Lassiter v. Department of Social Services: A New Interest Balancing Test for Indigent Civil Litigants

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The Supreme Court has struggled frequently with the question of what process is due in a variety of noncriminal proceedings. To resolve this question, modern due process analysis requires a balancing of three interests: the individual litigant's personal interests; the need for procedural safeguards; and the government's interest in economic efficiency and administrative convenience. Indigent litigants pose special problems because their particular disadvantages may require the adoption of more procedural protections, including the appointment of counsel. In criminal


3. Generally, courts have found that indigent litigants are less familiar with the judicial process and, consequently, more intimidated. As with all unrepresented civil defendants, indigent litigants are usually incapable of understanding the complexities of a modern civil trial. In addition, the unrepresented litigant may have a limited education that is no match for a seasoned attorney's legal expertise. See Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545 (1967). For judicial commentary on the plight of indigent litigants, see, e.g., Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932); Davis v. Page, 640 F.2d at 603; Reist v. Bay County Circuit Judge, 396 Mich. 326, 241 N.W.2d 55, 63-64 (1976). In a proceeding terminating parental rights, the extreme emotional stress may also have a debilitating effect on an unrepresented indi-
cases, an indigent has a right to counsel where actual imprisonment is imposed. Despite the general rule mandating the appointment of counsel in criminal cases, "no fixed rule regarding the right to counsel has developed in noncriminal proceedings."

In termination of parental rights and prolonged deprivation of custody cases, however, the lower courts have consistently held that an indigent parent has a right to the appointment of counsel. Recently, the Supreme Court addressed the issue of an indigent's right to appointment of counsel in *Lassiter v. Department of Social Services of Durham County*, a state-initiated termination of parental rights proceeding. The Court held that parents do not have a per se right to state appointed counsel in a terminate litigant. See id; Crist v. Division of Youth and Family Servs., 128 N.J. Super. 402, 411, 320 A.2d 203, 208 (1974), modified, 135 N.J. Super. 573, 343 A.2d 815 (1975).

4. Scott v. Illinois, 440 U.S. 367, 373 (1979) ("actual imprisonment . . . is the line defining the constitutional right to appointment of counsel."). See Argeresinger v. Hamlin, 407 U.S. 25 (1972) (regardless of the type of offense, appointment of counsel is required where imprisonment is imposed). The analysis of an indigent criminal's right to appointment of counsel involves both the fourteenth amendment due process clause and the sixth amendment. Scott, 440 U.S. at 370-74. The sixth amendment provides that the accused in a criminal proceeding "shall enjoy the right . . . to have the Assistance of Counsel." U.S. CONST. amend. VI. See also infra notes 47-56 and accompanying text.

5. L. Tribe, supra note 1, at 553 (footnote omitted). "Instead, the Court has indicated that the decision whether to appoint counsel in due process hearings should be made on a case by case basis, and that counsel is constitutionally required only where such assistance would be especially useful given the nature of the issues and the ability of the claimant to express himself adequately." Id (footnote omitted). See Goldberg v. Kelly, 397 U.S. 254 (1970); Note, supra note 3, at 545-50.

6. The termination of parental rights is the most drastic remedy available in juvenile court proceedings. See Note, The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings, 68 GEO. L.J. 213, 230 (1978). In North Carolina, for example, when a court enters an order terminating a parent's rights, the order completely and permanently terminates all rights and obligations of the parent to the child and of the child to the parent, arising from the parental relationship. . . . Such parent is not thereafter entitled to notice of proceedings to adopt the child and may not object thereto or otherwise participate therein.

N.C. GEN. STAT. § 7A-289.33 (1981). The significance and finality of a termination order is best appreciated when compared to the effect of a typical custody award. Generally, custody awards are temporary and can be modified pursuant to an action by the non-custodial party showing a change of circumstances since the time of the award. See Foster & Freed, Child Custody Pt. 2 39 N.Y.U. L. REV. 615, 623 (1964); Note, supra at 225-30.


9. Under North Carolina law, a petition to terminate parental rights can be filed by the county department of social services or the licensed child-placing agency that has custody of the child. N.C. GEN. STAT. § 7A-289.24(3) (1981). The hearing is before a district court sitting without a jury. Id. § 7A-289.30(a).
tion proceeding, thus rejecting the prevailing legal theory and eliminating the consistency that had existed regarding an indigent parent's right to counsel.\textsuperscript{10} Instead, the Court endorsed a case-by-case approach, using a four-pronged balancing test.\textsuperscript{11}

The plaintiff, Abby Gail Lassiter, originally lost custody of her infant son, William, in 1975 for failing to provide him with adequate medical care.\textsuperscript{12} The District Court of Durham County, North Carolina, gave custody to the Durham County Department of Social Services.\textsuperscript{13} In 1976, Ms. Lassiter was convicted of second-degree murder and sentenced to twenty-five to forty years in prison.\textsuperscript{14} Two years later, the Department of Social Services filed a petition to terminate Ms. Lassiter's parental rights. Ms. Lassiter appeared at the hearing without counsel and unsuccessfully attempted to cross-examine the state's sole witness, a Department social worker.\textsuperscript{15} The social worker testified that Ms. Lassiter had not contacted her son since 1975, had failed to correct the circumstances that necessitated the 1975 custody order, and had not demonstrated sufficient concern regarding her child's future.\textsuperscript{16} The court found that Ms. Lassiter had shown no interest in the child's future life, care, or welfare, and terminated her parental rights.\textsuperscript{17} On appeal, Ms. Lassiter's sole contention was that her indigent status entitled her to counsel under the due process clause of the fourteenth amendment. The North Carolina Court of Appeals rejected this argument and upheld the district court's decision to terminate Ms. Lassiter's parental rights.\textsuperscript{18} The United States Supreme Court affirmed in a five to four decision written by Justice Stewart.\textsuperscript{19}

\textsuperscript{10} See supra note 7 and infra notes 84-101 and accompanying text.
\textsuperscript{11} See supra note 2 and accompanying text. In \textit{Lassiter}, the Court said the balancing test was to be applied by the trial court in each termination proceeding. 452 U.S. at 32.
\textsuperscript{12} \textit{Lassiter}, 452 U.S. at 20.
\textsuperscript{13} \textit{Id}.
\textsuperscript{14} \textit{Id}.
\textsuperscript{15} \textit{Id} at 21-23. The trial judge repeatedly attempted to explain the rules of cross-examination, but eventually disallowed many of Ms. Lassiter's statements as argumentative. \textit{Id} at 54 n.22 (Blackmun, J., dissenting). See infra notes 108-11 and accompanying text discussing Ms. Lassiter's difficulties.
\textsuperscript{16} Specifically, the Department alleged that Ms. Lassiter 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 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. \textit{Lassiter}, 452 U.S. at 21.
\textsuperscript{17} \textit{Id}. at 24.
\textsuperscript{18} \textit{In re} William Lassiter, 43 N.C. App. 525, 527, 259 S.E.2d 336, 337 (1979).
\textsuperscript{19} \textit{Lassiter}, 452 U.S. at 18. Chief Justice Burger, and Justices White, Powell, and
In a novel analysis, the Court balanced the three due process considerations against a presumption that the right to appointment of counsel is contingent on imprisonment. The Court merged civil and criminal due process analyses, to conclude that Ms. Lassiter's interests were insufficient to overcome the combined weight of the state's interests and the presumption that imprisonment is a prerequisite to appointment of counsel. Recognizing that in certain situations the parent's interests would outweigh the combination of the state's interests and the imprisonment presumption (for example, where the procedures were complex or the proceedings were formal and adversarial), the Court left the decision to appoint counsel to the trial judge on a case-by-case basis.

