CASENOTES

The Right to Counsel in Parental Rights Termination Proceedings: *Lassiter v. Department of Social Services of Durham County, North Carolina*[1] — *Parens patriae* is the term traditionally used to describe the role of the state as guardian of persons such as infants and incompetents who are legally unable to act for themselves.[2] Under the *parens patriae* doctrine, the state is authorized to intervene in the family relationship where necessary to protect the welfare of the child.[3] All states have statutory schemes which govern the exercise of this power.[4] The most drastic form which state intervention in the parent-child

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[1] 452 U.S. 18 (1981).

[2] West Va. v. Chas. Pfizer & Co., 440 F.2d 1079, 1089 (1971); BLACK'S LAW DICTIONARY 1003 (rev. 5th ed. 1979).

[3] Singleman, *A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055, 1057-59 (1979). For a comprehensive description of the historical development of the *parens patriae* role of the state in the area of child neglect and abuse see Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L. REV. 887, 894-910 (1979).

[4] *See generally* Areen, *supra* note 3, at 920-30; Coleman, *Standards for Termination of Parental Rights*, 26 WAYNE L. REV. 315, 326-35 (1980); Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1 (1975); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 628-36 (1976).

In most states, permanent termination of parental rights is addressed in statutory provisions separate from those dealing with temporary action to protect the child. *See* Katz, *supra* note 4, at 66-67; Wald, *supra* note 4, at 633-36. For examples of termination provisions, *see, e.g.*, ARIZ. REV. STAT. ANN. §§ 8-531 to -544 (1974 & Supp. 1981); HAWAII REV. STAT. §§ 571-61 to -63 (1976 & Supp. 1981); IDAHO CODE §§ 16-2001 to -2015 (1979); IND. CODE ANN. §§ 31-6-5-1 to -6 (Burns 1980); MINN. STAT. ANN. §§ 260.221-.245 (West, 1971 & Supp. 1981); MISS. CODE ANN. §§ 93-15-101 to -111 (Supp. 1981); MO. ANN. STAT. §§ 211.442-.492 (Vernon Supp. 1982); N.Y. FAM. CT. ACT §§ 611-634 (McKinney Supp. 1980); N.D. CENT. CODE §§ 27-20-44 to -47 (1974 & Supp. 1981); OKLA. STAT. ANN. tit. 10, §§ 1130-34 (West Supp. 1981); S.C. CODE ANN. §§ 20-11-10 to -60 (Law. Co-op. 1976).

While the specific statutory language varies, the grounds for termination generally include abandonment, abuse, and neglect. *See* Areen, *supra* note 3, at 920; Coleman, *supra* note 4, at 326-32; Katz, *supra* note 4, at 67. *See also* Ketcham & Babcock, *Statutory Standards for the Involuntary Termination of Parental Rights*, 29 RUTGERS L. REV. 530, 544-45 (1976).

In an increasing number of states, an additional basis for termination is parental failure to make adequate progress in correcting conditions which led to an earlier adjudication of child neglect. *See, e.g.*, CAL. CIV. CODE § 232.1(8) (West Supp. 1981); COLO. REV. STAT. § 19-11-105(b) (1978); ILL. ANN. STAT. ch. 40 §§ 1501 D(m), 1510 (Smith-Hurd 1980); IND. CODE ANN. 31-6-5-4 (Burns 1980); N.C. GEN. STAT. § 7A-289.32 (1981).

In a number of states, once one of the statutory grounds for termination is established, the judge is required to make a further determination that termination is in the best interests of the child before the petition is granted. *See, e.g.*, FLA. STAT. ANN. §§ 39.41(1)(f)1, 63.072 (West Supp. 1982); KY. REV. STAT. ANN. § 199.603 (Bobbs-Merrill Supp. 1980); N.C. GEN. STAT. § 7A-289.31 (1981).

relationship may take is the termination of parental rights. The effect of an order terminating parental rights is to sever the parent-child relationship completely. The statutes are explicit in this regard.[5] After termination, the parent has no further right to custody of the child,[6] and loses all right to control the upbringing of the child.[7] The parent is not entitled to be consulted or informed about any decisions made with respect to the child's future,[8] or to visit or communicate with the child.[9] In addition, the child may be adopted without the parent's consent.[10] The effect of the termination order, from the perspective of the parent, is equivalent to the death of the child.[11]

