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The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services

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Anthony Lewis's classic account of the United States Supreme Court's landmark decision in *Gideon v. Wainwright*, includes a letter written by Clarence Earl Gideon to his court-appointed lawyer, Abe Fortas. Gideon had written in response to Fortas's request for a detailed biographical description of his life. Complying with his lawyer's request,

1. 372 U.S. 335, 342-44 (1963) (holding that the Sixth Amendment right to counsel in a criminal trial is a fundamental right).

2. ANTHONY LEWIS, GIDEON'S TRUMPET 65-68 (1966). Only two years after the *Gideon* decision, President Lyndon B. Johnson nominated Abe Fortas to the Supreme Court. See LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 244-47 (1990).

3. LEWIS, supra note 2, at 64-65. Abe Fortas asked Gideon for an autobiographical letter to determine if Gideon was illiterate or perhaps suffered from a mental defect because, under the
Gideon wrote a lengthy narrative recounting the sad trajectory of his troubled life that first took form in the hardscrabble counties of southwestern Missouri. Gideon’s poignant biographical letter ended with these simple but eloquent words:

I have no illusions about law and courts or the people who are involved in them. I have read the complete history of law ever since the Romans first started writing them down and before the laws of religions. I believe that each era finds a [sic] improvement in law each year brings something new for the benefit of mankind. Maybe this will be one of those small steps forward.

In Gideon v. Wainwright, the Supreme Court made such an advancement by recognizing that an indigent criminal defendant in a state felony prosecution has a constitutional right to appointed counsel. Although the right to counsel in state court criminal proceedings established by Gideon is undoubtedly one of our nation’s proudest constitutional achievements, over five decades later

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Betts v. Brady special circumstances doctrine, if a state criminal defendant suffered from insanity or, perhaps illiteracy, due process could require appointment of counsel in a noncapital state felony prosecution. KALMAN, supra note 2, at 180–82; see Betts v. Brady, 316 U.S. 455, 471–73 (1942), overruled by Gideon, 372 U.S. at 339. Fortas was concerned about this issue because the Court indicated it was going to consider whether Betts should be overruled. KALMAN, supra note 2, at 181–82. Interestingly, however, when a cousin of Fortas inquired whether he had any desire to meet his client, Fortas responded, “Why the hell would I want to meet a son of a bitch like that?” Id at 181.

4. LEWIS, supra note 2, at 65–78.
5. Id. at 78.
6. Gideon, 372 U.S. at 343–44. The same day Gideon was decided, the Court in Douglas v. California held that, under the Fourteenth Amendment, due process and equal protection compel the provision of appellate counsel to indigent state criminal defendants. 372 U.S. 353 (1963). Further expanding the Sixth Amendment right to counsel less than a decade later, the Court, in Argersinger v. Hamlin, found that, “absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.” 407 U.S. 25, 37 (1972). Five years after Argersinger, a divided court in Scott v. Illinois limited the scope of Argersinger by imposing a requirement of actual imprisonment to activate the right to counsel. 440 U.S. 367, 373–74 (1979). Justice William Rehnquist, writing for the five-member majority, distinguished the imposition of a fine and the mere threat of imprisonment from actual imprisonment. Id. at 373.

7. See LEWIS, supra note 2, at 201–07 (discussing the reaction of the states and the post-decision thoughts of Chief Justice Earl Warren and Justice Thomas Clark). Gideon was a tremendously important constitutional milestone; however, the resulting state structures responsible for indigent-criminal defense are burdened by chronic underfunding to the degree that the promise of Gideon remains an elusive one in many states and localities. See Mary Sue Backus & Paul Marcus, The Right to Counsel in Criminal Cases, A National Crisis, 57 HASTINGS L.J. 1031, 1045–52 (2006); Stephen B. Bright, Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake, 1997 ANN. SURV. AM. L. 783, 783–86, 793–94; see Paul Marcus, Why the United States Supreme Court Got Some (But Not a Lot) of the Sixth Amendment Right to Counsel Analysis Right, 21 ST. THOMAS L. REV. 142, 152–56 (2009). Earlier this year, President Barack Obama named Harvard Law School professor, Laurence Tribe, Senior Counselor for Access to Justice in the Department of Justice. Tribe’s mandate is to improve access to counsel in both criminal and civil matters. Tribe Named Senior
poor Americans enjoy no similar right to counsel in our civil justice system.\footnote{See \textit{Lassiter v. Dep't of Soc. Servs.}, 452 U.S. 18, 30–33 (1981) (holding that, under the particular circumstances of the case, the indigent parent facing termination of her parental rights did not have a constitutional right to counsel at state expense, and that there is a presumption against finding such a right in the absence of a deprivation of physical liberty).}

Whether a person is facing homelessness from foreclosure or eviction, is wrongfully denied eligibility for Supplemental Security Income benefits, is erroneously denied coverage under the federal Medicaid statute for a life-sustaining medical treatment or medication, is arbitrarily denied unemployment benefits, or is faced with an abusive consumer-collection suit, access to legal representation in civil cases in the United States continues to turn largely on the random and irrational calculus of wealth.\footnote{See \textit{Lassiter}, 452 U.S. at 31–32.}

In the years since \textit{Gideon v. Wainwright}, efforts to establish a commensurate federal constitutional right to counsel in civil proceedings for persons unable to afford private counsel have been weighted down and constitutionally hindered by the Supreme Court's 1981 decision in \textit{Lassiter v. Department of Social Services}.\footnote{\textit{Lassiter}, 452 U.S. at 31–32.} In \textit{Lassiter}, the Supreme Court determined that due process did not require appointment of a state-funded attorney for Abby Gail Lassiter (Ms. Lassiter), the impoverished mother whose parental rights were being terminated.\footnote{Id. at 20, 31–33.} The Court held that, in termination of parental rights cases, whether an indigent parent is entitled to appointed counsel must be decided on a case-by-case basis.\footnote{Id. at 31–33.}

Justice Potter Stewart, writing for the five-member majority, configured a due process inquiry using the \textit{Mathews v. Eldridge} three-factor balancing test.\footnote{Id. at 27–28; see \textit{Mathews v. Eldridge}, 424 U.S. 319, 335 (1976).} That test was then measured against a presumption that there is no such right to counsel except in those instances "where the litigant may lose his physical liberty if he loses the litigation."\footnote{\textit{Lassiter}, 452 U.S. at 25–27.} Using this legal calculus, the Court explained that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel."\footnote{Id. at 26.} The Court's adoption of a case-by-case...
standard and its use of a presumption grounded on personal liberty in \textit{Lassiter} quickly extinguished any hope that the due process clause of the Fourteenth Amendment might be used to establish either a categorical right for indigent parents facing the permanent severance of their familial bonds or a broader right to counsel in other types of civil cases.\textsuperscript{17}

In the intervening years since \textit{Lassiter}, there has been a steadily increasing crescendo of criticism of the Court's decision by legal scholars and poverty lawyers,\textsuperscript{18} along with an increasing number of organized efforts around the nation directed at establishing a civil right to counsel either through state judicial decision or by legislative action.\textsuperscript{19} Both academics and poverty law advocates have mapped out and developed numerous strategies, theories, and approaches to establish a civil right to counsel.\textsuperscript{20} Some scholars and advocates have focused on establishing a right to counsel in selected substantive areas of the law, such as eviction and housing matters, deportation proceedings, welfare hearings, medical-benefits proceedings, proceedings involving domestic violence, and child dependency proceedings.\textsuperscript{21}

\textsuperscript{16} In \textit{Lassiter}, the Court explicitly adopted the case-by-case standard articulated in \textit{Gagnon v. Scarpelli}, 411 U.S. 778, 790 (1973). \textit{Lassiter}, 452 U.S. at 31–32. Under \textit{Gagnon}, in a probation-revocation administrative-proceeding, there must be a colorable claim that the probationer had not violated his probation or there must exist mitigating reasons regarding why the violation should not result in revocation, as well as an inability on the part of the probationer to effectively develop his defense or present his defense on his own without the assistance of counsel. \textit{Gagnon}, 411 U.S. at 790–91. The agency retains discretion to determine whether counsel is necessary based on the circumstances of each case. \textit{Id.} at 790.


\textsuperscript{19} See Paul Marvy \\& Laura Klein Abel, \textit{Current Developments in Advocacy to Expand the Civil Right to Counsel, 25 Touro L. Rev.} 131, 132–34 (2009) (describing current efforts by advocates in eleven states and also nationwide to establish and expand a right to counsel in civil proceedings).

\textsuperscript{20} See \textit{infra} notes 21–25 and accompanying text.

Scholars and advocates have also examined the right to counsel in the context of a particular doctrinal theory or strategy\(^{22}\) as well as in the context of a particular population,\(^{23}\) while others have examined the issue through the prism of an international framework.\(^{24}\) State constitutions have also been the focal point of scholarly attention as a source on which to ground a right to counsel.\(^{25}\) These efforts gained momentum in 2006 when the American Bar Association (ABA) adopted a resolution calling for a publicly funded civil right to counsel "limited to those cases where the most basic of human needs are at stake," such as those involving "shelter, sustenance, safety, health and child custody."\(^{26}\) The ABA Resolution offered the hope that "the U.S. Supreme Court will eventually reconsider the cumbersome *Lassiter* balancing test and the unreasonable presumption that renders the test irrelevant for almost all civil litigants."\(^{27}\)


23. See, e.g., Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE J. SOC. JUST. 609, 612 (2004) ("All civil litigants with disabilities that prevent them from understanding or participating in the legal system should receive appointed counsel.").

24. See Lidman, supra note 9; see also Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 TOURO L. REV. 147, 152 (2009) (discussing materials that support "the proposition that a right to counsel in civil cases is an emerging human right necessary to the 'interests of justice,' and is gaining increasing acceptance in the international community").


26. TASK FORCE ON ACCESS TO CIVIL JUSTICE ET AL., AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES 12–13 (2006) [hereinafter ABA RESOLUTION], available at http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf. The report noted that "more than ten years have passed since [the 1994 study], and matters have only gotten worse." Id. at 5; see LSC JUSTICE GAP REPORT, supra note 9, at 12–14, 17–18.

27. ABA RESOLUTION, supra note 26, at 6. At its annual meeting in August of this year, the ABA House of Delegates will take up a proposed ABA Model Access Act and related ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings. See SECTION ON LITIGATION, ET AL., AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES 1–2 (2010) [hereinafter ABA 2010 REPORT], available at http://www.abanet.org/legalservices/sclaid/downloads/
In this Article, I return to where Lassiter began and ended, with Ms. Lassiter's poverty, her fractured life, and her claim for a greater measure of due process.\(^\text{28}\) I argue simply that Ms. Lassiter's two greatest disadvantages were the five-member majority's perception that she was a member of the "undeserving poor"\(^\text{29}\) and the Court's policy concern that recognizing a per se right to counsel in parental-termination proceedings would open the door to further extensions of the right to counsel in civil proceedings. Thus, I contend that poverty and policy concerns\(^\text{30}\) were more determinative than precedent in the Court's internal deliberative process. Using the personal papers of Justice Lewis Powell and Justice Harry Blackmun,\(^\text{31}\) I explore how the facts of Ms.
Lassiter's troubled and impoverished life affected the Court's decision, but in a way that was inapposite to how those facts should have structurally influenced the Court's formal due process analysis—and its understanding of fundamental fairness. I argue that the facts determined to be the most damning against Ms. Lassiter offered the most compelling reasons why due process should have entitled her to legal representation. Finally, I argue that due process remains a viable, constitutional basis on which to ground a civil right to counsel and that the Court should reconsider and overrule its 1981 decision in Lassiter.

The Article begins with an examination of the scope of the need for legal counsel in civil proceedings and the practical difficulties faced by poor litigants who must proceed without the benefit of legal counsel. In Part II, it examines Justice Stewart's use of the facts in Lassiter and how the Court's decision was influenced by Ms. Lassiter's status as a member of the undeserving poor. Next, in Part III, it explores and examines the policy concerns that informed the Court's decision-making process. Part IV examines Justice Stewart's due process analysis and his use of the Court's precedent to support a presumption against appointment of counsel in the absence of a risk of loss of physical liberty. In Part V, it sets out to explain that a conception of due process that is sensitive to concerns beyond efficiency offers a viable constitutional path to pursue a civil right to counsel.

Before proceeding further, a note on source material is appropriate. Scholars and other legal commentators have generally focused their attention and their analysis of Lassiter on the formal opinions written by Chief Justice Warren Burger and Justices Potter Stewart, Harry Blackmun, and John Paul Stevens. This Article, in addition to examining the formal opinions produced by the Court, draws on the personal papers of Justices Blackmun and Powell to help illuminate and understand the policy concerns that animated the Court's disquisition on due process. The notes taken by Justices Blackmun and Powell in their own handwriting, which recorded what each of the justices said during their private conference together, offer a useful historical window into the Court's deliberative process. Of the nine justices who participated in the Lassiter decision, the papers of five of the justices are currently open to the public. In addition to Justices Blackmun and Powell, the papers of Justice William Brennan, Potter Stewart, and Thurgood Marshall are available for use by the public. Justice Stewart's papers reveal little about his internal

32. See, e.g., Gardner, supra note 18, at 63–64, 72–75.
33. See sources cited supra note 31.
34. Access to Justice William Brennan's papers requires permission from the Library of Congress. E-mail from Bruce Kirby, Manuscript Reference Librarian, Library of Congress, to Robert Hornstein, Assistant Professor of Law, Florida Coastal School of Law (July 23, 2009, 14:46 EST) (on file with author). Persons interested in using the Brennan papers must submit a request explaining the intended use. Id. Certain portions of Brennan's papers, however, are currently not open to the public. Id. Justice Stewart's papers were donated to Yale University Library. E-mail from Rebecca Hatcher, Archivist, Sterling Memorial Library, Yale University, to Robert Hornstein, Assistant Professor of Law, Florida Coastal School of Law (May 5, 2009,
deliberative process or anything about the views of the other members of the Court. His papers do not include his conference notes, though they do include a circulation sheet noting whether each justice would join his majority opinion. Similarly, neither the Marshall nor the Brennan papers contain any conference notes from Lassiter. The personal papers of Chief Justice Warren Burger and Justices Byron White and John Paul Stevens are not yet available for public inspection.

The unavailability of all of the participating justices’ conference notes, to some degree, necessarily renders any picture that can be drawn of the Court’s deliberations—using only the Blackmun and Powell papers—an incomplete one. Admittedly, the value of this evidence is further limited to some extent because Justices Powell and Blackmun might not have accurately recorded or captured all that was actually said at conference by the other justices. Nevertheless, their individual conference notes provide historical insight into the views and concerns of all nine justices.


37. Chief Justice Warren Burger donated his papers to the College of William and Mary, but his papers are closed to researchers until 2026. See Warren E. Burger Online Exhibit – Earl Gregg Swem Library, http://swem.wm.edu/exhibits/burger/index.cfm (last visited July 24, 2010). Justice Byron White’s papers are currently closed until the year 2012. E-mail from Lia Apodaca, Manuscript Reference Librarian, Library of Congress, to Robert Hornstein, Assistant Professor of Law, Florida Coastal School of Law (May 19, 2009, 10:54 EST) (on file with author). Justice Rehnquist donated his papers to the Hoover Institution at Stanford University. Portions of Justice Rehnquist’s Supreme Court papers have been opened to researchers; however, materials from cases heard between the October 1975 and 2005 Terms are closed during the lifetime of any member of the Court who participated in one of those decisions. See Press Release, Hoover Institution, Rehnquist Papers: Finding Aid for Materials from 1947 to 2005 Available to Researchers on November 17, 2008, http://www.hoover.org/hila/announcements/news/34359614.html (last visited Aug. 11, 2010).

38. In this regard, it is worth observing that the conference notes of Justices Powell and Blackmun are consistent with one another in what they report. Powell’s conference notes contain slightly more detail and document his own position and the views he expressed at the conference. See Conference Notes of Justice Louis F. Powell, Lassiter v. Dep’t of Soc. Servs., 79-6423 (1981), in Powell Papers, supra note 31. Blackmun’s notes, however, do not record the views he may have expressed at the Court’s private conference. See Conference Notes of Justice Harry A.
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I. TROUBLE SO HARD: THE STRUGGLE TO ESTABLISH A RIGHT TO CIVIL GIDEON

Lack of access to counsel is a serious problem for tens of millions of poor Americans. This is particularly troubling in a constitutional democracy that is anchored to the rule of law and accepts as an article of public faith the principle that, regardless of one’s station in life, whether it be high or low, all Americans stand equal before the bar of justice. For too many Americans, however, the price of equal justice is simply beyond their means.