This Note will analyze the Lassiter decision in light of the Court's melding of the criminal and civil due process analyses of the right to appointment of counsel. It will incorporate briefly the recent evolution of the right to appointment of counsel in order to illustrate the significance of Lassiter's new due process analysis. Concentrating on the particular difficulties encountered by Ms. Lassiter, this Note will illustrate the divergence of the new analysis from the modern trend in appointment of counsel cases. Finally, it will extrapolate the impact of the Lassiter analysis on future indigent civil litigants who will encounter an unattainable barrier as a precondition to appointment of counsel.

I. The Indigent's Right to Counsel in Criminal Cases: Actual Imprisonment Required

Prior to 1942, the Supreme Court had recognized that the right to counsel was a significant safeguard. In Powell v. Alabama, the Court noted that even an "intelligent and educated layman" would encounter considerable difficulties in presenting his own case. Similarly, in holding that the

Rehnquist joined the majority opinion. Justice Blackmun filed a dissenting opinion joined by Justices Marshall and Brennan. Justice Stevens filed a separate dissent.

20. Id. at 31. The Court's method actually involved a two-step process. Initially, the three civil due process considerations—the litigant's interests, the need for procedural safeguards, and the state's interest—were weighed and balanced. The result was then balanced against the presumption that imprisonment is required to invoke a right to appointed counsel. See infra notes 118-33 and accompanying text.

21. 452 U.S. at 31-32.

22. Id. at 31.

23. Id. at 31-32. The Court relied on Gagnon v. Scarpelli, 411 U.S. 778 (1973), in deciding to leave the decision to appoint counsel to the trial judge. See infra notes 67-71 and accompanying text.

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

25. Id. at 69. The Court said:
The right to be heard would be, in many cases, of little avail if it did not compre-
sixth amendment requires the appointment of counsel in all federal crim-
nal prosecutions,26 the Court characterized the right to counsel as “neces-
sary to insure fundamental human rights of life and liberty.”27 The Court,
however, was reluctant to provide a per se right to counsel. In Betts v.
Brady,28 the Court specifically refused to extend the right to counsel to
every state criminal case, regardless of the circumstances.29

In holding that the failure to appoint counsel for Betts did not violate a
fundamental right, the Court focused on the “totality of facts” and found
that Betts’ trial did not evidence special circumstances warranting appoint-
ment of counsel.30 That is, despite the lack of counsel, Betts’ trial was
“fundamental[ly] fair.” The Court endorsed a case-by-case approach, fo-
cusing on the particular difficulties or special circumstances encountered
by the unrepresented defendant.31

The new standard was a less than ideal solution to the right to counsel
problem. The practical difficulties of utilizing a case-by-case, special cir-
cumstances approach were evidenced by a plethora of cases that were a
"continuing source of controversy and litigation in both state and federal courts." 32 In addition, the Court itself began to carve out certain exceptions to the Betts case-by-case approach. The Court found a per se right to counsel where the defendant was illiterate, mentally handicapped, or a minor, and where the statute or legal question involved was extremely complex. 33 These cases elucidated the desire for a more rigid and consistent standard for determining whether due process mandated the appointment of counsel. Recognizing the possible inequities in the case-by-case method, the Court adopted a nondiscretionary standard in the landmark case of Gideon v. Wainwright. 34

The petitioner, Clarence Gideon, was charged with breaking and entering, a noncapital felony, and appeared at his trial without counsel. 35 Despite his indigent status, Gideon's request for court appointed counsel was refused by the trial judge because Florida law only required appointment of counsel in capital cases. 36 Handicapped by his lack of legal experience, Gideon presented his own defense, and was convicted and sentenced to five years in prison. 37 The Florida Supreme Court denied Gideon's petition for a writ of habeas corpus without issuing an opinion. 38 Gideon then


34. 372 U.S. 335 (1963). The case was important because the Supreme Court finally overruled Betts and created an unqualified right to counsel in felony prosecutions. Yet it was not a startling decision, given the Court's decisions subsequent to Betts and the states' appointment of counsel, by law or court practice, in most criminal cases. Israel, Gideon v. Wainwright: The "Art" of Overruling 1963 SUP. CT. REV. 211, 212. See also Kamisar, supra note 33, at 17-20 (by 1962 only four states did not require appointment of counsel by law or court practice).

35. Gideon, 372 U.S. at 337.

36. Id.

37. Id.

38. Gideon v. Cochran, 135 So. 2d 746 (Fla. 1962) (mem.). On remand from the United States Supreme Court, the Florida Supreme Court said that it had relied on Betts in its
appealed his conviction to the United States Supreme Court.\textsuperscript{39}

The Supreme Court held that an indigent defendant has an unqualified right to appointed counsel in all felony prosecutions.\textsuperscript{40} Justice Black wrote 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."\textsuperscript{41} The right to counsel was a fundamental right necessary for proper and just adjudication.\textsuperscript{42} While \textit{Gideon} established mandatory appointment of counsel in felony cases, the lower courts remained split on the effect of \textit{Gideon} in prosecutions for lesser crimes and misdemeanors.\textsuperscript{43} Some courts confined \textit{Gideon} to felony cases, since the Court had considered only the case of an indigent felony defendant.\textsuperscript{44} Other courts "extend[ed] the right [to counsel] to every indigent accused of any offense, petty or serious,"\textsuperscript{45} finding \textit{Gideon}'s broad language to encompass all criminal prosecutions. Two subsequent Supreme Court cases clarified when appointment of counsel was mandated.\textsuperscript{46}

II. \textit{ARGERSINGER} AND \textit{SCOTT}: CONSISTENCY AT THE EXPENSE OF INDIGENT DEFENDANTS

In \textit{Argersinger v. Hamlin},\textsuperscript{47} Jon Argersinger was convicted of carrying a concealed weapon which made him subject to a maximum fine of five hundred dollars, a jail sentence up to six months, or both.\textsuperscript{48} Argersinger appealed his conviction, alleging that his indigent status entitled him to state appointed counsel. The Florida Supreme Court denied Argersinger's petition for habeas corpus relief on the ground that his punishment did not exceed six months in jail, the customary standard for appointment of counsel.
The United States Supreme Court reversed, stating that the type of crime or the length of imprisonment did not affect the critical role that a lawyer commands in an adversary hearing. The Court refused, however, to address the issue of right to counsel where a "loss of liberty is not involved," because Argersinger was actually sentenced to ninety days in jail. Essentially, the Court extended an indigent's right to counsel to all classes of crimes, regardless of their severity or insignificance, as long as the indigent suffered a deprivation of liberty.

