and inexpensive termination proceedings, an interest that might be thwarted by appointing counsel.[64] Although this interest is legitimate, the majority reasoned that it could not overcome the parent's right to receive a fair hearing.[65]

Although the *Eldridge* factors appear to favor a requirement that courts appoint counsel for indigent parents, the *Lassiter* majority stated that the dispositive question was whether these factors outweighed the presumption that a defendant has no right to appointed counsel absent a threat to his physical liberty.[66] The majority conceded that due process might require a court to appoint counsel when the parent's interests and the risk of error were strong and the state's interest in refusing counsel was weak. The *Eldridge* factors will not, however, always be distributed in this manner. Accordingly, the majority left the decision whether to appoint counsel to the trial courts, subject only to appellate review.[67] The majority then reviewed the record from Ms. Lassiter's termination hearing and held that the trial court did not err in failing to appoint counsel.[68]

As Justice Blackmun demonstrated in his dissenting opinion, the majority's analysis is open to substantial criticism. Blackmun rejected the presumption that indigent litigants have a right to appointed counsel only in proceedings that threaten their physical freedom; he argued that the Court's previous decisions show that incarceration is "neither a necessary nor a sufficient condition for requiring counsel on behalf of an indigent defendant."[69] The Court, for example, has not required counsel for parolees or probationers at revocation hearings, even though the hearings led to

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63. *Id.* at 28. Our adversary system assumes that an equal presentation from both sides in a legal proceeding is most likely to produce a just result. Thus, the desire to ensure an accurate result may prompt the state to provide an attorney to represent an indigent parent. *See id.*

64. *Id.* An attorney representing an indigent parent may thwart the state's desire for efficiency and economy by prolonging termination proceedings and increasing their cost. *Id.*

65. *Id.* North Carolina conceded that the cost of providing indigent parents with an attorney at termination hearings would be insignificant in comparison to the cost of providing attorneys for indigent criminal defendants. *Id.*

66. *Id.* at 31.

67. *Id.* In adopting a case-by-case approach, the *Lassiter* majority relied on Gagnon v. Scarpelli, 411 U.S. 778 (1973), as precedent. *See also supra* notes 56-57.

68. 452 U.S. at 32-33. For a discussion of the majority's due process analysis of Ms. Lassiter's termination hearing, see *infra* notes 84-85 and accompanying text.

69. 452 U.S. at 40 (Blackmun, J., dissenting).

their incarceration.[70] On the other hand, the Court has required the appointment of counsel for an already incarcerated indigent prisoner before the state could involuntarily transfer him from a prison to a mental hospital.[71] In the absence of this presumption, the Court's case-by-case approach appears "illogical," because the *Eldridge* factors always favor providing counsel for the parent in termination proceedings.[72]

Justice Blackmun argued further that the Court, in *Gideon v. Wainwright*,[73] had "thoroughly discredited"[74] the case-by-case approach for evaluating due process in criminal prosecutions by stating: "[I]n 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 for him."[75] Blackmun noted that in civil litigations the Court has adopted a more flexible approach to due process analysis, but even in those cases the Court has established the requirements of due process by assessing the individual interest at stake and the nature of the proceeding, rather than the facts of a particular case.[76]

Lassiter appears to deviate from the Court's usual practice of providing "a rule that has general application to similarly situated cases."[77] As Justice Blackmun observed, establishing rules that fit the context of the litigation, rather than the characteristics of a particular litigant, is essential in maintaining the predictability and uniformity of procedural requirements. A case-by-case approach, which requires "a retrospective review of the trial record of each particular defendant parent . . . undermines the very ratio-

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70. *Id.* (citing Gagnon v. Scarpelli, 411 U.S. 778 (1973)); *see* Morrissey v. Brewer, 408 U.S. 471 (1972); *supra* notes 55-56 and accompanying text. Justice Blackmun observed that the informal nature of revocation hearings influenced the *Gagnon* Court in its decision that due process required a case-by-case approach for determining the right to counsel in such proceedings. At revocation hearings the state usually is not represented by an attorney and the rules of evidence generally are not in force. 452 U.S. at 36.

71. Vitek v. Jones, 445 U.S. 480 (1980). In *Vitek* the Court emphasized the different forms of incarceration and the stigma that a prisoner might suffer from being confined in a mental hospital. *Id.* at 492. The Court also reasoned that prisoners with mental problems might be incapable of speaking for themselves. *Id.* at 496-97.

72. 452 U.S. at 49 (Blackmun, J., dissenting).