Fifteen years ago, the ABA conducted a nationwide study that revealed legal assistance was unavailable for over seventy percent of the serious legal needs of the poor. The Legal Services Corporation (LSC), created in 1974 to provide poor Americans access to the nation’s civil justice system, issued a report in 2009, Documenting the Justice Gap in America, which shows that the poor received legal assistance from a legal services organization or a pro bono private attorney for less than one in every five types of legal problems that were identified.

More recently, studies done by states and other private and governmental organizations continue to document that civil legal representation for most poor Americans in the United States is unavailable, and the need has not...
diminished since the seminal 1994 ABA study. For example, in Wisconsin and New Mexico, eighty percent of poor families in need of legal assistance must proceed without the benefit of counsel. Poor people in Utah fare even worse when it comes to access to justice. Over eighty-seven percent of the poor in Utah with a legal problem go forward without representation. In California, sixty-six percent of the legal needs of the poor go unmet. In Maine last year, the state’s six nonprofit legal assistance programs conducted a two-month survey and found that less than one in four poor people seeking legal assistance received legal representation. The 2009 Maine survey also found that in the first six months of this year, the demand for legal assistance by Maine’s poor increased thirty percent over the number of requests for assistance during the same period from the previous year. Persons faced with eviction in the courtrooms of New Jersey go unrepresented in ninety-nine percent of cases. The first study done in New Jersey since 2002 of the unmet legal needs of the state’s poor found that one-third of that state’s poor encounter legal problems each year, but “only 20 percent of those who need legal help actually get it.”

44. LSC JUSTICE GAP REPORT, supra note 9, passim; ABA RESOLUTION, supra note 26, at 5.
45. LSC 2009 BUDGET REQUEST, supra note 39, at 6.
46. Id.
47. Id. On October 12, 2009, California Governor Arnold Schwarzenegger signed into law Assembly Bill 590, creating a three-year civil-counsel pilot project for needy Californians in cases that implicate basic human needs. See Assem. B. No. 590, 2009-2010 Leg. Reg. Sess. (Cal. 2009). One of the legislative findings in the bill states that “the critical need for legal representation in civil cases has been documented repeatedly, and the statistics are staggering.” Id. § 1(b). The California legislature found that “[o]ver 4.3 million Californians are believed to be currently unrepresented in civil court proceedings, largely because they cannot afford representation.” Id. Importantly, the bill recognizes that “[b]ecause in many civil cases lawyers are as essential as judges and courts to the proper functioning of the justice system, the state has just as great a responsibility to ensure adequate counsel is available to both parties in those cases as it does to supply judges [and] courthouses.” Id. § 1(j). Under the bill, the pilot projects will commence on July 1, 2011, and last for three years, concluding with reports to the governor and legislature. Id. § 3. The bill will be funded by setting aside ten dollars of existing fees for certain court services to support the pilot projects. Id.
49. Id.
Today, the ranks of the poor include over forty million Americans and their numbers are expected to grow at an accelerated pace during the worst economic conditions since the Great Depression. The 2009 LSC Justice Gap Report sadly confirmed that the poor’s lack of access to legal representation across the nation remains a systemic problem, one that stands in sharp contradiction to our national creed of equal justice. Almost fifty million Americans earn an income small enough to qualify them for representation by an LSC-funded legal services program. It also found that nearly half of the people who apply for assistance from a LSC program are turned away because of limited resources.

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53. See Deborah M. Weisman, Law As Largess: Shifting Paradigms of Law for the Poor, 44 WM. & MARY L. REV. 737, 741, 827-28 (2002) (arguing “that despite the resonance of the national narrative of the Rule of Law, this ideal is subordinate to the ideology of self-sufficiency” and, as a consequence, it has been commodified such that, in the absence of the ability to pay for this benefit, the poor’s access to justice is rendered in the form of charity, thereby diminishing any claim of constitutional entitlement).


56. LSC JUSTICE GAP REPORT, supra note 9, at 2–3, 12. The most recent data available from LSC shows that in 2007, a total of 899,140 individual clients were served by LSC funded legal services programs. LEGAL SERVS. CORP., LEGAL SERVICES CORPORATION FACT BOOK 2007 17 (2008), available at http://www.lsc.gov/pdfs/factbook2007.pdf. LSC-funded programs in 2007 closed 906,507 cases. Id. at 10. This figure reflects the combined number of cases handled directly by traditional legal services staff lawyers, cases closed by LSC-funded programs serving migrant and Native American communities, and cases handled by private attorneys paid to represent LSC-eligible clients. Id. Pursuant to 45 C.F.R. 1614, LSC-funded programs are required to expend at least 12.5% of their LSC field-grant money to funding the delivery of legal services through private attorneys who are paid a reduced rate to accept LSC-eligible clients. Id. at 21 nn.13–14.
Nationwide, the *LSC Justice Gap Report* found that “on the average, only one legal aid attorney is available for every 6,415 low-income people... [compared to] one private attorney providing personal legal services... for every 429 people in the general population.” Compounding the simple arithmetic of LSC’s inability to meaningfully close the justice gap is the legacy of draconian and decidedly unfair restrictions on the ability of LSC lawyers to represent poor Americans eligible for assistance through LSC programs. The

57. *LSC Justice Gap Report*, supra note 9, at 1. Somewhat ironically, however, members of Congress have little difficulty retaining legal counsel because, unlike the poor, members of the United States House of Representatives and the United States Senate, as well as high level executive-branch officials, have little difficulty raising large sums of money for legal defense funds. See Robert Hornstein, Daniel G. Atkins & Treena A. Kaye, *The Politics of Equal Justice*, 11 Am. U. J. Gender Soc. Pol’y & L. 1089, 1091–103 (2003) (examining the history of the Legal Services Corporation and pointing out how elected officials have used campaign money and legal defense funds to pay for legal representation, including members of Congress who have objected to using public money to provide legal assistance to the poor).

58. See Quigley, supra note 42, at 253–63 (explaining the compromises in the LSC bill President Nixon signed, including restrictions prohibiting abortion litigation as well as litigation involving school desegregation and selective service, and describing the restrictions that have been placed on Legal Services during the years following its creation); see also Elisabeth Smith Bornstein, Comment, *From the Viewpoint of the Poor: An Analysis of the Constitutionality of the Restriction on Class Action Involvement by Legal Services Attorneys*, 2003 U. Chi. Legal F. 693, 693 (examining the restriction on class action-litigation and arguing that it is unconstitutional because it constitutes impermissible viewpoint discrimination); J. Dwight Yoder, Note, *Justice or Injustice for the Poor?: A Look at the Constitutionality of Congressional Restrictions on Legal Services*, 6 WM. & MARY BILL RTS. J. 827, 827 (1998) (examining the application of the unconstitutional-conditions doctrine to legislative restrictions on LSC and arguing that many of the restrictions are constitutionally infirm). On December 16, 2009, President Obama signed an appropriation bill into law that increased LSC’s funding and lifted the long-standing statutory restriction on the recovery and collection of attorneys’ fees. Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, div. B, tit. IV, 123 Stat. 3034, 3148 (2009). In response to Congress’s lifting of this restriction, the LSC immediately suspended the enforcement of its regulation that had implemented the statutory restriction. See LSC Updates, President Signs LSC Funding Increase into Law (Dec. 17, 2009), http://www.lsc.gov/press/updates_2009_detail_T246_R28.php. Proposed legislation in both the House and the Senate, if enacted, would end a number of the harshest remaining restrictions. A bill introduced in March 2009 by Iowa Senator Tom Harkin, the Civil Access to Justice Act of 2009, would lift the ban on class actions and permit LSC lawyers to bring class suits based on existing law. S. 718, 111th Cong. (1st Sess. 2009). It would also free nonfederal money received by LSC programs from federal restrictions except in matters relating to abortion and the representation of prisoners in certain civil matters. Id. The House of Representatives passed H.R. 2847, which had a provision lifting the restrictions against recovery of attorney’s fees, but left intact all other restrictions. H.R. 2847, 111th Cong. (1st Sess. 2009); see Brennan Ctr. for Justice, Timeline of FY 2010 Appropriations Process and Efforts to Repeal Key LSC Restrictions, http://www.brennancenter.org/content/resource/timeline_of_fy_2010_appropriations_process_and_efforts_to_repeal_the_lsc_re/ (last visited Aug. 11, 2009) (explaining the timeline and series of legislative steps taken to move the bills along); see also Rhonda McMillion, *Warming Trend: Congress Looks to Bolster the LSC as the Recession Raises Legal Worries for the Poor*, A.B.A.J., July 2009, at 66, 66; Editorial, *A Fair Shake for Legal Aid*, WASH. POST, July 13, 2009, at A16; Editorial, *Congress Must Lift Restrictions on Legal Aid*, BALTIMORE SUN, June 26, 2009, http://www.baltimoresun.com/news/opinion/editorial/bal-legalaidpreview0626,0,4374050.story; Press Release, Legal Servs. Corp.,
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fact that the problem has been known and documented as a conspicuous failure of our civil justice system since the 1919 publication of Reginald Heber Smith’s revelatory study of how the poor fared in the nation’s courts is a sobering reminder that, for a substantial part of our national history, our commitment to equal justice has been truer in word than in deed.59 Heber argued that “equal administration of justice must take cognizance of, and provide for, a class of citizens, numbering millions, who cannot secure for themselves the legal services without which the machinery of justice is unworkable.”60

There can be no serious dispute that a person’s inability to retain counsel bears heavily, if not conclusively, on the quality of justice he will receive in the nation’s civil courtrooms.61 It is neither overwrought rhetoric nor hyperbole to claim that there are two distinct types of justice available in the civil courtrooms of the United States—one that is available to those Americans able to afford counsel as well as those Americans who are fortunate enough to receive representation through a legal services program or a private pro bono lawyer, and another that is available to those Americans who must proceed on their own without the guiding hand of counsel.62

Over five decades ago, in Griffin v. Illinois, the Supreme Court was confronted with the question of whether an indigent criminal defendant who could not afford a transcript of the trial to secure appellate review was denied due process and equal protection when the state did not provide an effective means of appellate review.63 The Court in Griffin held that “[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.”64 Justice Hugo Black, writing for the House Approves $440 Million for LSC (June 18, 2009), http://www.lsc.gov/press/pressrelease_detail_2009_T248_R15.php.

59. REGINALD HEBER SMITH, JUSTICE AND THE POOR 31–34 (Am. Bar Ctr. 1967) (1919) (examining the impact poverty had on the quality of justice available to the poor and calling for increased efforts to provide equal access to justice); see James D. Lorenz, Jr., Almost the Last Word on Legal Services: Congress Can Do Pretty Much What It Likes, 17 ST. LOUIS U. PUB. L. REV. 295, 300–01 (1998) (asking whether “equal access to the system of justice . . . mean[s] access equal to the kind of representation [that] . . . middle class American citizen[s] can afford . . . or . . . access equal to that enjoyed by big corporations and government agencies” (internal quotation marks and citations omitted)).

60. SMITH, supra note 59, at 33.

61. See LSC JUSTICE GAP REPORT, supra note 9, at 26 (“There is a growing body of research indicating that outcomes for unrepresented litigants are often less favorable than those for represented litigants.”).

62. See Powell v. Alabama, 287 U.S. 45, 69 (1932) (explaining that in a criminal case even an educated and intelligent person “requires the guiding hand of counsel at every step in the proceedings against him”).


64. Id. at 19. The Court stopped short of obligating every state to provide a transcript in each case for indigent defendants. Id. at 20. The Court left open other means to ensure an indigent defendant has an adequate opportunity to secure appellate review. Id.
majority, pointedly observed that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."65 Although Griffin was a criminal appeals case that involved a loss of physical liberty, and is generally treated as an access to court fee-waiver decision, the Court's reasoning in Griffin offers useful instruction in understanding why the right to be heard through counsel in a civil case is a hollow ideal for the millions of litigants unable to afford counsel.66

In the course of explaining the rationale for its decision in Griffin, the Court proffered as a constitutional axiom that "[s]urely no one would contend that . . . a [s]tate . . . could . . . provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court."67 Finding that "[s]uch a law would make the constitutional promise of a fair trial a worthless thing," Justice Black reasoned that if a state were to condition the right to be heard on one's ability to pay court costs in advance, "[n]otice, the right to be heard, and the right to counsel would . . . be meaningless promises to the poor."68 No doubt, every American has a right to be heard through counsel in virtually any type of civil proceeding. But how much is this right worth for those who cannot afford to pay for counsel? Over nine decades ago, Reginald Heber Smith eloquently explained why a person's right to proceed on his own through the legal system held little meaning for the poor:

[T]he procedural law, in accordance with which litigation must be conducted, is a maze to the uninitiated; it is a science in itself. The law permits every man to try his own case, but 'the lay vision of every man his own lawyer has been shown by all experience to be an illusion.' It is a virtual impossibility for a man to conduct even the simplest sort of a case under the existing rules of procedure, and this fact robs the in forma pauperis proceeding of much of its value to the poor unless supplemented by the providing of counsel.69

More so than ever before, successfully navigating the administrative rules, statutes, judicial decisions, and layers of procedural rules that can apply in any given case, including the simplest of cases, is an increasingly challenging and costly task for experienced lawyers.70 It is difficult to imagine how a poor litigant would fare, for example, in the discovery process when it involves

65. Id. at 19.
66. See id. at 18–19.
67. Id. at 17.
68. Id.
69. SMITH, supra note 59, at 31–32 (emphasis added) (internal citations omitted).
70. Leslie C. Levin, The Ethical World of Solo and Small Law Firm Practitioners, 41 Hous. L. REV. 309, 324 (2004) ("As the practice of law has become more complex and technology has increased the speed at which law is practiced, it has become both easier and harder for solo and small firm practitioners to keep up with changes in the law and to perform their work in a competent fashion.").
complicated electronic-discovery issues. In fact, the burden of effective self-representation in the nation's civil courtrooms, as a practical matter, is nearly impossible for most poor Americans. Consider, as an illustration, the

71. See Maureen N. Armour, Federal Courts as Constitutional Laboratories: The Rat's Point of View, 57 Drake L. Rev. 135, 226 (2008) (explaining how the conscious use of judicial discretion by lower federal courts shapes the outcome in cases involving the problematic Supreme Court precedent and how this permits lower federal courts to serve as a type of laboratory incorporating fact finding as a facet of its adjudicatory function, which allows it to make doctrinal adjustments, but also noting that "this aspect of the laboratory [role] works best when lawyers are involved . . . [because] fact development, legal briefing, complex discovery, and difficult trials are time-consuming activities and involve technical skills beyond most pro se litigants"); Kristen McNeal, Note, Qualcomm Inc. v. Broadcom Corp.: 9,259,985 Reasons to Comply with Discovery Requests, Rich. J.L. & Tech, Spring 2009, at 1, 16 ("ever-evolving technological advances could further complicate the known difficulties involved when conducting extensive electronic discovery throughout complex litigation [and] [t]o avoid sanctions, attorneys and corporations need to know how to efficiently manage electronic discovery."); see also John T. Broderick, Jr. & Ronald M. George, A Nation of Do-It-Yourself Lawyers, N.Y. Times, Jan. 2, 2010, at A19 (discussing arguments of California and New Hampshire Supreme Courts for all states to adopt limited scope of representation rules because of the increasing number of litigants who cannot afford counsel and must proceed pro se).