The Supreme Court reaffirmed the Argersinger principle in Scott v. Illinois. In Scott, the indigent petitioner had been sentenced to pay a fifty dollar fine for shoplifting. Under the applicable Illinois statute, the maximum penalty for shoplifting was a $500 fine, one year in jail, or both. The petitioner argued that Argersinger clearly extended the right to counsel to cases where imprisonment was authorized. Justice Rehnquist, writing for the majority, rejected the petitioner's argument, and found that the mere statutory authorization of imprisonment upon conviction did not involve a deprivation of liberty or property that was protected under the fourteenth amendment. Justice Rehnquist stated the clear rule of Argersinger to be that "no indigent criminal defendant [can] be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." Accordingly, the Court

49. State ex rel. Argersinger v. Hamlin, 236 So. 2d 442 (Fla. 1970). The Florida Supreme Court relied on the United States District Court for the Southern District of Florida practice of appointing counsel only where imprisonment for the offense was greater than six months. Id. at 444.

50. Argersinger v. Hamlin, 407 U.S. at 30-34. The Court gave great weight to an American Civil Liberties Union study, which found that "[m]isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel." Id. at 36 (citing A.C.L.U., LEGAL COUNSEL FOR MISDEMEANANTS, PRELIMINARY REPORT 1 (1970)). See L. HERMAN, THE RIGHT TO COUNSEL IN MISDEMEANOR COURT 18-20 (1973).


52. In a concurring opinion, Justice Powell argued that the appointment of counsel should be made on a case-by-case basis. Id. at 63-65 (Powell, J., concurring). He listed three factors that should be analyzed in each case: the complexity of the offense charged, the probable sentence if the defendant is convicted, and "individual factors peculiar to each case." Id. at 64. The competency of the individual defendant and the attitude of the community toward the defendant were two "individual factors" delineated by Justice Powell. He acknowledged, however, that the individual factors would be very difficult to ascertain. Id.


55. Scott, 440 U.S. at 373.

56. Id. (emphasis supplied). The Court also reaffirmed Argersinger's holding that the type of offense or length of imprisonment was irrelevant in determining if the right to counsel was mandated. Id. at 373.
held that the right to appointment of counsel was not mandated in Scott's case because he was merely fined and not imprisoned.\footnote{57} Although the question of what process is due an indigent criminal defendant has been firmly established in regard to appointment of counsel, an indigent civil litigant does not enjoy the same procedural consistency. In the past decade, the Court has slowly developed a balancing test to determine what process is due in noncriminal litigation. A brief review of this recent development will facilitate an analysis of \textit{Lassiter}'s new standard for indigent civil litigants.

III. \textbf{Civil Litigants: At the Mercy of a Balancing Test}

The recent evolution of procedural due process reflects a determined effort by the Supreme Court to review noncriminal hearing procedures for constitutional inadequacies.\footnote{58} Initially, the Court ascertains whether the individual's interest "is within the Fourteenth Amendment's protection of the line of due process cases discussed above creates an anomaly. \textit{See Duke, supra} note 44, at 608-09. The author notes that some sixth amendment rights are limited or defined, and others are not, yet the amendment states that in "all criminal prosecutions" the delineated rights shall apply. \textit{Id.} Each case discussed above clearly acknowledges the vital role of counsel in assuring a fair trial. \textit{See supra} notes 24-34 and accompanying text. \textit{See also Argersinger}, 407 U.S. at 30-34. Despite the attorney's critical role, the Court has refused to extend the same assurance of fairness to those indigents who are not imprisoned. The rationale is that fines or adjudications of guilt do not necessarily involve deprivation of personal liberty, and therefore the due process clause is not implicated. \textit{See Scott v. Illinois}, 440 U.S. at 373; \textit{supra} note 1.

Although the \textit{Scott} decision is well accepted in present criminal procedure jurisprudence, the restriction of the right to counsel to \textit{imprisoned} indigents is far from a "fundamentally fair" procedure. \textit{See Note, supra} note 3, at 549-58; \textit{Brief for Petitioner} at 17-18, \textit{Lassiter v. Department of Social Servs.}, 452 U.S. 18 (1981). If the Court's description of the attorney's vital role is accurate, then the Court's restriction of the right to counsel to only imprisoned indigent defendants assures a fair trial to some indigent litigants while denying the same assurances to other indigents. It is anomalous to hold that an individual sentenced to five days in jail has a right to counsel (and thus, presumably, a fair trial) but deny that right to an individual charged with a substantial fine, or who suffers the loss of nonmonetary rights such as status or reputation. \textit{See Davis v. Page}, 640 F.2d at 604, \& n.8 ("to offer counsel when a single day in jail may be at stake, but to deny counsel to an indigent parent when the destruction of his or her family is threatened does not accord with our concept of due process") (Vance, J., majority opinion); \textit{Rossman, The Scope of the Sixth Amendment: Who is the Criminal Defendant}, 12 \textit{Am. Crim. L. Rev.} 633, 647-49 (1975) (civil litigants suffer some deprivation of liberty even if imprisonment is not imposed). \textit{Cf. Nowak, Foreword-Due Process Methodology in the Postincorporation World}, 74 \textit{J. Crim. L.} 397, 408-09 (1979); 93 \textit{Harv. L. Rev.} 82, 88 (1979) (penalties such as disqualification from certain jobs and the denial of state licenses or privileges, can be as "onerous" to the defendant as actual imprisonment).

liberty and property."

If such an interest is involved, then the due process clause is implicated, and the Court must determine whether the applicable procedures meet the constitutional requirements of due process. In *Goldberg v. Kelly*, the Court held that a pretermination evidentiary hearing was required to terminate income maintenance payments under the Aid to Families with Dependent Children (AFDC) program. The Court found that the welfare benefits were "a matter of statutory entitlement . . . more like 'property' than a 'gratuity.'" Accordingly, the due process clause was implicated. Because the payments constituted the recipients' sole subsistence, both the recipients and the state had an interest in assuring that the payments were not erroneously denied. That interest, the Court concluded, clearly outweighed the state's interest in preventing "any increase in its fiscal and administrative burdens." The Court, therefore, held that only a pretermination hearing, affording the recipients the opportunity to contest the proposed termination, would provide the recipients with due process of law.