73. 372 U.S. 335 (1963).

74. 452 U.S. at 35 (Blackmun, J., dissenting).

75. *Id.* at 36 (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

76. 452 U.S. at 36-37 (Blackmun, J., dissenting). Justice Blackmun observed that a termination hearing closely resembles a criminal trial: The hearing has an accusatory and punitive focus; a judge presides over the hearing; a prosecuting attorney represents the state; and the rules of evidence are in force. *Id.* at 37.

77. *Id.* at 49.

nale on which this concept of general fairness is based."[78]

In adopting a case-by-case approach, the *Lassiter* majority assumed that appellate courts will be able to determine from the record whether the lack of counsel subjected a parent to an unfair disadvantage. This determination will require, however, appellate courts to engage primarily in speculation, because the record will not reveal the arguments an attorney might have made, but will only demonstrate the parent's obvious blunders.[79] Even if a meaningful appellate review were possible, Justice Blackmun argued, it would be cumbersome and expensive.[80] Thus, *Lassiter*'s flexible standard for evaluating due process jeopardizes both the individual's interest in a just decision and the state's interest in procedural economy and efficiency.

As a comparison between the majority opinion and Justice Blackmun's dissent illustrates, appeals based on a refusal to appoint counsel are likely to produce unpredictable and inconsistent results. This is illustrated in *Lassiter*, because both the majority and the dissent applied the *Eldridge* factors to Ms. Lassiter's case, but arrived at opposite conclusions. In affirming the North Carolina Court of Appeals decision that due process did not require the trial court to appoint counsel for Ms. Lassiter, the majority reasoned that the risk of error (the second *Eldridge* factor) was insubstantial. The majority noted that although North Carolina did not provide an attorney for Ms. Lassiter, the state had established other procedural safeguards. These included notice,[81] a hearing,[82] and an appeal.[83] In addition, the state required that a judgment terminating parental rights must "be based on clear, cogent, and convincing evidence."[84] The majority also observed that Ms. Lassiter's hearing did not involve any complex issues, procedures, or points of law. Despite Ms. Lassiter's concededly incomplete defense, the majority concluded that the evidence against her was so substantial that the presence of counsel would not have led to a

78. *Id.* at 50 (footnote omitted).

79. *Id.* at 51.

80. *Id.*

81. *Id.* at 28-29 (citing N.C. GEN. STAT. § 7A-289.27 (1981)).

82. *Id.* at 29 (citing N.C. GEN. STAT. § 7A-289.28 (1981)).

83. *Id.* (citing N.C. GEN. STAT. § 7A-289.34 (1981)).

84. *Id.* (quoting N.C. GEN. STAT. § 7A-289.30 (1981)). The Supreme Court has recently held that due process requires a state to prove its allegations in a termination proceeding by at least clear and convincing evidence. Santosky v. Kramer, 102 S. Ct. 1388 (1982). For a discussion of *Santosky*, see 36 U. MIAMI L. REV. 369 (1982).

different result.[85]

Justice Blackmun expressed a markedly different view of the record. He stressed Ms. Lassiter's obvious legal blundering at the hearing, including her failure to pursue available defenses,[86] her failure to object to damaging hearsay evidence,[87] and her inability to effectively cross-examine the state's only witness, a social worker from the Department of Social Services.[88] He argued that these factors indicated that her hearing was far from "fundamentally fair," and concluded: "[T]he Court simply ignores the defendant's obvious inability to speak effectively for herself, a factor the Court has found to be highly significant in past cases."[89]

Justice Blackmun's vastly different view of the record demonstrates another problem with leaving the decision to appoint counsel to the trial court's discretion. A trial court will have difficulty predicting the issues and procedural problems that may arise at the hearing.[90] Because *Lassiter* does not provide any clear standard for evaluating the situation, the decision will vary from one judge to another. And when a trial judge denies counsel for an indigent parent, the hearing is likely to be fraught with error. As Justice Blackmun observed:

> The risk of error thus is severalfold. The parent who actually has achieved the improvement or quality of parenting the State would require may be unable to establish this fact. The parent who has failed in these regards may be unable to demonstrate cause, absence of willfulness, or lack of agency diligence as justification. And errors of fact or law in the State's case may go unchallenged and uncorrected.[91]

Lassiter's case-by-case approach is also likely to provoke a

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85. *Id.* at 32-33.

86. For example, Ms. Lassiter could have argued effectively that her incarceration for second-degree murder made it impossible for her to maintain contact with William or to plan for his future. *Id.* at 52 (Blackmun, J., dissenting).