72. See Lois Bloom & Helen Hershkoff, Federal Courts, Magistrate Judges and the Pro Se Plaintiff, 16 Notre Dame J.L. Ethics & Pub. Pol'y 475, 483 (2002) ("[T]he legally untrained face special difficulties in navigating and carrying out the arcane requirements of pleading and . . . [p]ro se claims can implicate abstruse and complex statutes, yet pro se litigants lack the resources, financial and other, to interpret the governing law or to marshal evidentiary and expert support for their claims."); Alicia M. Farley, An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants, 20 Geo. J. Legal Ethics 563, 564 (2007) ("[A]side from the disadvantage they face due to lack of legal knowledge and experience, pro se litigants are vulnerable to unethical opposing counsel, are less successful in asserting defenses and presenting evidence, and generally face poorer legal outcomes."). The problem of self-representation is compounded because many jurisdictions hold pro se litigants to the same standards as attorneys. See, e.g., Spurlock v. Demby, No. 92-3842, 1995 WL 89003 (6th Cir. Mar. 2, 1995) (holding pro se plaintiffs in a § 1983 action to the same requirements provided in Rule 11 of the Federal Rules of Civil Procedure as attorneys, and upholding the district court's granting of the defendant's motion for sanctions in the form of attorney's fees); Harris v. Boyd G. Montgomery Testamentary Trust, 262 S.W.3d 145, 146–47 (Ark. 2007) (per curium) (denying a motion for belated brief because of a pro se litigant's failure to timely file the order of the court, the record, and the brief because "pro se appellants receive no special consideration of their argument and are held to the same standard as licensed attorneys"); Watkins v. Peacock, 184 P.3d 210, 212, 215 (Idaho 2008) (holding the pro se appellant and servient-estate owner to the same standards as parties represented by attorneys in litigation concerning blockage of implied easement); Smith v. Donahue, 907 N.E. 2d 553, 554–56 (Ind. Ct. App. 2009) motion for leave to proceed in forma pauperis denied, 130 S. Ct. 800 (2009) (holding the pro se plaintiff to the same standards as attorneys and dismissing the plaintiff's civil rights claim against the Department of Corrections for frivolous for procedural defects in stating the claim); Rainey v. SSPS Inc., 259 S.W.3d 603, 604–06 (Mo. Ct. App. 2008) (holding the pro se appellant to the same standards under procedural rules as attorneys and denying relief to the appellant who sought unemployment compensation for failing to meet procedural requirements for contents of appellate briefs); Mayo v. Suemaur Exploration & Prod. LLC, No. 14-07-00491-CV, 2008 WL 4355259 (Tex. App. Aug. 26, 2008) (affirming summary judgment in favor of the appellee where the pro se appellant's documents filed as attachments to the response to the appellee's motion for summary judgment were unauthenticated, where the
likelihood in a foreclosure case that an impoverished homeowner would be able to locate cases or federal and state statutes and regulations that might provide a defense to the lawsuit.\textsuperscript{73} For this reason, the right to be heard, which is available to all who enter our civil courts, is little more than an illusory right unless a person can afford private counsel, is eligible for representation through a legal aid or legal services program, or is the beneficiary of pro bono representation by a member of the private bar.

II. WHY BAD FACTS SHOULD HAVE MADE GOOD LAW: REVISITING THE 
\textit{LASSITER} DECISION THROUGH THE PRISM OF THE UNDESERVING POOR

Justice Stewart begins his opinion in \textit{Lassiter} with facts that detail Ms. Lassiter's failings as a parent, including the original allegations that caused the Durham County Department of Social Services (Department of Social Services) to remove William, her infant son, from her custody.\textsuperscript{74} These facts include the circumstances in the spring 1975 when her son was first removed because she had been accused of neglecting to provide him with proper medical care.\textsuperscript{75} Next, Justice Stewart explains that, following the child's removal, which was authorized by a North Carolina state court that found William to be a neglected child, Ms. Lassiter and her mother, Lucille, were charged with first-degree murder of a neighbor.\textsuperscript{76} The latter incident occurred during a fight that started between the neighbor and Lassiter's mother and eventually involved Ms. Lassiter herself.\textsuperscript{77} The altercation ended with the

\textsuperscript{73} See \textsc{Melanca Clark & Maggie Barron, Brennan Ctr. for Justice, Foreclosures: A Crisis in Legal Representation} 2 (2009) (examining the sub-prime mortgage crisis and explaining how the poor's lack of access to counsel prevents them from raising meritorious defenses and how legal representation could prevent foreclosure and loss).

\textsuperscript{74} \textit{Lassiter v. Dep't of Soc. Servs.}, 452 U.S. 18, 20–24 (1981).

\textsuperscript{75} \textit{Id.} at 20. Professor Lowell F. Schechter and Professor Elizabeth G. Thornburg have each written powerful and poignant narratives on the \textit{Lassiter} decision. Professor Schechter's 1981 article, \textit{The Pitfalls of Timidity: The Ramifications of Lassiter v. Department of Social Services}, carefully traces the history of the events in \textit{Lassiter}, provides a rich source of information about both the case and Ms. Lassiter, and offers a forceful rebuttal of Justice Stewart's treatment of Ms. Lassiter's constitutional claim. \textit{See} Schechter, \textit{supra} note 30, at 435–37. Professor Thornburg's accounting of the \textit{Lassiter} decision also provides an insightful and in-depth analysis of the case's events and personalities involved, and is an eloquent statement about the vital importance of legal counsel to procedural fairness. \textit{See} Elizabeth G. Thornburg, \textit{The Story of Lassiter: The Importance of Counsel in an Adversary System}, in \textit{Civil Procedure Stories} 489, 522–26 (Kevin M. Clermont ed., 2004).

\textsuperscript{76} \textit{Lassiter}, 452 U.S. at 20 & n.1; Thornburg, \textit{supra} note 75, at 498.

\textsuperscript{77} \textit{Lassiter}, 452 U.S. at 20 n.1; Thornburg, \textit{supra} note 75, at 498–99.
stabbing death of the neighbor. Although the charge against her mother was dropped on a motion for a nonsuit, Ms. Lassiter was convicted of second-degree murder and sentenced to twenty-five-to-forty-years in prison.

After giving a summary account of the circumstances surrounding the initial removal of the child and Ms. Lassiter’s criminal conviction for second-degree murder, Justice Stewart recounted that three years later, while she was serving her prison sentence, the Department of Social Services initiated proceedings to terminate Ms. Lassiter’s parental rights on the basis that she had willfully left the child in foster care for more than two consecutive years without showing that substantial progress has been made in correcting the conditions which led to the removal of the

78. Lassiter, 452 U.S. at 20 n.1. Justice Stewart’s citation to facts contained in the North Carolina appellate decision reviewing Ms. Lassiter’s criminal conviction was sharply criticized by one of Justice Blackmun’s law clerks. Blackmun’s law clerk accused Justice Stewart of going outside the record in Lassiter to obtain the unpublished North Carolina appellate opinion. See Letter from JJB to Mr. Justice Blackmun (May 8, 1981), in Blackmun Papers, supra note 31. According to the law clerk, “[c]ontrary to the implication in the Court’s footnote, the murder appeal [was] not officially reported. Petiter S[tewart] must have sent away to North Carolina for the per curiam . . . and there is no indication anywhere in the record that this judge had knowledge of those events.” Id. Justice Stewart’s reference to the unpublished North Carolina decision and facts relating to Ms. Lassiter’s criminal case appear in the first footnote of his opinion in Lassiter. Lassiter, 452 U.S. at 20. Justice Blackmun’s law clerk had included an admonition against Justice Stewart in a footnote of a draft of Justice Blackmun’s dissenting opinion, but Justice Blackmun deleted the footnote. Letter from JJB to Mr. Justice Blackmun (May 8, 1981), in Blackmun Papers, supra note 31. After the charge had been removed from Justice Blackmun’s draft dissenting-opinion, the law clerk inquired if Justice Blackmun was certain about the revision, explaining, “I defer to your judgment here, but I do feel that Petiter S[tewart] acted in a highly inappropriate fashion by taking judicial notice of facts never considered below.” Id.

79. Lassiter, 452 U.S. at 21 n.1. Professor Thornburg, relying on materials from Ms. Lassiter’s post-conviction challenge to her criminal conviction and on interviews with Frank Bullock, the lawyer appointed to represent her at the murder trial, offers a narrative of the crime and the circumstances of Ms. Lassiter’s legal representation during the trial that suggests that Ms. Lassiter may, in fact, have been innocent and received neither a fair trial nor effective representation. Thornburg, supra note 75, at 497 n.33, 499–501. Professor Thornburg’s narrative centers on evidence showing that Lucille Lassiter may have been responsible for stabbing the neighbor. Id. at 499–501. Professor Thornburg details how the prosecution had an oral statement that Lucille gave to a police officer in which she stated that it was she, not Abby Gail Lassiter, who stabbed the neighbor. Id. at 499–500. However, this evidence, which was inculpatory of Lucille but exculpatory of Ms. Lassiter, was not timely disclosed to either Lucille’s lawyer or Ms. Lassiter’s lawyer. Id. at 500. A mistrial was declared and ultimately the state decided to forego using the statement, at which point Lucille’s lawyer successfully secured a dismissal of the charges against her. Id. Ms. Lassiter’s case went forward, but her lawyer elected not to use the statement or make a claim of constitutional error based on the failure of the state to disclose the statement before the trial. Id. at 500–01. In addition to the state’s failure to disclose Lucille’s oral statement, Lassiter’s appointed lawyer had limited experience, having only graduated from law school in 1973, eight years before the Supreme Court’s final decision was issued. Lassiter, 452 U.S. at 18; Thornburg, supra note 75, at 498. These circumstances surrounding the criminal proceeding offer an alternative narrative of Lassiter’s status as a convicted murderer—one that raises the possibility that she was innocent.
child, or without showing a positive response to the diligent efforts of the Department . . . to strengthen her relationship to the child, or to make and follow through with constructive planning for the future of the child. 80

Having established her criminal conviction, imprisonment, and the initiation of parental-termination proceedings, Justice Stewart next explained that Ms. Lassiter was given proper notice of the termination proceedings but that she failed to notify an attorney handling her post-conviction collateral criminal proceeding about the termination petition filed by the Department of Social Services. 81 In fact, Justice Stewart places special emphasis on the fact that Ms. Lassiter did not share this information with "any other person except with" a never-identified person who Ms. Lassiter had described in her testimony at the hearing only as "someone" in prison. 82 The transcript of the termination hearing, however, reveals that Ms. Lassiter attempted to get assistance. 83 At the outset of the hearing when the trial judge explored whether she had sufficient time to retain counsel, he inquired into what Ms. Lassiter did when she was served with the petition for termination:

THE COURT: And she has had over four months to speak to an attorney and has spoken to an attorney but has not consulted anyone with reference to this child. Isn’t that true?

LASSITER: Say what now?

THE COURT: I said you were served with notice of—I mean, you were served with a summons in reference to the termination of your parental rights of William L. Lassiter on April 12.

LASSITER: Yes, I got the papers.

THE COURT: And you have done nothing towards—

LASSITER: Yes, I did.

THE COURT: What did you do?

LASSITER: I reported to the Department of Corrections Center. I told someone about that. Didn’t nobody get in touch with no one and I told them I had a paper when I got the first paper. I contacted someone and told them I had to go to Court about this paper and didn’t nobody contact no one and I told one of the matrons there. 84

This colloquy belies Justice Stewart’s harsh judgment of Ms. Lassiter’s efforts to share the information and to notify someone about the termination proceeding. Any assessment of the efficacy of her efforts to obtain assistance, however, must be measured against the substantial obstacles created by her

80. Lassiter, 452 U.S. at 21.
81. Id.
82. Id.
83. Thornburg, supra note 75, at 502 n.45.
incarceration as well as by her limitations, which likely included some degree of mental retardation. Professor Lowell F. Schechter, in his 1981 article examining a number of important facts that were missing from the Court’s understanding of Ms. Lassiter, points to information suggesting that Ms. Lassiter might have been either mentally retarded or, at minimum, of very low intelligence. The Court’s accounting of her actions, though, never considered the possibility that she was impeded by her status as an inmate, by ignorance, by limited education, or by other circumstances such as mental retardation.

By any measure, Justice Stewart’s factual portrait of Ms. Lassiter is not flattering. It presents an almost perfect-pitch caricature of an undeserving poor person unwilling to meet the responsibilities of life and her parental responsibilities to her child and undeserving of representation. Historian Michael Katz, who has written extensively on the history of social welfare and poverty in the United States, explains that “the language of poverty is a vocabulary of invidious distinction.” According to Katz, “[b]y mistaking socially constructed categories for natural distinctions, we reinforce inequality and stigmatize even those we set out to help.” Katz documents how the increase in the number of poor, unwed black women receiving welfare informs our modern understanding of the undeserving poor. Noted sociologist

85. Schechter, supra note 30, at 437–55. The matter of Lassiter’s possible mental retardation was raised for the first time in the Supreme Court in her petition for rehearing. Lassiter’s attorneys argued her possible mental retardation was “[p]erhaps the most compelling reason appointed counsel” was necessary. Petition for Rehearing at 9, Lassiter v. Dep’t of Soc. Servs., 453 U.S. 927 (1981) (No. 79-6423). Lassiter’s lawyers further argued that evidence of her possible retardation was before the Court through evidence that, admittedly, constituted hearsay, but which was nonetheless “relied upon extensively in marshalling the case against her.” Id. at 10 n.3.

86. Schechter, supra note 30, at 437–55.
87. Id. at 446.
89. Id. at 5.
90. Id. at 6. In a recent essay, “Losers” and the Sub-Prime Mortgage Crisis, Professor Andrew R. Cline examines how the media’s use of the label “[l]oser has begun to shift ... from a largely sympathetic term for victims of the 2008-2009 recession, to a derogatory label for people who benefit from government largess at the expense of Americans more charitably described as ‘honest’ and ‘hardworking.’” Andrew R. Cline, “Losers” and the Sub-Prime Mortgage Crisis, POVERTY & PUB. POL’Y, 2009, at I, 1 (2009). Cline goes on to discuss how this rhetorical shift occurred by examining the narratives employed by print and television pundits like George Will, Rush Limbaugh, Rick Santelli, Larry Kudlow, and Ann Coulter. Id. at 3–8. Professor Cline explains how these media pundits’ narratives of the crisis included both veiled and naked references to race, undeservingness, and productivity, as well as narratives that linked government aid to effected sub-prime borrowers to welfare and immorality. Id.

Herbert Gans explored what he called the "ideology of undeservingness" in his influential book, *The War Against the Poor.* Gans argues under this ideology:

If poor people do not behave according to the rules set by mainstream America, they must be undeserving. They are undeserving because they believe in and therefore practice bad values, suggesting that they do not want to be part of mainstream America culturally or socially. As a result of bad values and practices, undeservingness has become a major cause of contemporary poverty. If poor people gave up these values, their poverty would decline automatically, and mainstream Americans would be ready to help them, as they help other, "deserving" poor people.

The concept of the undeserving poor is one that can be traced back to the era of the Elizabethan Statute of Laborers and the conception of public assistance in English history. It has been a continuing theme that has informed modern welfare-policy, from the era of the Freedman's Bureau following the Civil War to the debate over welfare reform during the 1990s.

that the push for welfare was focused on the programs that served those persons who were "traditionally categorized as the 'undeserving' poor"; Amy Mulzer, Note, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 668–69, 676, 684 (2005) (explaining how, under the social work model of AFDC, home visits by social workers and welfare case workers were used to both stigmatize welfare recipients and distinguish between the deserving and the undeserving poor).

92. GANS, supra note 29, at 6.

93. *Id.* Gans explains that the term "undeserving poor" has been used as a behavioral term "to describe poor people who are accused, rightly or wrongly, of failing to behave in the 'mainstream' ways of the . . . dominant American middle class." *Id.* at 2. Gans argues that the behaviors of the poor, which are deemed to be the result of moral deficiencies, are usually "poverty related effects." *Id.* He argues further "that sometimes poor people are driven by the effects of poverty to actions that violate their own morals and values." *Id.*


95. See Larry Cata Backer, *Medieval Poor Law in Twentieth Century America: Looking Back Towards a General Theory of Modern American Poor Relief*, 44 CASE. W. RES. L. REV. 871, 907–08 (1995) (arguing that American welfare policy makers circumvent having to address poverty in a meaningful way by labeling some of the poor as undeserving); Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 811, 813–14 (2007) (explaining how the concept of the undeserving poor and welfare policy has been informed by racial imagery, and how the "distinction between the deserving and undeserving poor" had an impact on the decision to extend the Freedman's Bureau for an additional two years); Joel F. Handler, "Constructing the Political Spectacle": *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 913 (1990) (explaining how, even prior to the New Deal, African Americans were considered "the most undeserving of the undeserving," and how New Deal legislation discriminated between the deserving and the undeserving poor); Richard Hardack, *Bad Faith: Race, Religion and the Reformation of Welfare
And so it was for Ms. Lassiter in her quest for a greater measure of justice before the Supreme Court. Justice Stewart’s unsympathetic depiction of Ms. Lassiter as a member of the undeserving poor served a purpose beyond mere biography. Portraying her in this way contextualized and subtly mitigated the obvious disadvantages she faced over twenty-five years ago in that North Carolina courtroom—as a convicted murderer who also carried the burden and stigma of being poor, black, and the unwed mother of five children.\(^{96}\) Equally important, it assisted the Court in finding that the termination of her parental rights was, quite simply, not fundamentally unfair in a constitutional sense or, for that matter, at odds with any normative sense of justice.\(^{97}\)

Although Ms. Lassiter’s principal brief before the Supreme Court raised her poverty as a factor militating in favor of the need for appointment of counsel to avoid an erroneous decision, it did so only indirectly by quoting *Gideon v. Wainwright*, referring to her as poor in a footnote, and citing academic works that support “the fact that most parents who are the subjects of termination proceedings are . . . poor and lacking in formal education.”\(^{98}\) The brief, however, did not examine how her particular circumstances as a poor person constrained her ability to represent herself.\(^{99}\) Ms. Lassiter’s brief also raised the issue of race by discussing the vitally important role of the extended family in the African American community as an alternative foster-care structure to provide for the well-being of children born out of wedlock.\(^{100}\) Ms. Lassiter’s lawyers argued that “[i]f counsel had been appointed . . . it is reasonable to expect that this important issue would have been clearly presented to the court as a discrete legal issue.”\(^{101}\) But it is fair to say that Ms. Lassiter’s lawyers stayed as far as possible from the details of her life.\(^{102}\)

Ms. Lassiter’s status as an undeserving poor person, however, is nevertheless deeply woven into Justice Stewart’s constitutional narrative,\(^{103}\)

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\(^{96}\) Thornburg, *supra* note 75, at 518–21; Schechter, *supra* note 30 at 437–43.