The balancing of the individual's interests, the government's interests and the adequacy of existing procedures was also applied in *Gagnon v. Scarpelli*. In *Scarpelli*, the indigent probationer requested the appointment of counsel in his probation revocation hearing. The Court found the probationer's liberty interest to be less than "the absolute liberty to which every citizen is entitled" due to his probation restrictions; the severity of loss was therefore minimal. The Court also found that the government's interest in quick and inexpensive hearings was significant, as was the maintenance of the special nature of the revocation hearings. Finally,
the requested procedure—appointment of counsel—would be inappropri-
ate because it was costly and burdensome. Accordingly, the Court held
that an indigent probationer does not have an absolute right to appoint-
ment of counsel in probation revocation hearings.

In *Mathews v. Eldridge,* the Court refined and clarified the balancing
test. George Eldridge was awarded social security disability benefits in
1968. In 1972, his benefits were terminated when the state agency adminis-
tering the benefit program determined that he was able to return to work.
Eldridge appealed the termination of his benefits in the United States Dis-
trict Court for the Western District of Virginia, bypassing the complex ad-
judicatory system of the Social Security Administration. He argued that
due process entitled a disability beneficiary to a pretermination evidentiary
hearing. The district court issued an injunction reinstating Eldridge's
benefits pending an evidentiary hearing, and the United States Court of
Appeals for the Fourth Circuit affirmed.

The Supreme Court utilized the three-pronged balancing test on appeal.
The Court first characterized the termination of disability payments as a
deposition of a protected property interest, but distinguished that prop-
erty interest from the welfare recipients' interest in *Goldberg v. Kelly.*

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70. Id.
71. Id. See Goss v. Lopez, 419 U.S. 565 (1975) (appointment of counsel in an informal
school disciplinary proceeding would create an inappropriate adversary atmosphere). The
three elements most often incorporated into the Court's balancing test were the severity of
loss which the individual suffers, the government's interest, and the appropriateness of the
requested procedure. See Note, *supra* note 1, at 1514.
73. Id. at 323-24.
75. Id.
76. 493 F.2d 1230 (4th Cir. 1974).
78. 397 U.S. 254 (1970). In *Goldberg,* the Court stated that "termination of aid (wel-
fare) . . . may deprive an eligible recipient of the very means by which to live while he
waits." *Id.* at 264 (emphasis in original). By contrast, the disability benefits paid to Eldridge
were not contingent on financial need. *Eldridge,* 424 U.S. at 340. *But see* Mashaw, *supra*
note 58, at 39 & n.42:

[The *Eldridge* test] is subjective and impressionistic. . . . [The Court] assumes
that disability recipients are less dependent on income support than welfare recipi-
ents. This assumption is buttressed only by the notion that welfare is for the needy
and disability insurance is for prior taxpayers. . . . [However,] any number of
circumstances might make a terminated welfare recipient's plight less desperate
than that of his disabled SSA counterpart, or vice versa.

The terminated welfare recipient may have access to home or general relief de-
pending upon his residence, whereas the disability claimant in a different state or
locality may not. The disability claimant may be totally dependent for his livelihood
on the disability payments, whereas the welfare recipient who is terminated
The degree of potential deprivation to Eldridge was not necessarily as severe as the loss of welfare payments in *Goldberg*.79 The Court next concluded that the "prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before denial of his claim becomes final."80 Finally, the state's interest in controlling costs and easing the administrative burden, although not controlling, was certainly relevant in assessing Eldridge's request for an evidentiary hearing.81 Balancing the petitioner's interests, the procedural safeguards, and the state's interests, the Court held that "an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process."82

The factors weighed in the *Eldridge* test are equally relevant to other due process inquiries.83 Most important for this discussion is the application of the *Eldridge* test to determine whether indigent civil litigants are entitled to court appointed counsel. In *Davis v. Page*,84 the United States Court of Appeals for the Fifth Circuit addressed this specific issue in the context of a prolonged deprivation of custody case.

IV. *Davis v. Page*: The Right to Counsel is Absolute

The leading and most representative case dealing with the right to counsel in a termination of parental rights or prolonged deprivation of custody case is *Davis v. Page*.85 The *Davis* court exhaustively canvassed court decisions and state legislative findings, and concluded that the great majority "have found a right to counsel in proceedings where prolonged or perma-
nent separation of parent and child is threatened." On January 30, 1976, Hilary Davis took her fourteen month old son, Carl, to a local hospital after her husband had broken the baby's arm. Social workers refused to allow Mrs. Davis to leave the hospital with her son, and the Florida Department of Health and Rehabilitative Services (DHRS) filed dependency proceedings in the circuit court. On February 4, the judge advised Mrs. Davis to retain counsel for the adjudicatory proceeding to be held the following month. Mrs. Davis was not able to afford counsel, and was unrepresented at the adjudicatory proceeding.

Carl Davis was declared a dependent child and temporary custody was given to the DHRS. Mrs. Davis was not informed of her right to appeal under Florida law. After the appeal period passed, Mrs. Davis obtained counsel and eventually filed a petition for a writ of habeas corpus with the Florida Supreme Court. Upon the supreme court's dismissal.


87. 640 F.2d at 600.

88. *Id.* at 600-01.

89. *Id.* at 601. Under Florida law, the adjudicatory hearing is a formal adversary proceeding similar to the North Carolina termination of parental rights proceeding. Compare Fla. Stat. § 39.408(1)(b) with N.C. Gen. Stat. §§ 7A-289.22 to 7A-289.32. See *Davis* v. Page, 640 F.2d at 601 ("such hearings are formal adversary proceedings").

90. Under Florida law, a dependent child can be placed in his own home or the home of a relative, temporarily or permanently committed to a licensed child-care agency or to the DHRS. Fla. Stat. § 39.41(1).

91. "'The phrase 'temporary custody' belies the serious consequences of an adjudication of dependency. Temporary custody continues until terminated by the court or until the child reaches the age of 18.' *Davis*, 640 F.2d at 601. See Fla. Stat. § 39.41(1)(c). In addition, in the proceedings to regain custody, the state does not have the burden of proof. Fla. Stat. §§ 39.408(1)(b) and 39.408(2).
without opinion, Mrs. Davis brought suit in federal court. The district court granted summary judgment to Mrs. Davis, and a panel of the United States Court of Appeals for the Fifth Circuit affirmed.