87. *Id.* at 53. The social worker testified about events that had occurred before the Department assigned her to Ms. Lassiter's case. She testified further that the Department's records described these events, but the state neither introduced these records into evidence nor made them available at the hearing.

88. *Id.* at 54. Ms. Lassiter attempted to cross-examine the social worker but, rather than asking questions, used the opportunity to make statements.

89. *Id.* at 57; *see, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778 (1973); Uveges v. Pennsylvania, 335 U.S. 437, 441-42 (1948).

90. 452 U.S. at 51 n.19 (Blackmun, J., dissenting). A trial judge can decide whether appointing counsel is necessary only by reviewing the evidence before the hearing takes place. *Id.*

91. *Id.* at 46 (footnote omitted).

multitude of appeals asserting that a trial court's decision denying counsel in a termination proceeding violated the parent's constitutional rights.[92] In establishing a flexible approach for due process analysis, the *Lassiter* majority reasoned that the Constitution should establish only minimum standards, permitting the states to regulate their own court procedures without excessive interference from the federal government.[93] Justice Blackmun argued that *Lassiter* may achieve exactly the opposite effect. He noted that post-verdict challenges after the Supreme Court, in *Betts v. Brady*,[94] decided that due process permitted a flexible, case-by-case determination of the need for counsel in state criminal trials.[95] *Lassiter* could lead to a similar result, causing the Court to review not only the fairness of state procedures, but also the decisions of state judges. Justice Blackmun, therefore, feared that the Court might become a "super family court."[96]

In another dissenting opinion, Justice Stevens argued that *Lassiter* was inconsistent with the Court's previous decisions that established an absolute right to counsel in criminal prosecutions. He reasoned that a permanent loss of parental rights often may be a more grievous deprivation of liberty than temporary incarceration.[97] Furthermore, he was shocked by the extent to which the majority discounted the importance of a parent's interest in maintaining custody of a child: "[T]he Court appears to treat this case as though it merely involved the deprivation of an interest in property that is less worthy of protection than a person's liberty."[98] Because parental termination proceedings may permanently extinguish both liberty and property interests,[99] Justice Stevens argued that the *Eldridge* factors are inappropriate for evaluating due process in these cases. He observed that the Court developed the *Eldridge* balancing test for determining the procedures a state must employ in allocating a limited amount of material resources among competing claimants. *Eldridge* is therefore appropriate for weigh-

92. Such challenges may include direct appeals and petitions seeking federal habeas corpus review. *See, e.g.*, Davis v. Page, 618 F.2d 374 (5th Cir. 1980), *aff'd in part*, 640 F.2d 599 (5th Cir. 1981) (rehearing en banc).

93. 452 U.S. at 33.

94. 316 U.S. 455 (1942).

95. *Id.* at 51-52 (Blackmun, J., dissenting); *see supra* text accompanying notes 6-14.

96. 452 U.S. at 52 (Blackmun, J., dissenting).

97. *Id.* at 59 (Stevens, J., dissenting).

98. *Id.*

99. *Id.* A termination hearing may deprive an individual of property rights by extinguishing the statutory rights of inheritance. *Id.*

ing property interests, but is unsuitable for weighing liberty interests as valuable as the parent-child relationship.[100]

CONCLUSION

Although *Lassiter* rejected an absolute right to counsel in termination cases and thus established a precedent applicable to other civil cases that do not threaten a litigant's physical liberty, its effect may not be permanent. *Lassiter*'s standard for due process analysis is extremely flexible and grants significant discretion to the trial courts, engendering decisions that will vary unpredictably from one court to another. Moreover, the Court's previous decisions requiring counsel to protect the physical liberty of a criminal defendant[101] are inconsistent with the *Lassiter* Court's refusal to provide the same protection to the fundamental rights that exist between a parent and a child. *Lassiter*, however, appears analogous to *Betts*, in which the Court adopted a flexible approach for criminal prosecutions, but later rejected it in favor of an absolute right to counsel. *Lassiter*'s case-by-case analysis may ultimately reach a similar fate. As an uncounseled litigant's disadvantage increases with the complexity of both society and the law, *Lassiter* may illustrate the need for a right to counsel in civil cases more than it limits this right.

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100. *Id.* at 59-60. Justice Stevens reasoned that the Constitution requires fundamental fairness in termination proceedings rather than a balance between the costs and benefits of requiring the state to provide an attorney for indigent parents.

101. *E.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1979); Gideon v. Wainwright, 372 U.S. 335 (1963).