\(^{99}\) See generally id.

\(^{100}\) Id. at 40.

\(^{101}\) Id. at 42.

\(^{102}\) See generally id.

though not in so many words. The influence that Ms. Lassiter’s status as a member of the undeserving poor had on the Court is evident in how Justice Stewart used the record to determine whether Ms. Lassiter was deserving of better constitutional treatment:

While hearsay evidence was no doubt admitted, and while Ms. Lassiter no doubt left incomplete her defense that the Department had not adequately assisted her in rekindling her interest in her son, the weight of the evidence that she had few sparks of such an interest was sufficiently great that the presence of counsel for Ms. Lassiter could not have made a determinative difference . . . . Finally, a court deciding whether due process requires the appointment of counsel need not ignore a parent’s plain demonstration that she is not interested in attending a hearing. Here, the trial court had previously found that Ms. Lassiter had expressly declined to appear at the 1975 child custody hearing.104

This narrative rests on the Department of Social Services’ account of the case’s history and its characterization of Ms. Lassiter’s conduct, which the North Carolina state trial judge embraced.105 In a very real sense both her need and her constitutional claim to representation were displaced by the majority’s moral judgments about her. Justice Blackmun, who authored an impassioned dissent, ceded to the majority that Ms. Lassiter “plainly has not led the life of

("Critical race scholars have long shown . . . the Justices’ beliefs about responsibility and deservedness heavily inform their decisions about the spirit of the law."); Linda S. Green, *From Brown To Grutter*, 36 LOY. U. CHI. L.J. 1, 13–14 (2004) (explaining in the context of equal protection under the rules of *Washington v. Davis*, 426 U.S. 229, 242 (1976), and *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987), how “constitutional doctrine immunizes from judicial inquiry the cumulative effects of private and public decision-making, as well as the influence of wealth and poverty”); Martin Guggenheim, *How Children’s Lawyers Serve State Interests*, 6 NEV. L.J. 805, 829 (2006) (arguing that the concept of the undeserving poor is a factor in “influence[ing] the public into believing that children in foster care come from undeserving homes to over-label their parents as abusers”); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1499 (1991) (arguing that a rhetoric of poverty runs through Supreme Court opinions that suggest the poor are “unwilling to work and especially likely to commit fraud or child abuse, or to violate other legal and moral norms [and] . . . have bad attitudes and are the cause of their own poverty”); see also Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family, and Criminal Law*, 83 CORNELL L. REV. 688, 702 (1998) (“For many poor women, single mothers, and women of color, the battle to retain custody of their children is often not with the children’s father, but with the state . . . . An understanding of the historical and cultural context in which courts hear child protection cases is critical to an analysis of the ways that judges respond to the mothers who appear before them.”); Symposium, *Access to Justice: Does it Exist in Civil Cases?*, 17 GEO. J. LEGAL ETHICS 455, 481 (2004) (documenting long-time access-to-justice advocate Esther Lardent’s explanation that one obstacle pro bono efforts faced in providing equal access to justice for the poor is the perception that “these people are just defective or lazy”).104


the exemplary citizen or model parent," but, nevertheless, he did not permit her fractured life to diminish or dilute her need for legal representation. Justice Blackmun understood that "the issue before the Court [was] not [Lassiter’s] character, [but] whether she was given a meaningful opportunity to be heard." It was because of her fractured life and her marginalized existence that she needed the assistance of counsel to obtain a fair hearing.

The conference notes of both Justice Blackmun and Justice Powell reveal that, although none of the justices raised Ms. Lassiter’s deservedness as an explicit decisional factor during their conference deliberations, the issue obliquely made its way into the decision-making process. During conference discussion of the case, several of the justices expressed the opinion that the case presented bad facts and that it had been correctly decided on the merits. Both Justice Powell’s and Justice Blackmun’s conference notes indicate that even Justice Marshall, who joined Justice Blackmun’s dissent, believed the case presented bad facts. Like Justice Brennan and Justice Blackmun, however, Justice Marshall thought the constitution required appointment of counsel for Ms. Lassiter.

Justice Blackmun’s conference notes suggest that Chief Justice Burger’s view of the case was driven in part by what he considered bad facts. According to Justice Blackmun’s notes, Chief Justice Burger’s preference was to dispose of the case on the ground that certiorari had been improvidently granted. More specifically, Chief Justice Burger thought it was a "bad case to open the counsel door." Ultimately, Chief Justice Burger concurred and

106. Lassiter, 452 U.S. at 57 (Blackmun, J., dissenting).
107. Id.
111. Lassiter, 452 U.S. at 35 (Blackmun, J. dissenting); cf. Bruce A. Green & Daniel Richman, Of Laws and Men: An Essay on Justice Marshall’s View of Criminal Procedure, 26 ARIZ. ST. L.J. 369, 384 (1994) (explaining that, in the context of criminal procedure, “it was important to Justice Marshall as a jurisprudential matter to reject the idea that constitutional provisions should be read through the prism of any individual Justice’s experience [and that Marshall believed that it] would [not] move society in a positive direction for the Court to issue rulings based on an assumption that the poor and minorities are ignorant of their rights”).
113. Id. Chief Justice Burger’s concurring opinion makes note of this position. Lassiter, 452 U.S. at 34 (Burger, C.J., concurring).
114. Id.
indicated in his opinion that he thought the case should have been dismissed on the ground that review had been improvidently granted.\textsuperscript{115} Justice Powell's conference notes indicate that Justice White believed that, "on [the] facts of this case—if we reached them—the case was rightly decided."\textsuperscript{116} Implicit, however, in these notes, which reflect the justices' views of the facts and the merits of the North Carolina trial court's ruling, is the belief that Ms. Lassiter was not deserving of the constitutional protections to which she claimed entitlement.

Ms. Lassiter's need for counsel was subordinated to the Court's assessment of her perceived worthiness to receive and benefit from a constitutional right to counsel.\textsuperscript{117} But if not Ms. Lassiter, then who might demonstrate a greater need for the protection and advice of legal counsel? The available evidence suggests that, although she was able to deny the allegations leveled against her in a rudimentary way, she lacked the communicative ability and the depth of understanding needed to present an effective defense.\textsuperscript{118} Certainly, if she was cognitively impaired by a type of mental retardation, her inability to effectively communicate would no doubt have affected her ability to defend her interests as well as take the steps necessary to seek out counsel. On rehearing, Lassiter's lawyers pointed out that "[a] case summary located in the Juvenile Court files indicate[d] that [Lassiter] appeared ‘... to have a retardation factor.'"\textsuperscript{119}

The Court's discomfort with Ms. Lassiter's deservedness was evident in how the Court assigned her personal responsibility for failing to ask for counsel or inform the trial court that she was indigent.\textsuperscript{120} The Department of Social Services argued in its brief that Ms. Lassiter failed to raise the matter of her right to appointed counsel in the trial court.\textsuperscript{121} Specifically, the North Carolina agency maintained that "[t]here is nothing in the record before the Court to indicate that this question was before the Trial Court[, and s]he never asked that [the court] appoint a lawyer for her . . . ."\textsuperscript{122} The Department of Social Services also argued that Ms. Lassiter never offered evidence of her indigency in the trial court.\textsuperscript{123} For these reasons, the Department of Social Services

\textsuperscript{115} Lassiter, 452 U.S. at 34 (Burger, C.J., concurring).
\textsuperscript{117} See Thornburg, \textit{supra} note 75, at 520 ("In many subtle ways Abby Gail's gender in fact affected the Court's analysis. . . . In the majority's view Abby Gail was a woman of loose morals, a bad mother, a murderer . . . .").
\textsuperscript{118} See \textit{Lassiter}, 452 at 23, 33.
\textsuperscript{119} Petition for Rehearing, \textit{supra} note 85, at 10 (alteration in original).
\textsuperscript{120} See \textit{Lassiter}, 452 U.S. at 33.
\textsuperscript{121} Brief for the Respondent, \textit{supra} note 105, at 10.
\textsuperscript{122} Id. at 8–9.
\textsuperscript{123} Id. at 9.
maintained that Ms. Lassiter's due process claim had not been properly preserved for review.\textsuperscript{124}

Whether Ms. Lassiter's failure to inform the trial judge that she was indigent and to ask for counsel constituted a waiver of her right to counsel was an issue that concerned some of the justices, yet none understood it in the context of her poverty.\textsuperscript{125} Justice Stewart did not formally address the waiver issue, and only implicitly addressed it through his carefully arranged presentation of the facts that repeatedly emphasized Ms. Lassiter's failure to act responsibly and protect her rights.\textsuperscript{126} Her failure to ask the trial court to appoint her counsel was another indicia of her undeservingness. This informed Justice Stewart's conclusion that "Ms. Lassiter did not aver that she was indigent, and [therefore] the court did not appoint counsel for her."\textsuperscript{127} The way Justice Stewart used the matter of Ms. Lassiter's possible waiver was in some measure a kind of judicial patois for her lack of personal responsibility.\textsuperscript{128}

Justice Stewart also invested considerable effort in establishing that Ms. Lassiter's appearance at the termination hearing was actually "[a]t the behest of the Department of Social Services' attorney" and that the trial judge began the proceeding with an inquiry into "whether Ms. Lassiter should have more time in which to find legal assistance."\textsuperscript{129} This may have been the first time Ms. Lassiter was fully aware of or understood the fact that she could be represented, but this possibility went unaddressed by Justice Stewart. Justice

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  \item \textsuperscript{124} Id. at 10.
  \item \textsuperscript{125} Interestingly, the law clerks for Justices Marshall, Blackmun, and Powell noted Ms. Lassiter's status as a poor person and treated it more sympathetically than the Court's formal opinion. In a bench memo written for Justice Powell a few days before the February 23, 1981 oral argument, one of his law clerks, who had recommended reversal of the North Carolina judgment, pointed out that "[p]eople whose parental rights are likely to be terminated are the poor and minorities who are least likely to persuade a court, in light of the contrary position of professional social workers, that they are proper parents." Bench Memorandum from Peter Byrne, Law Clerk, to Mr. Justice Powell 5 (Feb. 20, 1981), in Powell Papers, supra note 31. A clerk for Justice Blackmun argued, "The trial transcript of this case provides eloquent testimony to the inability of uneducated litigants to function adequately without counsel at a termination hearing. It also suggests that without the credibility provided by professional representation, an indigent and inartful parent is a likely victim of impatience or bias from the court." Bench Memorandum to Mr. Justice Blackmun 24 (Feb. 6, 1981), in Blackmun Papers, supra note 31, box 341, folder 1. Justice Marshall’s law clerk wrote, "the case provides an ideal opportunity to vindicate rights of poor people, who are able to provide care for their children through extended family networks, but who are nearly powerless in the face of the bureaucracy and the courts." Bench Memorandum to Mr. Justice Marshall 6 (Feb. 23, 1981), in Papers of Justice Thurgood Marshall (Manuscripts Division, Library of Congress, Washington, D.C., box 261, folder 2).
  \item \textsuperscript{126} Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 22 (1981).
  \item \textsuperscript{127} Id. (emphasis added).
  \item \textsuperscript{128} Concededly, Justice Stewart does not explicitly confront the question of waiver. Instead, he introduces the principle through facts to show that Ms. Lassiter never raised the matter of her need for counsel. See Lassiter, 452 U.S. at 33 ("In view of all these circumstances, we hold that the trial court did not err in failing to appoint counsel for Ms. Lassiter.").
  \item \textsuperscript{129} Id. at 21.
\end{itemize}
Stewart also had little interest in determining whether the state trial judge adequately inquired of Ms. Lassiter whether she was able to retain counsel.\textsuperscript{130} What Justice Stewart did focus on, however, was Ms. Lassiter's failure to inform the private lawyer handling the post-conviction challenge of her criminal case.\textsuperscript{131} To Justice Stewart, her failure to do so was another constitutionally damning fact.

It appears that Justice Brennan saw waiver as a minimal concern but not one weighty enough to avoid deciding the case in her favor.\textsuperscript{132} But under either scenario—waiver or the merits of the trial court's ruling—the same facts that were considered bad by a number of the justices should have militated decisively in favor of finding that due process required appointment of counsel. It was precisely because of her status as a convicted inmate, who had neither the understanding nor the ability to tender a defense on her own behalf, that Ms. Lassiter needed legal representation to receive a fair hearing.\textsuperscript{133} Justice Stewart's treatment of the waiver question, however, absolved the trial court of any duty or responsibility and cast Ms. Lassiter as someone who did not deserve greater constitutional protections.\textsuperscript{134}

At the termination hearing the trial judge should have had no doubt about Ms. Lassiter's indigency because, at the initial neglect proceeding in 1975, he found that her welfare checks were being mailed to her boyfriend's house.\textsuperscript{135} Given that, in the past, Ms. Lassiter had received Aid to Families with Dependent Children (AFDC) welfare benefits and that she was before the Court as an inmate, her indigency should have been a matter of primary concern for the trial court. The Department of Social Services' argument in the Supreme Court that there was nothing in the record on the matter of her indigency was, at best, disingenuous.\textsuperscript{136} Indeed, the Department of Social Services framed this issue in terms of Ms. Lassiter's failure to demonstrate her indigency.\textsuperscript{137} Given that Ms. Lassiter had been subject to the agency's oversight since her child was removed for neglect, it is virtually certain that her

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  \item \textsuperscript{130} See \textit{id.} at 20–21.
  \item \textsuperscript{131} \textit{id.} at 21; see Rebecca E. Zietlow, \textit{Beyond the Pronoun: Toward an Anti-Subordinating Method of Process}, 10 \textit{TEX. J. WOMEN \\& L.} 1, 3–4 (2000) (arguing that our procedural "rules articulate a paradigm that does not correspond to the experience of many people in our society—people who fall outside the mainstream because of their gender, race, level of income, or some combination of these characteristics," and pointing out that poor women frequently lose in court "because decision-makers do not understand the plight of the poor women who appear before them and, far too often, because the decision-maker is prejudiced against them").
  \item \textsuperscript{132} Conference Notes of Justice Harry A. Blackmun, Lassiter v. Dep't of Soc. Servs., 79-6423 (Feb. 25, 1981), \textit{in Blackmun Papers, supra} note 31.
  \item \textsuperscript{133} See \textit{Lassiter}, 452 U.S. at 33–34 ("Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel.").
  \item \textsuperscript{134} \textit{id.} at 32–33.
  \item \textsuperscript{135} Transcript of Evidence, \textit{supra} note 84, at 17; see Schechter, \textit{supra} note 30, at 450.
  \item \textsuperscript{136} See Brief for the Respondent, \textit{supra} note 105, at 8–9.
  \item \textsuperscript{137} \textit{id.}
\end{itemize}
case file would have contained information on her income sources and employment history. Ironically, however, the lawyer for the state agency questioned Ms. Lassiter on why her welfare check was sent to her boyfriend’s grandparents’ home. The state agency’s lawyer then referenced evidence from the 1975 neglect hearing that showed Lassiter was not living at that address.