The court of appeals, sitting en banc, held that "where prolonged or indefinite deprivation of parental custody is threatened, due process requires that an indigent parent be offered counsel and that counsel be provided unless a knowing and intelligent waiver is made." The court utilized the Eldridge test to reach its holding. The court found the interest of a parent in raising a child to be "far more precious . . . than property rights," stating that "[i]t is difficult to imagine a loss more grievous than that of a parent deprived of his or her child." The facts in Mrs. Davis's case, the court asserted, clearly illustrated the significant and typical disadvantages encountered by an unrepresented indigent defendant. The presence of counsel could have prevented an erroneous decision. Finally, the court rejected an argument that appointment of counsel would impose an undue financial burden on the state. Given its parens patriae function, the State was obligated to do all it could to assure a proper decision, including the appointment of counsel. The court concluded

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93. Davis v. Page, 618 F.2d 374 (5th Cir. 1980).
94. Davis v. Page, 640 F.2d at 604. It should be noted that the deprivation of custody in Davis was less severe than the termination of parental rights in Lassiter even though Mrs. Davis was denied custody for an extended period of time. See Fla. Stat. § 39-41(1).
95. Davis, 640 F.2d at 603 (quoting May v. Anderson, 345 U.S. 528, 533 (1953)).
96. 640 F.2d at 603.
97. Id. See, e.g., In re A.Z., 383 So. 2d 434 (Fla. 1980).
98. Davis, 640 F.2d at 603. The court said:

Mrs. Davis was unfamiliar with the judicial process and easily intimidated by its workings. She was ignorant of the substantive governing law, unaware even that the dependency hearing might result in an indefinite separation from her child. Unacquainted with the rules of evidence, she was unable to challenge hearsay and opinion testimony. The trial judge found that '[s]he sat silently through most of the hearing . . . fearful of antagonizing the social workers' and that she 'was little more than a spectator in the adjudicatory proceeding.'

Id.

99. The doctrine of parens patriae is essentially the state's sovereign power of guardianship. Traditionally, equity courts "acknowledged and insisted that the state owed a duty of protection to children or persons under a disability . . .": Florida Juvenile Law and Practice, § 1.11 (1979). See Ex parte Crouse, 4 Whart. 9 (Pa. 1839). The duty includes the care, protection, and discipline of its citizens. See Note, supra note 6, at 216; Thomas, Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspectives, 50 N.C.L. Rev. 293, 313-22 (1972).

100. Davis v. Page, 640 F.2d at 604. The Court further stated that "[w]here the right to counsel is essential to the protection of a liberty so basic to the fabric and philosophy of our society, the interest in saving an uncertain sum will not defeat that right." Id. See also Stanley v. Illinois, 405 U.S. 645 (1972).
that "[t]he right involved is absolute and should not be subject to the discretion of the trial judge."\(^{101}\)

*Davis* was the last termination or prolonged deprivation of custody case decided prior to *Lassiter*. The *Davis* court held that an indigent parent had an absolute right to appointment of counsel in prolonged deprivation of custody cases. The *Lassiter* Court reached a contrary conclusion, departing from the prevailing law, in a strikingly similar factual setting.

V. *LASSITER v. DEPARTMENT OF SOCIAL SERVICES*: ADDING A FOURTH ELEMENT TO THE BALANCING TEST

In 1975, Abby Gail Lassiter lost custody of her son, William, for failing to care adequately for her child. William was eight months old and was suffering from "breathing difficulties, malnutrition . . . [and] scarring from a severe infection that had gone untreated."\(^{102}\) Ms. Lassiter was later convicted of second-degree murder in an unrelated incident and began serving a prison sentence of twenty-five to forty years.\(^{103}\) In 1978, the county Department of Social Services petitioned the court to terminate Ms. Lassiter’s parental rights.\(^{104}\) Ms. Lassiter never mentioned the Department’s petition to the attorney retained for her appeal in the murder case.\(^{105}\) At the hearing, the judge determined that Ms. Lassiter’s failure to obtain counsel was "without cause," and therefore did not appoint counsel.\(^{106}\) The Department was represented by its own attorney.

A Department of Social Services employee testified that Ms. Lassiter had exhibited a total disregard for William, and that Ms. Lassiter’s mother would not be able to care for William if he were placed in her home.\(^{107}\) Ms. Lassiter then conducted a completely ineffective cross-examination.\(^{108}\) The judge’s attempts to explain the cross-examination roles and to confine Ms. Lassiter’s cross-examination to questions directed toward the witness

101. *Davis*, 640 F.2d at 604.
105. *Id.* at 21.
106. *Id.* at 22.
107. *Id.*
108. The following excerpts from the transcript illustrate Ms. Lassiter’s difficulty:
were equally ineffective. Consequently, Ms. Lassiter's argumentative statements were disallowed and she failed to contest any of the social worker's statements. The judge also became frustrated and "noticeably
impatient" with Ms. Lassiter, during her direct testimony, he openly mocked one of her answers.

On direct examination, conducted by the trial judge, Ms. Lassiter denied that she had neglected William and claimed that she had seen him five or six times after the 1975 custody hearing. She also stated that, because William could not be with her, her mother should receive custody. Her mother testified that she could care for William and she vehemently denied the social worker's statement that she had not visited William while he was in state custody. The court found that Ms. Lassiter had "willfully failed to maintain concern or responsibility for the welfare of the minor," and therefore terminated her parental rights. After two unsuccessful appeals, Ms. Lassiter filed a petition for certiorari with the United States Supreme Court.

Before analyzing Ms. Lassiter's claim that the due process clause of the fourteenth amendment mandated the appointment of counsel in her termination proceeding, Justice Stewart, writing for the majority, acknowledged that although "due process" has never been precisely defined, the "phrase [does] express the requirement of 'fundamental fairness.'" He noted that the criminal cases dealing with the appointment of counsel held that imprisonment, of any length, was a prerequisite to the operation of the right to counsel. Citing Gagnon v. Scarpelli, Justice Stewart also found that "as a litigant's interest in personal liberty diminishes, so does

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111. See Hearing Transcript at 30:
   THE COURT: Did you know your mother filed a complaint on the 8th day of May, 1975 . . . ?
   A. No, cause she said she didn't file no complaint.
   THE COURT: That was some ghost who came up here and filed it I suppose.
112. Lassiter, 452 U.S. at 23.
113. Id. Her mother had custody of Ms. Lassiter's other children. Id. During her testimony, Ms. Lassiter argued that her mother should have custody of William because: "He knows us. Children know they family. . . . They know they people, they know they family and that child knows us anywhere. . . . I got four more other children. Three girls and a boy and they know they little brother when they see him.” Id.
114. Id.
115. Id. at 24.
116. See supra note 18.
118. Lassiter, 452 U.S. at 24.
119. Id.
120. Id. at 26-27. Justice Stewart cited Argersinger and Scott to support his analysis. See supra notes 46-57 and accompanying text.
his right to State appointed counsel." The litigant in Gagnon had a lesser interest in personal liberty because he was free on probation, a status the court called "conditional liberty." The Court refused to create a per se rule mandating appointment of counsel at probation or parole revocation hearings. Justice Stewart concluded that

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.