The termination of parental rights by the state results in a permanent deprivation of a parent's fundamental liberty interest in maintaining a relationship with his or her child.[12] In several other cases where state action infringes on fundamental liberty interests, the Supreme Court has held that due process requires that counsel be provided for indigent litigants.[13] The issue of the right to counsel as a requisite of due process in parental rights termination proceedings was not resolved, however, until the Court's decision in *Lassiter v. Department of Social Services* in 1981.[14]

The litigation in *Lassiter* arose in 1975, when the Department of Social Services of Durham County, North Carolina received a complaint from a local pediatric clinic that Abby Gail Lassiter, a mother of five children, had failed to bring her youngest child, William, to the clinic for treatment of medical problems.[15] Following the receipt of this complaint, a social worker visited the

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[5] *See, e.g.*, N.C. GEN. STAT. § 7A-289.33 (1981) which provides:

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

See also ARIZ. REV. STAT. ANN. § 8-539 (1974) (effect of termination is to "divest the parent and the child of all legal rights, privileges, duties and obligations with respect to each other. . . ."); CAL. CIV. CODE § 232.6 (West Supp. 1981) ("A declaration of freedom from parental custody and control pursuant to this chapter terminates all parental rights and responsibilities with regard to the child.").

[6] *See, e.g.*, IND. CODE ANN. § 31-6-5-6(a) (Burns 1980) ("When the juvenile court terminates the parent-child relationship, all rights, privileges, immunities, duties, and obligations pertaining to that relationship (including any rights to custody, control, visitation or support) are permanently terminated, and the parent's consent to the child's adoption is not required.").

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *See* KY. REV. STAT. ANN. § 199.613(2) (Bobbs-Merrill Supp. 1980) ("Where parental rights have been terminated . . . all legal relationships between the parent and child shall cease to exist, *the same as if the relationship of parent and child had never existed*, except that the child shall retain the right to inherit from its parents under the laws of descent and distribution until the child is adopted.") (*emphasis added*).

[12] *See infra* text and notes at notes 297-303.

[13] *See infra* text and notes at notes 202-65.

[14] 452 U.S. 18, 24 (1981).

[15] Brief of Petitioner, App. IV at 10-11, Lassiter v. Dept. of Social Services of Durham

Lassiter home.[16] She found the child to be in need of medical attention and took him to a local hospital.[17] Doctors at the hospital diagnosed the child's illness as the result of a severe infection which had not been properly treated.[18] The Department of Social Services initiated a proceeding to have William declared a neglected child and asked that custody be transferred to the state.[19] Abby Lassiter was served with notice of this proceeding but did not attend.[20] At the hearing, in June of 1975, the judge found that William had been neglected and ordered that he be placed in the custody of the Department of Social Services.[21]

One year later, in June of 1976, Abby Lassiter was convicted of second-degree murder and began serving a twenty-five to forty-year sentence of imprisonment.[22] Abby's mother, Mrs. Lucille Lassiter, assumed the responsibility of caring for four of her five grandchildren.[23] William remained in the custody of the state Department of Social Services.[24]

In 1978, after Ms. Lassiter had been in prison for two years, the Department of Social Services petitioned the court to terminate Abby Lassiter's parental rights.[25] The Department alleged that termination was justified under North Carolina law on two grounds.[26] First, the Department contended, Abby Lassiter had failed to maintain contact with the child since December of 1975.[27] Second, the Department alleged, she had willfully left William in foster care for more than two years without demonstrating substantial progress in correcting the conditions that led to his removal.[28] In addition, the Department alleged that Ms. Lassiter had failed to show a positive response to the diligent efforts of the Department to strengthen her relationship with William or to make and follow through with constructive planning for his future.[29] Ms. Lassiter re-

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County, N.C., 452 U.S. 18 (1981) (Transcript of the Evidence, In the Matter of William L. Lassiter (N.C. D.C. Aug. 31, 1978 at 10-11)) [hereinafter cited as *Transcript of Evidence*].