This fact evidencing her status as an impoverished person, who had previously received AFDC, escaped the attention of Justice Stewart when he assigned her blame for not informing the trial court that she was indigent and not asking the court to appoint her counsel. The Court’s lack of interest in understanding why she may not have acted on her own behalf, beyond the prejudicial construct that she was irresponsible and undeserving, is given greater context by her possible mental retardation. If she, in fact, suffered from a mental deficiency, her silence about her indigency and her accompanying failure to ask for appointed counsel would not be the result of irresponsibility or disaffection, but rather the result of her social isolation and limited abilities.

The Supreme Court’s response to the question of waiver in Johnson v. Zerbst, a case about the Sixth Amendment right to counsel in federal criminal felony proceedings, offers a useful analogue to understand the reason Justice Stewart’s treatment of Ms. Lassiter’s failure to ask the trial court for counsel was constitutionally insufficient. The Court in Zerbst held that an indigent defendant in a federal felony prosecution has the right to appointed counsel under the Sixth Amendment, absent an intentional waiver. In Zerbst, two enlisted Marines were arrested in Charleston, South Carolina, and charged with passing four counterfeit twenty-dollar bills. The two defendants were initially represented by counsel in a preliminary proceeding, but, after being indicted by a grand jury two months later, they were unable to retain private counsel. At their arraignment, the two defendants informed the trial judge they were not represented, and, after an inquiry by the Court, the defendants stated that they were ready to proceed to trial.

138. Transcript of Evidence, supra note 84, at 18–19.
139. Id.
141. Schechter, supra note 30, at 446.
142. Id. at 446–47. Ms. Lassiter’s lawyers raised this evidence in her brief seeking rehearing. Petition for Rehearing, supra note 85, at 9–10.
144. Id. at 467–68.
145. Id. at 459–60.
146. Id. at 460.
147. Id.
The defendants in *Zerbst*, like Ms. Lassiter, had little education and could not afford private counsel.¹⁴⁸ Unlike Ms. Lassiter, these two defendants were far from home with no friends or family nearby.¹⁴⁹ And, of course, unlike Ms. Lassiter, their physical liberty was at stake.¹⁵⁰ In *Zerbst*, the evidence showed that the two defendants, similar to Ms. Lassiter, never asked the court to appoint counsel.¹⁵¹ The evidence adduced at the habeas proceeding also showed that they asked the prosecutor to find counsel for them, but the prosecutor denied this.¹⁵² After their trial, they returned to jail, and at that point asked a guard to contact a lawyer for them.¹⁵³

Although the issue of waiver in *Zerbst* was examined in the context of the Sixth Amendment’s command that an accused shall have the assistance of counsel, the Court’s analysis nevertheless is helpful in understanding why Justice Stewart’s treatment of Ms. Lassiter’s failure to ask for counsel was constitutionally short-sighted. The Court in *Zerbst* identified a “protecting duty” that “imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver.”¹⁵⁴

In *Lassiter*, Justice Stewart used Ms. Lassiter’s failure to request appointment of counsel to help establish the fairness of the proceedings and to exonerate the trial judge from any default in his judicial duty.¹⁵⁵ After all, why should the North Carolina trial judge be held responsible when Ms. Lassiter never acted to inform her? *Zerbst* provides the answer. First, Justice Stewart pointed to the trial court’s finding that Lassiter “had ample opportunity to seek and obtain counsel prior to the hearing.”¹⁵⁶ Second, he devalued Ms. Lassiter’s testimony that she attempted to notify someone for assistance when she was served with the termination petition.¹⁵⁷ Given that Justice Stewart attached

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¹⁴⁸. *Id.*
¹⁴⁹. *Id.*
¹⁵⁰. See *id.* at 465.
¹⁵¹. *Id.* at 460.
¹⁵². *Id.* at 460–61.
¹⁵³. *Id.* at 461.
¹⁵⁴. *Id.* at 465.
¹⁵⁵. See Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 22 (1981) (“Since the court concluded that she ‘has had ample opportunity to seek and obtain counsel prior to the hearing of this matter, and [that] her failure to do so is without just cause,’ the court did not postpone the proceedings.”).
¹⁵⁶. *Id.*. The hearing record reveals that the trial judge, after noting Ms. Lassiter had been served and had done nothing to prepare for the hearing, pointed out the case had been set for hearing once before, thereby suggesting she had ample opportunity to retain counsel. Transcript of Evidence, *supra* note 84, at 3. However, it turned out the first hearing was cancelled because the judge was out of town at a judicial conference. *Id.* at 6–7, In re Lassiter, No. 75J56 (N.C. Dist. Ct. 1978). After it was revealed that the first hearing never took place, the lawyer for the state agency noted that, if the court wanted to allow Ms. Lassiter more time to talk with the lawyer handling her criminal case, he would not object. *Id.* at 7. Even with this, the trial judge saw no need or justification to allow Ms. Lassiter additional time to retain counsel. *Id.* at 9.
¹⁵⁷. See *Lassiter*, 452 U.S. at 21 (noting that Ms. Lassiter spoke with “someone” in prison about the termination petition).
great constitutional significance to Ms. Lassiter’s parental interest, there is no reason the North Carolina trial judge’s responsibilities should not have included a “protecting duty” to ensure that she had not waived her right to be heard through counsel. The trial judge, however, never truly considered appointing counsel. This is so despite the fact that there was ample evidence of her indigency based on the trial judge’s knowledge that she had received welfare. Further, her limited ability to speak for herself, which is clear from the transcript, was likely very apparent to the trial judge as well. The protective model of Zerbst, despite its Sixth Amendment roots and accompanying concern with the loss of physical liberty, puts the omissions of the trial judge, and Justice Stewart’s disregard of those omissions, in bold relief.

Virtually every lawyer who represents poor people would likely view Ms. Lassiter’s inaction and silence far differently than did Justice Stewart. Lawyers who represent the poor understand that Ms. Lassiter’s failure to tell her criminal lawyer about the termination petition was more likely the result of her isolation as an inmate, her restricted sophistication and abilities, and her limited understanding, rather than an indicium of her lack of interest. Professor Schechter brings to light the fact that there was evidence in the lower court transcript showing that Ms. Lassiter’s only contact with the lawyer handling her collateral challenge was a single letter the lawyer sent her, possibly explaining why she never informed him. Employing a middle-class sensibility, the possibility that she would know she could obtain legal counsel when there was a lawyer working on her behalf on another matter is not a credible one. Or, perhaps, it is an explanation that fails to take account of personal responsibility. However, the poor are frequently ill-informed of their rights and even more limited in their understanding of how to assert them. This lack of understanding is further compounded in cases where the person

158. Id. at 31.
159. See Schechter, supra note 30, at 447.
160. See id. at 450.
161. See generally Transcript of Evidence, supra note 84.
162. Schechter, supra note 30, at 445. Ms. Lassiter’s lawyers raised this issue in her petition for rehearing, explaining that during the period between when she was served and the termination hearing, her only contact with the lawyer handling her criminal appeal was the receipt of a letter from the lawyer. Petition for Rehearing, supra note 85, at 13. The hearing transcript suggests that the letter only concerned the post-conviction criminal proceeding. Transcript of Evidence, supra note 84, at 5. Her appellate lawyers submitted an affidavit by the attorney handling her criminal appeal that made clear he had not communicated with her about the termination case and that she had never sought assistance from him with the termination proceeding. Lassiter, 452 U.S. at 53 n.21 (Blackmun, J., dissenting).
163. Cf. Richard A. Rosen, Reflections on Innocence, 2006 WIS. L. REV. 237 n.33 (2006) (quoting RICHARD HARRIS, JUSTICE: THE CRISIS OF LAW, ORDER, AND FREEDOM IN AMERICA 235 (1970)) (“[A]ll the Miranda decision did was assure to the uninformed and the poor the same rights that reasonably knowledgeable and prosperous citizens had asserted all along.” (alteration in original)).
has impaired intellectual capabilities or suffers from a mental disability. In the case of Ms. Lassiter, all of these factors may have been at work.\textsuperscript{164} In many jurisdictions, persons who must proceed on their own because they cannot afford counsel are nevertheless held to the same exacting standards as practicing lawyers, creating an unforgiving fiction.\textsuperscript{165}

The transcript of Ms. Lassiter's termination of parental rights hearing reveals a similarly unforgiving fiction—that she was afforded a meaningful opportunity to be heard and to defend her interests, though she did not have the assistance of counsel.\textsuperscript{166} Justice Stewart, however, determined that the hearing was not fundamentally unfair.\textsuperscript{167} He accomplished this by describing portions of the testimony of the principal witness for the Department of Social Services, a case worker named Bonnie Cramer, and by pointing out that Ms. Lassiter cross-examined the social worker who "firmly reiterated her earlier testimony."\textsuperscript{168} Justice Stewart made note of the fact that many of Ms. Lassiter's questions were excluded despite efforts of the trial judge to explain to Ms. Lassiter that cross-examination required her to ask questions rather than make arguments.\textsuperscript{169} Further, Justice Stewart observed that both Ms. Lassiter and her mother were able to testify.\textsuperscript{170}

One could argue that Justice Stewart's prosaic account is an accurate and balanced portrait of the termination hearing that, by and large, was fair. The transcript of the hearing, however, reveals a dynamic far more hostile and a trial court judge who was as disbelieving as he was impatient with a person clearly incapable of proceeding on her own or able to competently protect her legal interests.\textsuperscript{171} The true tenor of the hearing and the insurmountable challenges faced by Ms. Lassiter were apparent to Justice Blackmun, who, in an undated file memorandum that he wrote in the first person, affectingly observed that "[o]ne need only examine the transcript in this case to perceive

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\item \textsuperscript{164} Schechter, supra note 30, at 445–47.
\item \textsuperscript{165} See, e.g., Anderson ex rel. J.A. v. Sch. Bd., 830 So. 2d 952, 952–53 (Fla. Dist. Ct. App. 2002) (holding that a student who appeared without counsel at a school expulsion hearing had waived any due process claim of error for not raising the issue at the hearing despite the fact that he was given notice on a Friday afternoon that the hearing would be the following Monday morning); Rainey v. SSPS, Inc., 259 S.W.3d 603, 604, 606 (Mo. Ct. App. 2008) (holding a pro se appellant to the same standards under procedural rules as attorneys, and denying relief to an appellant seeking unemployment compensation for failing to meet the procedural requirements for contents of the appellate briefs).
\item \textsuperscript{166} See generally Transcript of Evidence, supra note 84.
\item \textsuperscript{167} Lassiter, 452 U.S. at 32–33.
\item \textsuperscript{168} Id. at 23.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} See Transcript of Evidence, supra note 84, passim.
\end{itemize}
the utter helplessness and the sense of loss sustained by the petitioner when she was forced to proceed without the assistance of counsel."

The trial judge’s harsh treatment of Ms. Lassiter did not go unnoticed by either Justice Blackmun or his law clerks. In a memorandum prepared by one of Justice Blackmun’s clerks, commenting on changes Justice Blackmun had made to a draft of his dissenting opinion, the law clerk addressed the matter of the trial judge’s temperament and treatment of Ms. Lassiter:

I appreciate your desire not to be overly harsh toward the local judge. I tried on pp.28-31, to achieve a compromise position in this regard—not casting direct aspersions, but still identifying for the reader what was undignified about the treatment accorded to [Lassiter]. Your additions on p.29 are a key bridge here.

Justice Stewart’s accounting of the termination hearing, however, gave no hint of the harsh treatment Ms. Lassiter received. Instead, it was informed by a strategic use of the facts to establish that the hearing itself was constitutionally fair and that Ms. Lassiter was not deserving of any greater measure of process than what was afforded her. Relying on statements by the trial court judge concerning Ms. Lassiter’s actions at the initial neglect hearing in 1975, Justice Stewart painted a picture of a parent who not only failed to seek counsel at the termination hearing, but who also contacted the Department of Social Services prior to the initial hearing in 1975 and told it she would not be attending.

A review of the transcript reveals, even more compellingly, just how severe a disadvantage Ms. Lassiter faced. The portion of the hearing during which she was permitted to cross examine the social worker puts the unfairness of the proceeding in bold relief:

THE COURT: All right. Do you want to ask her questions?
LASSITER: About what? About what she—
THE COURT: About this child.
LASSITER: Oh, yes.

172. Memorandum from Justice Blackmun 2 (undated), in Blackmun Papers, supra note 31, box 341, folder 1 (containing Justice Blackmun’s hand edits). This three-page typed memorandum, which contains corrections in Justice Blackmun’s own hand, has language similar to that found in various parts of his dissenting opinion. It appears to be a document memorializing his thoughts and sentiments about the case and the reasons he dissented. However, the memorandum’s affecting description of the hearing was edited down for inclusion in his dissent; in his dissent, Justice Blackmun wrote “[t]he problem of inadequate representation is painfully apparent in the present case.” *Lassiter*, 452 U.S. at 52 (Blackmun, J., dissenting).


175. *Lassiter*, 452 U.S. at 22–23. Professor Schechter raises the possibility that the claim Ms. Lassiter phoned an agency social worker prior to the initial 1975 dependency hearing to inform the agency that she was not going to appear is factually untrue. Schechter, supra note 30, at 438. He points to facts suggesting it was Ms. Lassiter’s mother, and not Ms. Lassiter herself, who made that call. *ld.*
CROSS EXAMINATION by MS. LASSITER:
Q: The Only thing I know is that when you say–
THE COURT: I don’t want you to testify.
MS. LASSITER: Okay.
THE COURT: I want to know whether you want to cross examine her or ask any questions.
MS. LASSITER: The only thing I know is that when you say–
THE COURT: I don’t want you to testify.
MS. LASSITER: Okay.
THE COURT: I want to know whether you want to cross examine her or ask any questions.
MS. LASSITER: Yes, I want to. Well, you know, the only thing I know about is my part that I know about it. I know–
THE COURT: I am not talking about what you know. I want to know if you want to ask her any questions or not.
MS. LASSITER: About that?
THE COURT: Yes. Do you understand the nature of this proceeding?

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THE COURT: Are there any questions you want to ask her about what she has testified to?
MS. LASSITER: Yes.
THE COURT: All right. Go ahead.
Q: I want to know why you think that you are going to turn my child over to a foster home? He knows my mother and he knows all of us. He knows her and he knows all of us.
THE COURT: Who is he?\footnote{176}{Transcript of Evidence, \textit{supra} note 84, at 19–20.}

The transcript leaves little doubt that Ms. Lassiter lacked both the understanding and the ability to protect her interests at the termination hearing. Just as Justice Stewart’s opinion gives no hint of the intemperate demeanor of the trial judge during the termination hearing,\footnote{177}{Early in the proceeding, Ms. Lassiter’s mother, Lucille Lassiter, interrupted a social worker’s testimony to deny that she indicated to the agency that she would be unable to care for the child. The trial judge threatened to jail her if she did not remain quiet. Transcript of Evidence, \textit{supra} note 84, at 14.} he similarly ignored the many instances where Ms. Lassiter’s limited understanding and capabilities foreclosed any chance for a fair hearing.
III. A Matter of Policy Over Precedent

The conference notes of Justice Blackmun and Justice Powell suggest that the outcome in Lassiter was driven as much by policy concerns as by the Court's reading of its right to counsel precedent.178 Most of the justices, including Justice Brennan, who would join Justice Blackmun's dissent, wrestled with the policy implications of reversing the North Carolina decision terminating Ms. Lassiter’s parental rights.179 Justice Powell’s papers indicate that, during the Court’s conference, Justice Stewart argued, “we have never extended these [right to counsel] rulings to purely civil cases;” Goldberg v. Kelly was to [the] contrary.”180

Justice Stewart was also concerned that if the Court held due process required appointment of counsel in Lassiter, an attorney would also have to be appointed to the child in such proceedings.181 After acknowledging that his law clerk had recommended that the Court reverse the North Carolina decision and hold due process required appointment of counsel for an indigent parent in a state termination of parental rights proceeding, Justice Powell, in a note written in his deliberate cursive writing on the first page of a bench memo prepared by the same clerk, conceded that “deprivation of parental rights is a serious matter—more severe than many criminal penalties.”182 However, Justice Powell’s policy concerns caused him to ask, “If we reverse, what principle will prevent a vast extension of [the] right to counsel?”183 His conference notes provide an even clearer insight into his policy concerns. At conference, he took the position that “[a]bsent any way to limit the effect of holding that the Constitution requires counsel in this case ([and] I have heard none suggested), I agree with most of what [Justice Stewart said].”184 Justice Powell further explained that he agreed with Chief Justice Burger’s view “that


179. Justice Powell’s conference notes indicate that, although Justice Brennan announced he would vote to reverse the decision, he was concerned with “how to contain a holding that counsel is required.” Conference Notes of Justice Louis F. Powell, Lassiter v. Dep’t of Soc. Servs., 79-6423 (Feb. 25, 1981), in Powell Papers, supra note 31.