Without explanation, Justice Stewart added that "[i]t is against this presumption that all the other elements in the due process decision must be measured."

Turning to the civil analysis of due process, Justice Stewart relied primarily on the three-pronged Eldridge test. Accordingly, he analyzed Ms. Lassiter's interests at stake in the litigation, the State's interest, and the risk that the procedures used would lead to an erroneous decision. Justice Stewart found that Ms. Lassiter's interest in the hearing, the possible termination of her parental rights, was a "commanding" one. Similarly, he found that the State had a strong interest in protecting its citizens and in promoting fair and equitable decisions. The State also had economic interests, such as the cost of counsel and the concomitant lengthening of the proceeding. Finally, after analyzing the applicable statutes, Justice Stewart found that the complexity of termination proceedings could, but

122. Lassiter, 452 U.S. at 26 (emphasis supplied). See supra notes 67-71 and accompanying text.
123. See Morrissey v. Brewer, 408 U.S. at 480.
125. Id. at 27. Presumably, Justice Stewart was referring to the elements in the Eldridge test, since he immediately discussed Eldridge after this statement. Id. The conflation of the presumption that an indigent litigant has a right to appointed counsel only when he faces loss of his physical liberty and the Eldridge test, however, had never before been applied in a due process analysis of the right to counsel in civil litigation.
126. See supra notes 72-83, 125 and accompanying text.
127. Lassiter, 452 U.S. at 27. In a termination of parental rights, "the State's aim is not simply to influence the parent-child relationship but to extinguish it. A termination of parental rights is both total and irrevocable." Id. at 39 (Blackmun, J., dissenting) (emphasis in original) (footnote omitted). North Carolina's absolute termination orders are similar to most states' termination orders. Compare, e.g., N.C. GEN. STAT. § 7A-289.33 (1981) with CAL. CIV. CODE § 232.6 (West) (Supp. 1981); ILL. REV. STAT. ch. 4 § 9.1-17 (1978); Mo. REV. STAT. § 211.482 (Supp. 1981).
129. Id. at 28.
would not always, generate erroneous decisions.\textsuperscript{130}

Justice Stewart then stated that the Court must balance the three elements of the \textit{Eldridge} test “against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.”\textsuperscript{131} The addition of this presumption to the balancing test in the present case resulted in the Court’s holding that a right to counsel does not exist in every termination proceeding, and that the appointment of counsel should be decided by the trial courts on a case-by-case basis.\textsuperscript{132} The Court found that the problems Ms. Lassiter encountered did not affect the final decision to terminate her rights, and that the presence of an attorney would not have made any appreciable difference.\textsuperscript{133}

In a long, emotional and acerbic dissent, Justice Blackmun decried the majority’s conclusion that due process does not require counsel to be appointed in every termination case as “illogical.”\textsuperscript{134} He further stated that it was “virtually incredible” for the Court to hold that Ms. Lassiter’s hearing was fundamentally fair.\textsuperscript{135} Justice Blackmun utilized the same due process elements of the \textit{Eldridge} test that the majority found controlling,\textsuperscript{136} but found the majority’s “insensitive presumption that incarceration is the only loss of liberty sufficiently onerous to justify a right to appointed counsel” to be totally inconsistent with the adaptable and flexible nature of due process.\textsuperscript{137}

Justice Blackmun considered Ms. Lassiter’s stake in the litigation to be paramount.\textsuperscript{138} He stated that the North Carolina procedures were “dis-

\textsuperscript{130} \textit{Id.} at 31.
\textsuperscript{131} \textit{Id.} at 27.
\textsuperscript{132} \textit{Id.} at 31-32. Justice Stewart was relying on the precedent of \textit{Scarpelli}. \textit{See supra} notes 67-71.
\textsuperscript{133} \textit{Lassiter}, 452 U.S. at 32-33. The Court found that Ms. Lassiter’s case “presented no specially troublesome points of law,” that some of Ms. Lassiter’s arguments were understood by the trial judge, that Ms. Lassiter had not made an effort either to speak to her retained lawyer (her lawyer from her previous murder trial) or to appear at an earlier custody hearing, and that “the weight of the evidence that she had few sparks of . . . interest [in her son] was sufficiently great that the presence of counsel for Ms. Lassiter could not have made a determinative difference.” \textit{Id.}
\textsuperscript{134} \textit{Id.} at 49 (Blackmun, J., dissenting).
\textsuperscript{135} \textit{Id.} at 57.
\textsuperscript{136} Justice Blackmun adopted the majority’s use of the \textit{Eldridge} test, and defined Ms. Lassiter’s liberty interest by citing the same case as the majority: \textit{Stanley v. Illinois}, 405 U.S. 645, 651 (1972). Justice Stevens, in a separate dissent, noted that Justice Blackmun met the majority “on its own terms.” \textit{452 U.S.} at 59 (Stevens, J., dissenting).
\textsuperscript{137} \textit{Id.} at 42.
\textsuperscript{138} \textit{Id.} at 38-40.
tinctly formal and adversarial” with an “accusatory and punitive focus.”

These proceedings could thus be distinguished from the short, informal or primarily medical proceedings that the Court had previously determined did not require appointment of counsel.\(^{140}\) Under Ms. Lassiter’s circumstances, he reasoned, the presence of an attorney would certainly diminish the possibility of erroneous termination.\(^{141}\) Finally, although the State has an important interest in protecting its citizens, the cost of providing counsel is relatively minimal compared to the parent’s interests. Casting the pertinent interests in this light, Justice Blackmun concluded that Ms. Lassiter was entitled to an attorney.\(^{142}\)

In a separate dissent, Justice Stevens argued that termination of parental rights involves a serious “deprivation of both liberty and property, because statutory rights of inheritance as well as the natural relationships may be destroyed.”\(^{143}\) He agreed with Justice Blackmun that the *Eldridge* test required appointment of counsel in Ms. Lassiter’s case, but also argued that the issue was simply one of fundamental fairness that did not necessitate an analysis of pecuniary cost.\(^{144}\)

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139. *Id.* at 42-46. The statutes provide for the filing of a formal petition delineating the grounds for terminating parental rights, N.C. GEN. STAT. § 7A-289-25; a summons requesting an answer is also issued, *id.* § 7A-289.27. The hearing is “conducted by the district court sitting without a jury.” *Id.* § 7A-289.30. Formal rules of evidence still apply, except the husband-wife or physician-patient relationship privilege, and all findings of fact must be “based on clear, cogent, and convincing evidence.” *Id.*


141. Justice Blackmun argued that the available statistics, rejected by the majority as “unilluminating,” illustrated the need for counsel. *See* 452 U.S. at 29 n.5; *id.* at 46 nn.14-15. “When the parent is indigent, lacking in education, and easily intimidated by figures of authority, the imbalance may well become insuperable.” *Id.* (footnote omitted).