[16] *Id.* at 11.

[17] *Id.*

[18] *Id.*

[19] 452 U.S. at 52.

[20] *Id.*

[21] *Id.* at 20.

[22] *Id.*

[23] *Id.* at 52.

[24] *Id.* at 20-21.

[25] *Id.*

[26] *Id.* at 21.

[27] *Id.* At the time of the termination hearing, the state statute provided for termination upon a finding that the parent has without cause failed to establish or maintain concern or responsibility as to the child's welfare. N.C. GEN. STAT. § 7A-289.32(1) (1977). The termination statute was later amended and this provision was deleted. 1979 N.C. Sess. Laws c. 669, s. 2.

[28] 452 U.S. at 21.

[29] *Id.* The language of the termination petition closely follows the statutory language. *See* N.C. GEN. STAT. § 7A-289.32(2) (1981), which authorizes termination on a finding that:

> The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing a positive response within two years to the diligent efforts of a county department of social services, a child-caring

ceived notice of the termination petition in prison.[30] She discussed the pending proceeding with prison guards but they made no effort to assist her in securing legal assistance.[31] At the time that Ms. Lassiter received notice of the pending termination proceeding, she was consulting with an attorney concerning a possible appeal of her criminal conviction.[32] She did not, however, mention the termination proceeding to this attorney.[33]

At the beginning of the termination hearing, the trial judge, on his own motion, considered whether he should grant a continuance of the hearing to enable Ms. Lassiter to secure counsel.[34] He decided that since Ms. Lassiter had access to an attorney in prison and had failed to consult him about the termination action, she had been afforded sufficient time and opportunity to obtain counsel.[35] The judge determined, therefore, that Ms. Lassiter was not entitled to any additional opportunity to seek representation.[36] The hearing then proceeded in the absence of counsel for Ms. Lassiter.[37]

The principal state witness at the trial was a social worker who testified to the circumstances surrounding the initial removal of William from Ms. Lassiter's custody.[38] This social worker was not personally involved in the events leading to the initial finding of neglect.[39] Her testimony as to the events surrounding William's removal from his home was based on social service department records.[40] Ms. Lassiter did not attempt to challenge this hearsay testimony.[41] The social worker also testified that since the initial removal of William from his mother's custody, Ms. Lassiter had failed to maintain contact with the child.[42] Her testimony indicated that, in the more than two years that had passed since the initial neglect proceeding, Ms. Lassiter had met with William on only two occasions.[43] One meeting had been arranged by the Department of Social Services and the other was a chance encounter in the street.[44] The social worker testified that Ms. Lassiter had not contacted the

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institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

In addition, N.C. GEN. STAT. § 7A-289.31 (1981) provides that once one of the statutory grounds for termination is established, the judge must determine if termination is in the best interests of the child.

[30] 452 U.S. at 21.

[31] *Id.* at 53.

[32] *Id.* at 53 n.21.

[33] *Id.* This attorney later indicated that he would not have been willing to represent Ms. Lassiter in the termination action because she would be unable to compensate him for his services. *Id.*

[34] *Id.* at 21. Ms. Lassiter did not make a request at the beginning of the hearing for counsel or indicate that she was unable to afford counsel. *Id.* at 22.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 53.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 22.

[43] *Id.*

[44] *Id.* The initial removal of the child occurred in May of 1975. The arranged meeting

Department to inquire about the child or to request any further meetings with him after these two occasions.[45] Shortly after the second meeting, Ms. Lassiter was imprisoned.[46] She remained in prison until the termination hearing two years later.[47] The social worker also testified that the Department had concluded, based on conversations with persons in the community familiar with the Lassiter family, that placing William in his grandmother's care was not a viable alternative to termination of Ms. Lassiter's parental rights.[48] The Department, according to the social worker, did not feel that Ms. Lassiter's mother would be able adequately to discharge the responsibility of caring for William.[49] There was no testimony, however, that the grandmother's care of Ms. Lassiter's other four children was inadequate.[50]