182. Bench Memorandum from Peter Byrne, Law Clerk, to Mr. Justice Powell 5 (Feb. 20, 1981), in Powell Papers, supra note 31 (quoting Justice Powell’s February 21 notes reviewing the memorandum).

183. Id.

we should be careful not to constitutionalize every need that strongly appeals to our sense of what would be highly desirable.’”

Justice Powell, however, was not alone in his concern about the possible consequences of finding that due process entitled Ms. Lassiter to appointed counsel at state expense. During conference, Justice Rehnquist indicated that he thought the “[Constitution] spell[ed] it out,” and that there was “no limiting principle.”

According to Justice Powell’s notes, Justice Burger maintained that the Court had gone as far as it “should go in finding in [the] Constitution a right to counsel.”

For Chief Justice Burger, the matter was a legislative choice of “when counsel should be provided at public expense in civil cases.” Justice White’s policy reservations were evident when he posed the question, “Where would this lead us?”

As noted earlier, Justice Brennan, who voted to reverse the lower court decision, also voiced a concern over how the Court could limit a holding that due process required appointment of counsel. According to Justice Powell’s conference notes, Justice Blackmun, who initially voted at conference to affirm, saw the case as falling within the framework of *Morrissey v. Brewer* and *Gagnon v. Scarpelli*. Justice Blackmun’s conference notes

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187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. The available conference notes revealed two unexpected turns in the Court’s internal deliberations. Justice Powell’s conference notes reveal, somewhat surprisingly, that Justice Blackmun had initially indicated at the conference that he would be casting his vote to affirm the state court decision terminating Ms. Lassiter’s rights under the authority of *Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). Conference Notes of Justice Louis F. Powell, Lassiter v. Dep’t of Soc. Servs., 79-6423 (Feb. 25, 1981), in Powell Papers, *supra* note 31. Other than Justice Powell’s conference notes, neither his papers nor the papers of Justice Brennan, Justice Stewart, Justice Marshall, or Justice Blackmun shed any further light on what ultimately caused Justice Blackmun to change his initial vote to affirm. This fact is surprising, given the forcefulness and passion of the dissenting opinion Justice Blackmun eventually wrote. Additionally, Justice Blackmun’s papers show that, at one point in the decisional process, he was hopeful of writing an opinion that would garner a majority, with Justice White supplying the critical fifth vote. *See* Letter from Justice Blackmun’s Law Clerk to Justice Blackmun (May 8, 1981), in Blackmun Papers, *supra* note 31. A May 8, 1981 memo from one of Justice Blackmun’s clerks explaining revisions the law clerk made to Justice Blackmun’s draft opinion reveals that at that stage, the opinion was being prepared with the hope it would gain a majority. *Id.*

The clerk recommended to Justice Blackmun that he omit language at the end of the draft because it might trouble Justice White. *Id.* The clerk explained further that he “tried to write the conclusion, and indeed the opinion as a whole, narrowly, in the hope that [Justice White] would not get frightened off.” *Id.*


reveal that Justice Stevens, in fact, addressed the policy concerns being raised by other justices during conference. 194 According to Blackmun’s notes, Stevens argued that counsel is the “essence” of due process and that any “slippery slope” could be handled by deciding such cases on an “ad hoc basis.” 195 Neither Justice Blackmun’s nor Justice Powell’s notes indicate that Justice Marshall expressed any policy concerns. The notes of both Justices Blackmun and Powell, however, signify that Justice Marshall was convinced that appointed counsel was necessary despite his belief that the case presented bad facts and had been correctly decided. 196 Justice Powell’s notes show that Justice Marshall told the conference that “even [though] this case was correctly decided on the facts, [he] will find some way to hold counsel is necessary.” 197 According to Justice Blackmun’s conference notes, however, Justice Marshall, was unwilling to make such a holding retroactive. 198 Although the available conference notes do not yield any further evidence indicating what Justice Marshall might have said at conference, it seems fair to infer that he understood a parent in the position of Lassiter needed counsel to obtain a fair hearing.

Both Justice Blackmun’s and Justice Powell’s conference notes make abundantly clear that policy concerns were an animating concern for the justices in Lassiter. 199 For a majority of the justices, it appears that policy concerns tipped the balance for how they calibrated the justice due Ms. Lassiter under the Fourteenth Amendment. Whether framed as a concern grounded in judicial restraint or as an institutional deference to the primacy of the legislative branch to decide whether the right to counsel should extend beyond the confines of cases involving the loss of physical liberty, a majority of the members of the Court nevertheless made a deliberate policy choice that affected their application and interpretation of the Constitution. 200

194. Conference Notes of Justice Harry A. Blackmun, Lassiter v. Dep’t of Soc. Servs., 79-6423 (Feb. 25, 1981), in Blackmun Papers, supra note 31. Unlike Justice Powell, who included his own views expressed during the Court’s conference, Justice Blackmun’s conference notes in Lassiter do not document his own position at the conference or the views he shared with the other justices. See id.

195. Id.


197. Id.


200. Felix Frankfurter acknowledged that the Court’s decisional process was informed by policy concerns and the justices’ interpretive choices. See FELIX FRANKFURTER & JAMES LANDIS, THE BUSINESS OF THE SUPREME COURT 307–10 (2007). Justice Frankfurter explained that “[c]onstitutional interpretation is most frequently invoked by the broad and undefined clauses of the Constitution, [and] [t]heir scope of application is relatively unrestricted, and the room for play of individual judgment as to policy correspondingly broad.” Id. at 308. He recognized
IV. TWISTING IT WRONG TO MAKE IT RIGHT: JUSTICE STEWART'S DUE PROCESS ANALYSIS

Neither the Court's Sixth Amendment right to counsel jurisprudence nor its Fourteenth Amendment right to counsel cases provided an inexorable command for the ultimate outcome in *Lassiter*. Having laid out the factual narrative that would support his eventual finding that there was no constitutional trespass against Ms. Lassiter's due process rights, Justice Stewart proceeded to take on the task of examining what due process means and whether due process in the specific context of the *Lassiter* case required appointment of counsel. As to defining due process, Justice Stewart first explained that, although the concept "can never be[] precisely defined," it "expresses the requirement of fundamental fairness." He narrowed the bounds of determining what fundamental fairness requires to precedent and to a consideration of the particular interests at risk utilizing the three-factor test established in *Mathews v. Eldridge*.

Wasting little time or space, Justice Stewart determined that the Court's precedent established that an indigent person's right to counsel was inextricably linked to the risk of the loss of physical liberty. He explained that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel." In reaching this conclusion, he drew a sharp distinction between an indigent's right to counsel under the Sixth and Fourteenth

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201. The idea for this section heading was supplied by Michael Simon, a Florida Coastal Law School student, who used it as the title of a paper he wrote in my fall 2008 Poverty Law class on the 2005 Bankruptcy Reform Act. The original source of the phrase is a lyric from the song "Landed" by the singer and songwriter Ben Folds. See Ben Folds - Landed Lyrics, http://www.lyricsmania.com/lyrics/ben_folds-lyrics_4267/songs_for_silverman_lyrics_13231/landed_lyrics_153466.html (last visited Aug. 11, 2010) ("And I twisted it wrong just to make it right.").


203. Id. at 24 (internal quotation marks omitted).

204. Id. at 27 (explaining that the test "propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions"); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) ("Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

205. Id. at 25.

206. Id. at 26.
Amendments in criminal cases that involved the “defendant’s interest in personal freedom” and cases that did not implicate the risk of a loss of physical liberty. By doing so, he was able to use both criminal right to counsel cases and the probation- and parole-revocation due process cases to more closely align the right to appointed counsel with the risk of the loss of personal freedom. Equally important, however, is that, by drawing this alignment between a person’s interest in personal liberty and the right to counsel, Justice Stewart was able to cabin the meaning of fundamental fairness and to support the use of a presumption against such a right when physical liberty was not in jeopardy:

In sum, the Court’s precedents speak with one voice about what ‘fundamental fairness’ has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

This emphasis on the loss of personal liberty, however, although drawing its greatest support from the Court’s decision in Scott v. Illinois, which held that the Sixth and Fourteenth Amendments mandate the provision of counsel to indigent defendants only when they face actual imprisonment, was not a doctrinal postulate demanded by the Court’s precedent. Writing for the Court in Scott, Justice Rehnquist recast the core concern of Argersinger v. Hamlin as one resting on the premise “that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment.” No doubt, Scott offers support for Justice Stewart’s use of a presumption that is informed by the loss of physical liberty. But the Court’s criminal right to counsel cases prior to Scott do not, by language or by logic, foreclose finding that due process requires the appointment of counsel in instances other than when the loss of physical liberty is at stake. To conclude otherwise, however, as Justice

207. Id. at 25.
208. See id. at 25–26 (citing Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (holding a revocation proceeding is “not part of a criminal prosecution and thus the full panoply of rights due a [criminal] defendant in such a proceeding does not apply to parole revocations,” but not deciding the question of whether a parolee is entitled to assistance of retained counsel, or appointed counsel if he is indigent)); Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (establishing that whether a person facing revocation of probation is entitled to appointed counsel is a case-by-case determination, and concluding that “[a]lthough the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees”).
211. Id. at 373.
212. See id. at 372–73.
Stewart did in *Lassiter*, requires a type of syllogistic reasoning. Professor Schechter maintains that cases that hold counsel was required because a loss of personal liberty was at stake “do not establish the converse proposition that counsel is not required when deprivation of physical liberty is not threatened.”213

In *Lassiter*, though, Justice Stewart engrafted onto the Court’s criminal right-to-counsel cases an exclusionary meaning that linked the need for counsel to the loss of physical liberty—which was neither dictated as a matter of precedent nor demanded as a matter of logic. Justice Stevens’ dissent in *Lassiter* demonstrates this point. According to Justice Stevens, “the reasons supporting the conclusion that the Due Process Clause of the Fourteenth Amendment entitles the defendant in a criminal case to representation by counsel apply with equal force to a case of this kind.”214 At the Court’s conference, Stevens took the position that the liberty interest at stake was “entitled to [a] higher degree [of] protection” and that counsel was the essence of due process.215 For Justice Stevens, the loss of personal freedom was not necessary to implicate the right to counsel.

In fact, the sharp line of demarcation Justice Rehnquist drew in *Scott* based on actual imprisonment was rejected by Justice Powell, who explained in his concurring opinion in *Scott* that “the drawing of a line based on whether there is imprisonment (even for overnight) can have the practical effect of precluding provision of counsel in other types of cases in which conviction can have more serious consequences.”216 Justice Powell’s personal papers from *Lassiter* reveal that this remained a concern for him, but not enough of one to reject Justice Stewart’s use of a presumption that turned on the absence of a loss of physical liberty.217

However, in a number of earlier cases that did not involve a loss of physical liberty, the Court showed a reluctance to attach a rigid distinction in all circumstances to the constitutional significance of the absence of the risk of loss of physical liberty or to the distinction between civil and criminal proceedings. In *Mayer v. City of Chicago*, the Court considered whether an indigent person charged with a non-felony offense, but who faced only a fine and not confinement, was entitled to a record of the trial proceedings to file an appeal.218 Finding the Constitution entitled the defendant in *Mayer* to a

213. Schechter, supra note 30, at 471.
215. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (observing that, although it had never closely defined “liberty,” the “term is not confined to mere freedom from bodily restraint”).
transcript at state expense, the Court discounted the constitutional significance of any distinction based on whether the sentence would result in a fine or a loss of personal liberty.\textsuperscript{220} In \textit{Boddie v. Connecticut}, the Court drew upon its earlier decision in \textit{Griffin}, a criminal access-to-court case, to reject Connecticut’s interest in the resource-allocation argument when it determined that the state’s court-fee structure violated due process by barring indigents seeking divorce.\textsuperscript{221} That \textit{Griffin} involved a criminal case and the loss of personal freedom did not, however, present an obstacle for the Court in \textit{Boddie}, a purely civil case involving no personal liberty loss.\textsuperscript{222} In \textit{McKeiver v. Pennsylvania}, which did involve a loss of liberty, the Court, in a plurality opinion written by Justice Blackmun, held the Fourteenth Amendment does not require a jury trial in juvenile proceedings.\textsuperscript{223} But in his explanation, Justice Blackmun offered the admonition that “little, indeed, is to be gained by any attempt simplistically to call the juvenile court proceeding either ‘civil’ or ‘criminal.’”\textsuperscript{224}

Justice Blackmun’s dissent in \textit{Lassiter} demonstrates that the sharp line drawn by Justice Stewart was not necessarily compelled by the Court’s prior decisions. Justice Blackmun explained that the Court used due process outside of the criminal context to determine whether counsel was required in cases not involving the loss of personal liberty.\textsuperscript{225} He used \textit{Goss v. Lopez}, a public-school student discipline case, to illustrate this point.\textsuperscript{226} Although the Court in \textit{Goss} determined due process did not require legal counsel, it is nevertheless noteworthy that the need for counsel was considered in a civil proceeding without any reference to whether there was a risk of personal liberty loss.\textsuperscript{227}

\textsuperscript{220} Id. at 197.
\textsuperscript{222} See id. at 382. However, twenty-five years later in \textit{M.L.B. v. S.L.J.}, the Court held an indigent parent seeking appellate review of a judicial decree that terminated her parental rights was entitled to waiver of the fee required to prepare the trial record; the Court pointed out that it had not “extended \textit{Griffin} to the broad array of civil cases.” \textit{M.L.B. v. S.L.J.}, 519 U.S. 102, 116 (1996). But the Court in \textit{M.L.B.} also explicitly rejected Mississippi’s argument to “rigidly restrict \textit{Griffin} to cases typed ‘criminal.’” Id. at 127. In rejecting Mississippi’s entreaty to limit \textit{Griffin}, the Court noted that it was “satisfied that the label ‘civil’ should not entice us to leave undisturbed the Mississippi courts’ disposition of the case.” Id. at 128.
\textsuperscript{223} McKeiver v. Pennsylvania, 403 U.S. 528, 541–42, 551 (1971).
\textsuperscript{224} Id. at 541. One of Justice Blackmun’s clerks prepared a lengthy memorandum directing the justice’s attention to his decision in \textit{McKeiver} and the fact that his opinion brushed aside the distinction between civil and criminal proceedings in a related context. Memorandum from Justice Blackmun’s law clerk to Justice Blackmun 24 (Feb. 6 1981), in Blackmun Papers, supra note 31; see Fuentes v. Shevin, 407 U.S. 67, 94 n.31 (1972) (dismissing the distinction between civil and criminal in the context of how courts evaluate a purported waiver of a fundamental constitutional right and noting that there is a presumption against such a waiver).
\textsuperscript{227} Id. at 583 (explaining that the Court was “stop[ping] short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel”).
In other noncriminal due process cases not involving a loss of personal freedom, the Court has explicitly employed language taken from *Powell v. Alabama* to illustrate the inextricable relationship between the right to be heard and the right to counsel.\(^{228}\) In *Goldberg v. Kelly*, the Court, though unwilling to find that due process required counsel be provided to indigent welfare recipients at a pre-termination hearing, nevertheless recognized the essential relationship between the right to counsel and the right to be heard.\(^{229}\) Quoting from its decision in *Powell*, which involved a capital offense, the *Goldberg* Court made the point that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”\(^{230}\) Despite this, the Court in *Goldberg* went on to concede that the appointment of counsel is not required in such hearings.\(^{231}\) However, the Court’s overt use of language from *Powell* in its *Goldberg* opinion offers an eloquent rebuttal to Justice Stewart’s attempt to doctrinally distinguish the Court’s criminal right to counsel cases from cases not involving a physical loss of liberty.\(^{232}\)

Similarly, Justice Stewart’s use of *Morrissey v. Brewer* and *Gagnon v. Scarpelli* to fence off the availability of legal counsel in civil cases is certainly open to question. Most notably, in *Morrissey* the Court actually declined to address the question of the right to counsel.\(^{233}\) In *Gagnon*, the Court held that counsel should be appointed presumptively when the parolee or probationer makes a colorable claim that he is not culpable of the alleged violation, or when there is no factual dispute over whether he committed the violation though there may be mitigating circumstances that are complex or difficult to present.\(^{234}\) The Court did not mandate appointment of counsel, however, but

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\(^{229}\) Id.