A Parent Representation Study showed that parents represented by counsel had a “higher rate of dismissed petitions, 25% to 7.9%, and lower rates of neglect adjudications, 62.5% to 79.5% . . .” *Id.* at 46 n.15 (citing *Representation in Child Neglect Cases: Are Parents Neglected?*, 4 COLUM. J.L. & SOC. PROBS. 230, 241 (1968) [hereinafter cited as *Parent Representation Study*]). A North Carolina study produced similar findings: represented parents prevailed 5.5% of the time, unrepresented parents prevailed only .15% of the time. *Lassiter*, 452 U.S. at 46 n.15.

142. *Lassiter*, 452 U.S. at 52-56. Justice Blackmun also argued that persons similarly situated are entitled to appointment of counsel. *Id.* at 57-58.

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

144. *Id.* at 59-60. *See* *Davis v. Page*, 640 F.2d at 599, 604. Essentially, Justice Stevens’ fundamental fairness argument reflects due process analysis prior to *Gideon*. *See* *Palko v. Connecticut*, 302 U.S. 319 (1937); *Twining v. New Jersey*, 211 U.S. 78 (1908); and *Note, supra* note 1.
VI. THE EFFECT OF LASSITER: EVISCERATION OF AN INDIGENT'S RIGHT TO APPOINTMENT OF COUNSEL IN TERMINATION HEARINGS

The new interest-balancing test adopted by the Lassiter majority is most effectively analyzed through a discussion of its impact on indigent parents in termination of parental rights hearings. This will provide an insight into the practical shortcomings of the test, while highlighting the possible adverse consequences inflicted upon indigent parents in termination hearings. A narrow, practical discussion is necessitated because Lassiter involved only the rights of indigent litigants in parental rights termination proceedings.

The utilitarian balancing of interests adopted in Eldridge has several drawbacks when applied, as it was in Lassiter, in an inflexible manner.145 In addition, the Eldridge test itself is "a crude sort of social welfare function"146 that tends to negate the property or liberty interests at stake.147 The Lassiter decision is a vivid example of the negation of property and liberty interests inherent in the Eldridge test.148 A parent's interest in his or her children has been described as "essential to the orderly pursuit of happiness,"149 and "far more precious . . . than property rights."150 The

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145. See also L. TRIBE, supra note 1, at 539-43.

The 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 clauses. Id. at 542-43. See Mashaw, supra note 58, at 47-50. The Eldridge test "utilitarian calculus tends, as cost-benefit analysis typically do, to 'dwarf soft variables' and to ignore complexities and ambiguities." Id. at 48.

146. L. TRIBE, supra note 1, at 540.

147. See id. at 540-41; Mashaw, supra note 58, at n.1. Note, supra note 1. By assigning a weight to the government's interests, the test eliminates an absolute protection of a liberty or property interest. See L. TRIBE, supra note 1, at 540. The test's emphasis on economic costs and the presumption that the government's procedures are constitutional also tends to negate liberty and property interests. Id.

148. For the proposition that a liberty interest is involved in a termination of parental rights, see, e.g., Pierce v. Society of Sisters, 268 U.S. 519, 535 (1924); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Davis v. Page, 640 F.2d at 602; Danforth v. State Dep't of Health & Welfare, 303 A.2d 794 (Me. 1973). In Lassiter, Justice Stevens also found a property interest. Lassiter, 452 U.S. at 59 (Stevens, J., dissenting).


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The inherent deficiencies in applying the Eldridge test restrictively are also highlighted by the innumerable problems the Lassiter decision will undoubtedly create. First, as Justice Blackmun illustrated, the case-by-case approach adopted by the majority does not lend itself practically to judicial review. The transcript of a termination proceeding alone will not be dispositive of whether an unrepresented indigent was disadvantaged. The transcript will not show whether the indigent litigant had adequate discovery or access to legal resources necessary for constructing a defense. Consequently, the reviewing court must expand its analysis into a "cumbersome and costly," time-consuming investigation of the entire proceeding. Since the case-by-case approach involves a constitutional inquiry, "it necessarily will result in increased federal interference in state proceedings." This is contrary to the rationale in Gideon, wherein the court developed an absolute standard in an attempt to obtain consistency and eliminate the time-consuming analysis of "special" circumstances. Part of the rationale behind Gideon's prophylactic rule "was that the previously prevailing 'special circumstances rule,' [the Betts v. Brady decision] though requiring counsel on fewer occasions, had repeatedly resulted in messy and friction-generating factual inquiries into every case." The Lassiter decision departs from the Gideon rationale, and will accordingly produce numerous federal-state conflicts.

152. See supra notes 118-33 and accompanying text. Ms. Lassiter's liberty interests were effectively negated.
153. See cases cited supra in note 86. See also Stanley v. Illinois, 405 U.S. 645 (1972).
154. Lassiter, 452 U.S. at 50-51 (Blackmun, J., dissenting).
155. See id. The transcript alone will not provide the appeals court with sufficient information to apply the Eldridge test. In addition, many factors not on the record will affect the balance. See id.
156. See id.
157. Id.
158. Id.
160. Id.
A case-by-case approach is also time consuming and burdensome on the trial court. Not only must it determine in advance the need for counsel, it must develop pretrial procedures and standards in order to determine properly the need for counsel. There is no guarantee that these standards will produce equitable decisions in every case. Additionally, it will not always be possible for the trial court to predict accurately, in advance of the proceedings, what facts will be disputed, the character of cross-examination, or the testimony of various witnesses. These factors increase the possibility that appointment of counsel will be denied erroneously by the trial court. Because of the procedural delays encountered in litigation of appeals, the parent's rights could be terminated erroneously for an extended period of time. The parent also would be denied the custody of his or her children during this period. An absolute right to counsel would avoid any erroneous denial of appointment of counsel and would eliminate the need for cumbersome and time-consuming standards, while preserving the right to family integrity.