\(^{230}\) Id. at 270 (quoting *Powell*, 287 U.S. at 68–69).

\(^{231}\) Id. Stephen Loffredo and Dan Friedman argue that the Court in *Goldberg* did not reject the right to appointed counsel because, at the time, pending federal regulations would have conferred a right to appointed counsel at a more extensive post-deprivation hearing. Loffredo & Friedman, *supra* note 21, at 293–94. Loffredo and Friedman contend that “the Court’s analysis of the process due at the pre-termination stage assumed that any welfare claimant who did not prevail there would have recourse to a full-blown statutory ‘fair hearing’ at which more ample procedural protections would come into play” and would include appointed counsel. Id. As noted earlier, however, the conference notes of both Justice Blackmun and Justice Powell indicate that Justice Stewart read *Goldberg* as establishing a contrary principle—that the right to counsel did not extend beyond to purely civil cases. *See supra* text accompanying note 180.

\(^{232}\) See *Goldberg*, 397 U.S. at 70. In *Fuentes v. Shevin*, a prejudgment-remedy procedural due process case, the Court pointed out the severe disadvantage facing a debtor without counsel. 407 U.S. 67, 69–70, 83 n.13 (1972). The Court observed that when a debtor is uneducated and without access to counsel, “there may be a substantial possibility that a summary seizure of property—however unwarranted—may go unchallenged.” Id. at 83. n.13.

\(^{233}\) *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972); *see supra* note 208.

instead adopted a case-by-case assessment of the need for counsel.\textsuperscript{235} Although the Court’s decision in \textit{Gagnon} can be viewed as consistent with Justice Stewart’s focus on the risk of the loss of liberty, it by no means doctrinally dictated the outcome in \textit{Lassiter} because the liberty interest implicated in \textit{Gagnon} was a conditional one.\textsuperscript{236} Given the presence in \textit{Gagnon} of a less than full-measured liberty interest, this fact actually undermines its use as precedent to define the right to counsel exclusively through the constitutional prism of a loss of liberty.\textsuperscript{237}

Justice Stewart’s application of the \textit{Mathews v. Eldrige} three-factor test in \textit{Lassiter} rests on a utilitarian model of due process\textsuperscript{238} that was fatally weighted down by his use of a presumption against the right to counsel in the absence of a risk of the loss of physical liberty.\textsuperscript{239} Under this model, Justice Stewart was willing to find Ms. Lassiter’s interest in the accuracy and justice of the process a commanding one, and one that the state shares given its own interest in the well-being of her child.\textsuperscript{240} However, these shared interests deviate from the state’s desire for fiscal economy.\textsuperscript{241} With regard to the third \textit{Mathews’} factor, the risk of erroneous deprivation absent representation, Justice Stewart recognized that parental-termination proceedings can present difficult and

\begin{itemize}
\item \textsuperscript{235} \textit{Id.} at 790.
\item \textsuperscript{236} \textit{Id.} at 781 (quoting \textit{Morrissey}, 408 U.S. at 480); Schechter, \textit{supra} note 30, at 472–73.
\item \textsuperscript{237} In \textit{Vitak v. Jones}, the Court considered whether due process required counsel be provided to an indigent defendant at a hearing that would involve largely medical issues when the defendant was facing an involuntary transfer to a mental hospital. 445 U.S. 480, 482–83 (1980). The Court determined that counsel was necessary. \textit{Id.} at 497. However, it did not rest its decision on a narrow definition of liberty concerned only with the risk of the loss of personal freedom. Instead, the Court deemed that the liberty interest encompassed broader interests, including the stigmatizing consequences of being involuntarily transferred to a mental institution. \textit{Id.} at 491–92.
\item \textsuperscript{238} \textit{See} JERRY L. MASHAW, \textit{DUE PROCESS IN THE ADMINISTRATIVE STATE} 102 (1985) (explaining that the approach taken by the Supreme Court in \textit{Mathews} was “functionally oriented and quasi-scientific in its methodology; it made the guarantee of due process a guarantee of accurate and cost-effective decision making”); Jane Rutherford, \textit{The Myth of Due Process}, 72 B.U. L. REV. 1, 47 (1992) (“Utility theory balances the competing needs of individuals and society in favor of society . . . . \textit{Mathews v. Eldridge} best illustrates utilitarian theory.”); Linda Beale, Note, Connecticut v. Doehr and Procedural Due Process Values: The Sniadach Tetrad Revisited, 79 CORNELL L. REV. 1603, 1643–44 (1994) (“[T]he Mathews utilitarian calculus unduly emphasizes administrative convenience. It thus tends to undermine the principal value of constitutional due process protection—providing fundamentally fair procedures to the individual even when those procedures come at a cost to the general public.” (citation omitted)); see also LAURENCE H. TRIBE, \textit{AMERICAN CONSTITUTIONAL LAW} 718 (2d ed. 1988) (“[T]he Court’s unwillingness to consider values beyond accuracy of result in the context of a utilitarian balancing test when deciding what process is due, and the Court’s grant of a strong presumption of constitutionality to statutory procedural provisions, amount to a serious abdication of traditional notions of judicial responsibility under the due process clause.”).
\item \textsuperscript{240} \textit{Id.} at 27–28.
\item \textsuperscript{241} \textit{Id.} at 28.
\end{itemize}
complex matters and that a parent’s limited education and sophistication might render the risk "insupportably high."  

After identifying these interests and their relative weight, Justice Stewart’s due process decision balances them against the presumption against appointment in the absence of a deprivation of personal liberty. The presumption would be rebutted in those cases where the scales weighed heavily in favor of the parent’s interest and the risk of erroneous deprivation was high, while the interest of the state was at its nadir. Explaining that this balancing process will vary depending on how the three factors are weighted, the Court adopted the case-by-case standard announced in Gagnon v. Scarpelli to determine whether, in a particular parental-termination case, due process requires appointment of counsel.

The Court’s due process formulation in Lassiter offered little assistance to Ms. Lassiter. Justice Stewart minimized both the degree of risk and the benefit to be gained from appointment of counsel. First, he reduced the degree of risk by emphasizing the state’s argument that the allegations against Ms. Lassiter did not place her in criminal jeopardy. Thus, her right to counsel was irreparably burdened by the full weight of a presumption against appointment of counsel. Second, although Justice Stewart ceded the point that Ms. Lassiter did not fully present her defense that the social service agency had not met its duty to assist her in maintaining contact with her son, he nonetheless gave greater weight to her failings as a parent and found that the evidence showed she had little interest in her son. In Justice Stewart’s view, representation at the hearing would have made little or no difference in the outcome of the case. This conclusion makes clear the starkly utilitarian nature of the Court’s inquiry in Lassiter. Third, Justice Stewart’s application of the Mathews three-factor analysis elided any examination of Ms. Lassiter’s poverty, lack of sophistication, and limited abilities. Had the Court considered these concerns, due process, as an expression of procedural fairness, would have required appointment of counsel.

242. Id. at 30–31.
243. Id. at 31–34.
244. Id. at 32. In Gagnon, the Court recognized that its adoption of a case-by-case approach harkened back to the ad hoc method established in Betts v. Brady to determine the right to counsel in noncapital felony cases—an approach that was later overruled and replaced with a per se rule in Gideon v. Wainwright. Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973); Betts v. Brady, 316 U.S. 455, 473 (1942), overruled by Gideon v. Wainwright, 372 U.S. 335, 339 (1963).
245. Lassiter, 452 U.S. at 32.
246. Id. at 32–33.
247. Id. at 33.
V. A RETURN TO FUNDAMENTALS: A MORE MAJESTIC VISION OF DUE PROCESS

In *Lassiter*, the Court viewed the essential command of due process for fundamental fairness through a narrow and constricted legal prism that relied on a utilitarian theory of procedural due process. In fact, though Justice Stewart recognized that the principal object of due process is the search for fundamental fairness, his search, in many ways, ended before it ever began. The disadvantages Ms. Lassiter faced under this model were compounded because she was perceived as a member of the undeserving poor. Her status as an undeserving poor person was, perhaps, as important to the outcome as was the Court's use of a starkly functional analysis, which rested on a presumption against the right to counsel in the absence of a risk of a loss of personal liberty. The clear thrust of Justice Stewart's due process analysis was that providing her counsel would not have made any material difference, and her lack of fitness as a parent and personal irresponsibility justified a conclusion that she was not entitled to any greater process than she was afforded.

The due process analysis used in *Lassiter*, however, did not account in any way for how Ms. Lassiter's poverty and personal limitations militated in favor of appointing counsel. Nor did it account for how her status as a poor person, who was required to proceed without counsel, procedurally implicated an equality concern. Certainly, had Justice Stewart not engrafted a presumption onto the *Mathews v. Eldridge* test, Ms. Lassiter should have fared much better—even under a purely utilitarian due process model. Even so, the Court's analysis would still have been affected by its perception of Ms. Lassiter as an undeserving poor person and the weighing process would still have been subject to the underlying considerations of the utility of providing her counsel.

The constitutional path the Court traveled in *Lassiter* elided any discussion that might have offered a conception of due process that was sensitive to values outside of the *Mathews* utilitarian formulation of procedural accuracy and efficiency. It is the omission of values such as equality, dignity, substantive fairness, and fairness in a primary sense that render *Lassiter*'s due process formula inadequate for poor people. Although Justice Stewart tied accuracy to just results and acknowledged these outcomes are "most likely to

248. See id. at 27-28.
249. Id. at 24.
250. See id. at 32-33.
251. Id. at 31.
252. See id. at 32-33.
be obtained through the equal contest of opposed interests, he offered an antiseptic rendering of due process that ignored the litigation realities that Ms. Lassiter had to confront as well as her limited abilities.

From the preparation of her defense to the presentation of her case, Ms. Lassiter was undeniably disadvantaged. How might Ms. Lassiter, as an unrepresented impoverished inmate, prepare a defense against the state’s efforts to terminate her parental rights? How would she research her defenses? Beyond her plaintive claims that the state agency’s actions were unfair and her denial of the principal allegations, Ms. Lassiter was not capable of doing anything else to protect her rights. She could not have acquired favorable evidence; a substantial portion of the evidence she would need was in the possession of the state agency. She needed access to her son’s medical records and to the medical and social workers who had worked on her case and were involved in the care of her son. From whom would she have learned about the procedural requirements of presenting her case? The answers to these questions highlight the unfairness of the proceeding and the inadequacy of Justice Stewart’s due process model. No doubt, her lack of legal training alone would be a substantial and, in most cases, insurmountable procedural obstacle to a fair hearing, but when combined with her very limited capabilities, there was no semblance of a procedurally fair proceeding. No reordering of the events or the facts in Lassiter could transmute her hearing into a fair hearing.

In Lassiter, the Court’s exclusive reliance on the Mathews model did not sufficiently allow for a consideration of the impact that Ms. Lassiter’s poverty had on the fairness of the proceeding. This utilitarian approach leaves little space for considering values other than societal costs and benefits, and any added measure of accuracy that more process might yield. Ms. Lassiter’s experience demonstrates the limits of the Mathews three-factor test in responding to procedural inequality. The Court’s focus on calibrating the parties’ respective interests yielded what passed for a constitutionally appropriate opportunity to be heard, but without the assistance of counsel, Ms. Lassiter’s voice was effectively muted. The Court’s conception of due process omitted any realistic assessment of the actual obstacles Ms. Lassiter faced in defending the action without counsel, and notably omitted a candid assessment of whether the process was fair in a primary sense.

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254. Lassiter, 452 U.S. at 28.
255. See id. at 32–33.
256. See id. at 20–24.
257. Id. at 30.
258. See id. at 59–60 (Stevens, J., dissenting).
259. See id. at 27–28 (majority opinion).
260. See id. at 31–33.
261. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring) (“Fairness of procedure is ‘due process in the primary sense.’”).
But it is the assistance of counsel that makes the civil judicial process penetrable and accessible to litigants. In Ms. Lassiter's case, she was laboring under the burdens of incarceration, poverty, and limited capabilities. In Goldberg v. Kelly, the Court recognized that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."262 The Court in Lassiter, however, did not consider her capabilities.263 An honest appraisal of procedural fairness would have taken account of her poverty and her limited ability to navigate the legal system. The consequence of the lack of procedural fairness in Lassiter was a judicial proceeding in which Ms. Lassiter's poverty and limited abilities denied her a meaningful opportunity to be heard.

Equality, as a feature of procedural fairness, is not a stranger to the Court's criminal right to counsel and access to the court due process calculus. The Supreme Court in Griffin v. Illinois, in the context of an indigent criminal defendant's right to a free transcript necessary to gain meaningful access to the appellate process, explained that "[b]oth equal protection and due process emphasize [that] the central aim of our entire judicial system" is to ensure a measure of equality for all participants.264 Griffin linked fair criminal procedure with the absence of invidious discrimination based on wealth.265 Douglas v. California is another case in which equality was an important element of the Court's criminal right to counsel due process calculus.266 As in Griffin, the identified "evil is the same: discrimination against the indigent."267 A poor person's inability to afford counsel in a civil proceeding results in unacceptable procedural inequality.

Professor Rebecca Zietlow, who has argued for a return to a more organic approach that would "foster communitarian values such as economic justice and fairness," explains that "the prevention of arbitrary action by the state is essential to due process, and unequal treatment is more likely to be arbitrary."268 She further contends that, because procedural inequality is at sharp odds with our understanding of due process, the Court needs to "recognize the impact of money on process, and acknowledge the importance of procedural parity to a functional democracy."269

Equality, however, as a factor in the assessment of the procedural fairness of Ms. Lassiter's hearing, was missing from the Lassiter decision. It was a concern that the Court failed to adequately address beyond a weak attempt to

263. See Lassiter, 452 U.S. at 27 (relying on the three elements of Mathews v. Eldridge).
265. Id. at 17–18.
267. Id. at 355.
269. Id. at 52.
demonstrate that she was able to proceed on her own, even though Justice Stewart conceded Ms. Lassiter "left incomplete her defense that the Department had not adequately assisted her in rekindling her interest in her son."[270] But this omission was a decisional necessity because any careful consideration of equality would lay bare the brutal truth that the proceeding was fundamentally unfair in the absence of legal representation. A conception of procedural due process that extends beyond the utilitarian bounds of the Mathews three-factor balancing test would be less formulaic and embrace a broader range of concerns that reflect fundamental values, such as equality, dignity, fairness, and the legitimacy of the process.[271]

The Court's formulation of due process in Lassiter did not account for human dignity as a constitutional value that was either useful or relevant to a due process inquiry.[272] Though human dignity has not yet been accorded constitutional rank as an expressly protected value, it has been recognized by the Supreme Court as a concern in the context of other constitutional interests and rights.[273] For instance, in Lawrence v. Texas, which declared unconstitutional a Texas sodomy statute, Justice Kennedy's opinion employed language that was rooted in a concern for the human dignity of homosexuals.[274] The immediate constitutional focus in Lawrence was the right

272. The relationship between fair process and dignity values has been examined by a number of scholars over the years. Professor Jerry Mashaw, whose scholarship on this subject has been influential, explains that a due process analysis that accounts for dignity values "would, in sum, reconcile procedural due process analysis with the spirit of the Constitution." JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 167 (1985).
273. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S 833, 851 (1992) (explaining that at the core of women's right to choose to end their pregnancies lie "choices central to personal dignity and autonomy"); Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours . . . no other approach would comport with the premise of individual dignity and choice upon which our political system rests."); Miranda v. Arizona, 384 U.S. 436, 460 (1966) ("[T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens."); Rochin v. California, 342 U.S. 165, 174 (1952) (describing the forced extraction of the contents of a suspect's stomach to recover evidence as "brutal" and "offensive to human dignity"); Trop v. Dulles, 356 U.S. 86, 100 (1951) ("[T]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). Though the Court in these and other cases, as well as individual members writing in dissent, have given voice to a concern for human dignity, the Court has not elevated dignity to a constitutionally protected right. See Maxine D. Goodman, Human Dignity in Supreme Court Constitutional Jurisprudence, 84 NEB. L. REV. 740, 793–94 (2006). Professor Goodman examines how human dignity has been both an articulated and an implied concern in Supreme Court decisions. Id. at 756–90. She concludes that, as our shared understanding of decency evolves over the next several decades, "[o]ur legal landscape will thus reflect increasing concern for the human dignity of all individuals who seek the Constitution's protection." Id. at 794.
274. 539 U.S. 558, 567 (2003). Although human dignity has not enjoyed constitutional rank in the United States, a number of nations have given dignity constitutional status. See Neomi
of homosexuals to engage in private conduct as an element of liberty under the
due process clause. Justice Kennedy, however, recognized that “[t]he
instant case involves liberty of the person both in its spatial and in its more
transcendent dimensions.” Certainly, the legal disability imposed on
homosexuals by the Texas sodomy statute trespassed severely on their human
dignity. Although dignity was not the stated constitutional ground on which
the Court’s decision turned, the human dignity of homosexuals was a concern
that informed the Court’s decisional process.

Professor David Luban has examined the relationship between human
dignity and the right to counsel. First, Luban explains that “[t]he advocate
defends human dignity by giving the client voice and sparing the client the
humiliation of being silenced and ignored.” He then asks, “why should
litigants have counsel?” and turns to the philosopher Alan Donagan for the
answer. Luban explains that, according to Donagan, regardless of how
dishonorable or disfavored one’s past conduct has been, a person’s human
dignity is transgressed if, as an initial matter, the person’s testimony is not
being offered in good faith. He draws from this principle the corollary that
“litigants get to tell their stories and argue their understandings of the law.”
And he points out that a procedural system in which a litigant is not heard
treats “her story as if did not exist.”

According to Luban, the need for representation rests on the understanding
that “human dignity requires litigants to be heard.” He details some of the
circumstances that illustrate why poor litigants need legal representation:

People may be poor public speakers. They may be inarticulate,
unlettered, mentally disorganized [and] . . . [t]hey may know nothing
of the law and so [are] unable to argue its interpretation. Knowing
no law, they may omit the very facts that make their case, or focus on
pieces of the story that are irrelevant or prejudicial. They may be
unable to utilize basic procedural rights such as objecting to their

Rao, On the Use and Abuse of Dignity in Constitutional Law, 14 COLUM. J. EUR. L. 201, 202
(2008) (explaining how, in the aftermath of World War II, human dignity became a “focal point
for human rights and constitutional protections”). The inclusion of human dignity in the
Universal Declaration of Human Rights was a catalyst for nations to adopt dignity as a
constitutional value. Id.

275. Lawrence, 539 U.S. at 562.
276. Id.
277. See id. at 567.
278. David Luban, Lawyers as Upholders of Human Dignity (When They Aren’t Busy
279. Id. at 819; see Alan Donagan, Justifying Legal Practice in the Adversary System, in THE
280. Luban, supra note 278, at 819.
281. Id.
282. Id.
283. Id.
adversary’s leading questions. Their voices may be nails on a chalkboard or too mumbled to understand.284

Professor Luban’s explication of the poor’s need for representation is Ms. Lassiter writ large. Although dignity did not factor into Justice Stewart’s due process analysis, Justice Blackmun’s dissent was informed by a concern for Ms. Lassiter’s human dignity.285 As pointed out earlier, Justice Blackmun, in a three-page memorandum outlining his thoughts about the case, poignantly stated that “[o]ne need only examine the transcript in this case to perceive the utter helplessness and the sense of loss sustained by the petitioner when she was forced to proceed without the assistance of counsel.”286

A rendering of due process that accounts for human dignity would support providing counsel to indigent litigants at state expense because the lack of access to counsel strips the right to be heard of much of its meaning in the context of a civil justice system that is procedurally complex and structured around an attorney-client representational model.287 Providing counsel to indigent litigants unable to afford counsel preserves their human dignity288 and, therefore, the legitimacy of the judicial process and the rule of law. On a practical level, a model of due process that does not include providing counsel to persons unable to afford counsel is divorced from the realities of the civil justice system and offers a cramped definition of procedural fairness. It rests on the fiction that a poor person can navigate the civil justice system without the assistance of counsel and still receive a constitutionally acceptable measure of fair process. But it becomes far more opaque when examined through the prism of the everyday experience of the poor in courtrooms across the nation.

In Ortwein v. Schwab, an access-to-court court-fee case in which the Court held neither due process nor equal protection requires waiver of an appellate filing fee for welfare recipients seeking judicial review of an administrative ruling, Justice William O. Douglas, writing in dissent, viewed the majority’s refusal to require waiver of the financial-fee barrier as validating a system of

284. Id. (internal citation omitted).
286. Memorandum from Justice Blackmun 2 (undated), in Blackmun Papers, supra note 31, box 341, folder 1 (containing Justice Blackmun’s hand edits).
287. See Meltzer v. C. Buck Lecraw & Co., 402 U.S. 954, 959 (1971) (Black, J., dissenting from denial of certiorari) (“[T]here cannot be meaningful access to the judicial process until every serious litigant is represented by competent counsel.”). In Meltzer, Justice Hugo Black viewed legal representation as fundamental to the system of justice and argued for expanding to all civil cases the Boddie v. Connecticut holding that court fees could not prevent indigent persons access to divorce court. Id. at 958; see Boddie v. Connecticut, 401 U.S. 371, 382–83 (1971). Further, Justice Black, who dissented in Boddie, thought the Court’s decision in Boddie supported appointment of counsel to indigents in all types of civil cases. Meltzer, 402 U.S. at 959–60. This was justified because, in his view, absent “brute force,” the courts were the exclusive means to resolve disputes. Id. at 957.
288. Luban, supra note 278, at 819.
"judicial review whereby justice remains a luxury for the wealthy." Because counsel is central to fair process, Justice Douglas’s criticism in Ortwein applies with equal force regarding the poor’s access to legal counsel in the civil justice system. Justice Stevens’s observation that counsel is the “essence of d[ue] p[rocess],” made at the Court’s conference regarding Lassiter, recognizes the simple truth that absent court-appointed counsel at state expense, the amount of due process a poor pro se litigant receives in any civil proceeding is measurably less than what a litigant able to afford private counsel receives.

For example, can an indigent tenant facing eviction receive a fair trial when she is forced to proceed in a summary action and has no understanding of the procedural requirements necessary to raise defenses or the grounds on which to seek dismissal of the action against her? Can an impoverished pro se Medicaid recipient denied a medically necessary item protect her interest against a powerful state bureaucracy represented by a large cadre of governmental workers and attorneys? Can a homeowner faced with foreclosure receive a fair opportunity to defend when he is without funds to retain counsel and the foreclosing bank has near inexhaustible resources to retain counsel and to litigate its claim?

A recent report issued by the Brennan Center for Justice, Foreclosures: A Crisis in Legal Representation, points out that “[t]he nation’s massive foreclosure crisis is also, at its heart, a legal crisis [and that] [m]any homeowners are losing their homes because they lack the ability to navigate the landscape of our lending laws.” The Brennan Center report succinctly explains the importance of access to counsel in foreclosure cases:

The difference lawyers make in foreclosure proceedings springs from the simple fact that lawyers can make claims and raise defenses about which most homeowners are unaware. Counsel can advance viable legal claims on behalf of a homeowner as leverage to inspire the lender to agree on sustainable loan terms, and can also slow foreclosure proceedings to give the homeowner adequate time to find alternate solutions. Quite simply, for many Americans, the difference between facing foreclosure with counsel or unassisted can be the difference between having a roof over their heads—or not.

In addition to carefully documenting the importance of access to counsel in the specific context of the sub-prime mortgage foreclosure crisis, the Brennan Center report unmasksthe faulty assumptions on which our notion of procedural fairness rests when access to legal counsel turns solely on the calculus of wealth.

290. See Lassiter, 452 U.S. at 59–60 (Stevens, J., dissenting).
292. CLARK & BARRON, supra note 73.
293. Id. at 4.
The Supreme Court's decision in *Gideon v. Wainwright* offers a clear-eyed exposition of the central importance of access to counsel and its relationship to fair process—in both criminal and civil proceedings. In *Gideon*, the Supreme Court concluded that "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."294 Further, the Court observed that this was an "obvious truth" given that lawyers are at the core of the prosecutorial function and "there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their case."295 The critical relationship of legal representation to fair process is no less compelling or necessary in the civil context.296 The skills and training competent counsel possess allow meaningful access to the judicial process and the ability to enforce legal rights. Professor Mashaw has observed that "[p]rocess rights affect substantive outcomes."297 There is simply no quarter of life in modern America that is untouched by the law. The importance of access to counsel as a necessary element of procedural fairness in the civil justice system is no less an obvious truth. When some litigants have access to counsel and others do not solely because of the lack of wealth, justice becomes little more than a market-driven commodity.

**VI. CONCLUSION: AFTER REASON AND REFLECTION**

The experience of Abby Gail Lassiter reveals the limitations of a conception of due process that ignores the effect that poverty and wealth have on the ability of litigants to be heard in the civil justice system. In *Lassiter*, the Court asked what the utility was of providing Ms. Lassiter counsel to defend against the termination of her parental rights. *Lassiter* does not teach us much, because, in the view of the Court, counsel would not have made any difference. But the Court's assessment of due process in *Lassiter* omitted any discussion of the core value that informs our understanding of due process—fairness in its own right and as an expression of justice. The Court in *Lassiter* could not have decided that appointment of counsel was unnecessary if fairness was a primary concern. Rather, fairness was subordinated to efficiency and error avoidance as the leading metrics for procedural due process.

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295. *Id.*
296. Each year billions of dollars are spent on legal services in all manners of civil and criminal legal disputes by individuals, businesses, and governments. *See* LISA DONALDSON ET AL., U.S. CENSUS BUREAU, U.S. GOVERNMENT ESTIMATES OF QUARTERLY REVENUE FOR SELECTED SERVICES 2ND QUARTER 2009 2–3 (2009), available at http://www2.census.gov/services/qss/2009/qssq2-09pr.pdf. In September 2009, the U.S. Census Bureau issued its Government Estimates of Quarterly Revenue for Selected Services. This survey shows that in the last two quarters of 2008 and the first two quarters of 2009, over 250 billion dollars was spent on legal services. *Id.* Although the quarterly survey reports revenue, the reported data reflects the amount spent by consumers, businesses, and government on legal services. *See* *id.*
297. MASHAW, supra note 238, at 5.
In contrast, the Court in *Gideon*, less than two decades earlier, reached the simple conclusion that, given the central role of counsel in the criminal justice system, lawyers are “necessities, not luxuries.”\(^{298}\) This observation is no less true in the civil justice system. It was also true in 1919 when Reginald Heber Smith inquired into how the poor were faring in the nation’s courts; it remains equally true today. The fact that personal liberty is often, though not always, at stake in the criminal justice system does not diminish the importance of counsel to fair process in the civil context. As long as the judicial process provides the exclusive means to resolve virtually every type of private legal dispute, and legal representation is at the core of the adversarial system, lack of access to counsel based on wealth is unfair in any normative sense of fair process.

*Gideon* offers more than simple instruction on the essential value of access to counsel; it offers the Court a judicial pathway to revisit and reconsider its decision in *Lassiter*. In *Gideon*, the Court reversed its *Betts v. Brady* ruling of twenty years earlier that the Sixth Amendment right to counsel did not extend to state criminal prosecutions and that the circumstances of each case determined whether due process required appointment of counsel for state criminal defendants.\(^{299}\) The Court’s willingness in *Gideon* to revisit and overrule its prior decision in *Betts* reminds us that the doctrine of stare decisis, and its core concern for stability and predictability, will yield when confronted with a poorly reasoned decision or a dated constitutional axiom that, when considered “in the light of its full development and its present place in American life,”\(^{300}\) no longer enjoys the continued currency of truth or constitutional validity.\(^{301}\) Can it be said that *Lassiter*’s conception of

\(^{298}\) *Gideon*, 372 U.S. at 344.

\(^{299}\) *Id.* at 344–45 (overruling *Betts v. Brady* to establish a right to counsel for indigents in state felony prosecutions, and agreeing that “*Betts* was ‘an anachronism when handed down’ and that it should now be overruled,” without any discussion of stare decisis).


\(^{301}\) See, e.g., Citizens United v. FEC, 130 S. Ct. 876, 912–13 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, which limited corporate expenditures for political campaigns, and explaining why stare decisis did not preclude the Court from rejecting established precedent); Montejo v. Louisiana, 129 S. Ct. 2079, 2082, 2090–91 (2009) (overruling *Michigan v. Jackson*’s rule that prohibited the police from “initiat[ing] interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding”); Pearson v. Callahan, 129 S. Ct. 808, 816–18 (2009) (overruling *Saucier v. Katz*’s mandatory two-step sequence for resolving governmental claims of qualified immunity and allowing district court judges to determine which of the two prongs to address first); Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 227, 231–37 (1995) (overruling *Metro Broadcasting*, thus requiring strict scrutiny instead of intermediate scrutiny for racial classifications, and recognizing the limited effect of stare decisis because *Metro Broadcasting* “departed from . . . prior cases—and did so quite recently”); Payne v. Tennessee, 501 U.S. 808, 827–30 (1991) (holding that “if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar,” and overruling *Booth v. Maryland* and *South Carolina v. Gathers*, stating that the doctrine of stare decisis is “not an inexorable command” and that these cases were “wrongly decided”).
procedural fairness has any continued currency of truth?\textsuperscript{302}

Two years before \textit{Lassiter} was decided, Justice Blackmun was invited by the president of the Aspen Institute to co-moderate a summer seminar on justice, society, and the individual.\textsuperscript{303} The seminar brought together about two-dozen lawyers, judges, business leaders, scholars, and government officials to examine the role of justice in society.\textsuperscript{304} Justice Blackmun's personal papers contain hand-written notes and printed materials from the seminars he attended for many years during his tenure on the Court. One topic at the 1979 seminar was "Justice and the Lawyer's Role." A handout distributed to the participants stated "a pervasive theme of justice regarding lawyers is the distribution of legal services, which some claim, unfairly reflects the larger injustices in wealth and power in American society."\textsuperscript{305} What was described as a pervasive theme at the seminar Justice Blackmun attended in 1979 remains a sobering reality of our civil justice system three decades later.

The year following the \textit{Lassiter} decision, Justice Blackmun co-moderated another Aspen Institute conference on society, justice, and the individual.\textsuperscript{306} His handwritten notes from a session at that conference include a reference to the \textit{Lassiter} decision and the right to counsel in cases where the state seeks to terminate parental rights.\textsuperscript{307} Underneath the reference to \textit{Lassiter}, Justice Blackmun wrote "one of PS's worst opinions," referring to Justice Stewart.\textsuperscript{308}

For the tens of millions of Americans unable to afford counsel to protect their

\textsuperscript{302} Chief Justice John Roberts eloquently delineated the limits of stare decisis in his concurring opinion in \textit{Citizens United v. FEC}. Roberts cautioned that "we must keep in mind that \textit{stare decisis} is not an end in itself." \textit{Citizens United v. FEC}, 130 S. Ct. 876, 920 (2010) (Roberts, C.J., concurring). The Chief Justice further observed that the "greatest purpose [of \textit{stare decisis}] is to serve a constitutional ideal—the rule of law." \textit{Id.} at 921. Accordingly, he explains "that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent." \textit{Id.}

\textsuperscript{303} See Dennis J. Hutchinson, \textit{Aspen and the Transformation of Harry Blackmun}, 2005 SUP. CT. REV. 307, 310–11 (examining the influence of Justice Blackmun’s participation in the annual Aspen Institute’s seminars and arguing they had an effect on his transformation into a liberal justice); Norval Morris, \textit{HAB}, 43 AM. U. L. REV. 730, 730 (1994) (describing Justice Blackmun’s involvement over seventeen years with the Aspen Institute and observing that his participation as co-moderator “provide[d] the philosopher’s stone that transmute[d] our too-often self-serving words, if not to gold, at least to ideas of some value”).


\textsuperscript{305} Aspen Inst. for Humanistic Studies Program on Justice, Executive Seminar Readings on Justice and Society, Vol. 1, in Blackmun Papers, \textit{supra} note 31, box 1483, folder 5.

\textsuperscript{306} See Hutchinson, \textit{supra} note 303 (noting that Justice Blackmun attended the seminars for seventeen years, until 1995).


\textsuperscript{308} \textit{Id.}
homes, their health, their jobs, and their civil rights, Lassiter’s formulation of procedural fairness is little more than a “teasing illusion like a munificent bequest in a pauper’s will.”