The Lassiter decision virtually ignored the special nature of the family courts and the available statistical evidence concerning the impact of counsel in custody and termination hearings. The Court also neglected to consider the highly emotional and traumatic nature of most family court disputes. This atmosphere, combined in many instances with the pressure of state-initiated termination, could severely affect an individual's

161. See Potvin v. Keller, 313 So. 2d 703, 706 (Fla. 1975).
162. Davis, 640 F.2d at 604.
163. Id.
164. Justice Stewart gave only a cursory examination of several relevant statistics. 452 U.S. at 29-30 & n.5; see supra note 141. He considered the statistics “unilluminating.” Id. Under the restrictive Mathews test, Justice Stewart was not required to weigh the statistics. See supra note 141. This is an illuminating example of how strict interest-balancing tends to “dwarf” non-delineated elements or variables. See supra note 145. For additional statistics, see Parent Representation Study, supra note 141, at 242-43:

<table>
<thead>
<tr>
<th>DISPOSITION</th>
<th>% Represented By Counsel</th>
<th>% Unrepresented By Counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td>Children placed outside the home.</td>
<td>18.2</td>
<td>40.6</td>
</tr>
<tr>
<td>Discharged under court supervision</td>
<td>45.4</td>
<td>39.6</td>
</tr>
<tr>
<td>Discharged without court supervision</td>
<td>9.1</td>
<td>5.0</td>
</tr>
<tr>
<td>Petition dismissed after findings</td>
<td>9.1</td>
<td>3.0</td>
</tr>
<tr>
<td>Other</td>
<td>18.2</td>
<td>11.8</td>
</tr>
</tbody>
</table>

165. See Wald, supra note 149. For an excellent insight into the practical workings of one family court system, see P. Prescott, The Child Savers (1981), discussing the New York Family Court system.
ability to present a defense.\textsuperscript{166} Adequate consideration of these factors could have led the Court to decide the case in a manner more consistent with \textit{Davis v. Page}.

It is doubtful, however, that consideration of these factors would have produced a different result in \textit{Lassiter}, given the Court's unexplained and unjustified addition of the fourth element to the balancing test—the presumption that no right to counsel exists unless imprisonment is imposed. \textit{Davis} and \textit{Lassiter} reached diametrically opposed conclusions, yet both courts relied on the three-pronged \textit{Eldridge} test in deciding whether appointment of counsel was mandated.\textsuperscript{167} In \textit{Lassiter}, the inclusion of the presumption that imprisonment is required tipped the scales in the state's favor. Since actual imprisonment is rarely imposed in civil litigation,\textsuperscript{168} it is highly unlikely that any indigent civil litigant can overcome this presumption. As Justice Blackmun stated:

By emphasizing the value of physical liberty to the exclusion of all other fundamental interests, the Court today grafts an unnecessary and burdensome new layer of analysis onto its traditional three-factor balancing test. Apart from improperly conflating two distinct lines of prior cases . . . the Court's reliance on a "rebuttable presumption" sets a dangerous precedent that may undermine objective judicial review regarding other procedural protections.\textsuperscript{169}

\textsuperscript{166} The necessity of state-appointed counsel is particularly acute in cases . . . where the State initiates a civil proceeding against an individual to deprive her of the custody of her children. Here the State is employing the judicial mechanism it has created to enforce society's will upon an individual and take away her children. The case by its very nature resembles a criminal prosecution. The defendant is charged with conduct—failure to care properly for her children—which may be criminal and which in any event is viewed as reprehensible and morally wrong by a majority of society. And the cost of being unsuccessful is dearly high—loss of the companionship of one's children. . . . Certainly, if the State must provide funds for an indigent mother's court costs for a divorce, the State should also provide her with counsel to protect her rights to something far more important to most mothers and to society—her right to custody of her children. Kaufman v. Carter, 402 U.S. 954, 959-60 (1971) (Black, J., dissenting to the denial of certiorari).

\textsuperscript{167} See supra notes 84-133 and accompanying text.

\textsuperscript{168} See Rossman, supra note 57, at 646-55. There is, of course, civil commitment for alcoholism, mental retardation, and other similar afflictions. \textit{Id}. A civil litigant can also be held in contempt of court, and subsequently imprisoned, but in most civil litigation imprisonment is not a likely result. \textit{Id}.

\textsuperscript{169} \textit{Lassiter}, 452 U.S. at 41 n.8 (emphasis supplied). The \textit{Lassiter} decision also presents possible equal protection problems. See Cleaver v. Wilcox, 499 F.2d 940, 944 (1974); Parent Representation Study, supra note 141, at 251; Note, supra note 3, at 550 ("Separate right to counsel for rich and poor may deny equal protections as well as due process."). See Note, \textit{Child Neglect: Due Process for the Parent}, 70 COLUM. L. REV. 465 (1970). See also
VII. CONCLUSION

The results of Lassiter are two-fold. First, the Court has combined two different areas of due process law in order to ascertain what process is mandated in a termination of rights hearing. Under this new analysis, the three elements delineated in Mathews v. Eldridge must be balanced and the result weighed against a fourth element—the presumption that an indigent is entitled to appointment of counsel only where imprisonment is imposed.

Second, the Court has eviscerated the indigent's right to appointment of counsel. By weighing the three elements in the Eldridge test and then setting their cumulative net weight against the presumption that the right to counsel exists only where imprisonment is imposed, the Court has established a virtually unattainable prerequisite for appointment of counsel. Since parents involved in termination proceedings rarely face imprisonment, under the Court's new four-part test they will rarely be entitled to court appointed counsel.

Although Lassiter's holding applied to termination hearings, the four-part test is broad enough to apply in all civil cases. A court applying the new test would be obliged to consider imprisonment an effective precondition to appointment of counsel, and would thus deny appointment in most civil cases. Such application beyond Lassiter's factual setting would be unwarranted. It also would signal a move toward the absolute elimination of an indigent's right to appointment of counsel in civil litigation. Such a result is certainly not desirable nor "fundamentally fair."

Kevin W. Shaughnessy

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Rossman, supra note 57, at 648. Arguably, a nonindigent parent represented by his or her own counsel will almost certainly turn the termination proceeding into a more formal adversary proceeding. Cleaver, 499 F.2d at 944. In this type of proceeding the parent's case will be presented much more successfully. See supra note 141. Unrepresented indigent parents would not enjoy this advantage. In a survey of judges in the Kings County, New York Family Court, 72% of the judges reported that it was more difficult to conduct a fair hearing when the parents were unrepresented; 66.7% found it more difficult to develop the facts in hearings with unrepresented parents. See Parent Representation Study, supra note 141, at 253. By not establishing an absolute right to counsel, the Court has created an inequitable situation where similarly situated parents would experience different results solely due to the presence of counsel. See also Douglas v. California, 372 U.S. 353, 357 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Note, Child Neglect: Due Process for the Parent, supra, at 476; Rossman, supra note 57, at 648.