Ms. Lassiter attempted to cross-examine the social worker but was unable to do so effectively.[51] She did not understand the difference between questioning the witness and testifying herself.[52] Ms. Lassiter's cross-examination consisted largely of statements contesting the accuracy of the social worker's conclusion that termination was justified and arguments that William should be placed in the custody of his grandmother.[53] Ms. Lassiter did not attempt to show that much of the social worker's testimony was hearsay.[54] Nor did Ms. Lassiter try to show that her failure to visit William after the two initial meetings was attributable to her imprisonment during much of the period in question.[55] Such a showing might have formed the basis for a defense to the charge that she willfully failed to demonstrate concern and responsibility for the child, grounds for termination under North Carolina law.[56] Ms. Lassiter also did not try to show that the Department had failed to make diligent efforts to strengthen her relationship with William.[57] Failure to respond to these diligent efforts was one of the grounds on which the state sought to terminate her parental rights.[58]

Ms. Lassiter and her mother both testified against the termination.[59] Ms. Lassiter testified that she had not neglected William.[60] During cross-examination by the state's attorney, Ms. Lassiter reiterated her argument that custody

took place in December, 1975; the chance encounter occurred in July, 1976. *See Transcript of Evidence*, *supra* note 15, at 11-12.

[45] 452 U.S. at 22.

[46] *See Transcript of Evidence*, *supra* note 15, at 12, 27. Ms. Lassiter was tried and convicted of second-degree murder in July, 1976. *Id.* at 27.

[47] 452 U.S. at 21.

[48] *Id.* at 22.

[49] *Id.*

[50] *See Transcript of Evidence*, *supra* note 15. In fact, the social worker testified that the grandmother was doing a "fine job of caring for the other children." *Id.* at 13.

[51] 452 U.S. at 53.

[52] *Id.*

[53] *See Transcript of Evidence*, *supra* note 15, at 19-24.

[54] 452 U.S. at 53.

[55] *Id.* at 56.

[56] *Id. See supra* text of statute at note 29.

[57] 452 U.S. at 56.

[58] *Id.* at 21.

[59] *Id.* at 23.

[60] *Id.*

of the child should be given to his grandmother.[61] Ms. Lassiter's mother also testified that she should be given custody of William.[62] She denied telling the Social Services Department that she was not able to take on the responsibility of caring for William.[63] She also denied allegations that she had made no attempt to maintain contact with her grandson during the time that he was in the custody of the state.[64] Ms. Lassiter was not informed that she could question her mother and did not attempt to do so.[65]

At the conclusion of the hearing, the trial court found that Ms. Lassiter's parental rights should be terminated.[66] The judge found that Ms. Lassiter had failed to contact the Social Services Department about the child since December of 1975 and had failed to express concern about his welfare or plan for his future since that time.[67] These failures, the judge concluded, constituted a willfull failure to maintain concern or responsibility for the child, grounds for termination under North Carolina law.[68] The Court also found, as required by state law, that termination was in the best interests of the child.[69]

Ms. Lassiter appealed from the termination order on the sole ground that the trial court denied her due process of law in violation of the fourteenth amendment when it failed to appoint counsel for her as an indigent parent in a termination proceeding.[70] After the North Carolina Court of Appeals rejected her due process claim[71] and the Supreme Court of North Carolina summarily denied her application for discretionary review,[72] the Supreme Court of the United States granted her petition for certiorari.[73]

In a 5-4 decision, a majority of the Supreme Court held that due process does not require that counsel be provided to all indigent parents facing state attempts to terminate their parental rights.[74] The majority observed that prior cases involving right to counsel claims established a presumption against the right in any case where the physical liberty of the litigant was not threatened by the state's action.[75] The Court then applied the balancing test which it has developed for the determination of what process is due in any particular context.[76] Applying this test, the Court determined that the parent's interest in retaining parental rights and the risk of error in the absence of counsel was not of

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[61] *Id.*
[62] *See Transcript of Evidence*, *supra* note 15, at 52.
[63] 452 U.S. at 23.
[64] *Id.*
[65] *Id.* at 55.
[66] *Id.* at 24.
[67] *Id.* at 23-24.
[68] *Id.* at 23-24. This ground for termination was repealed in 1979. *See supra* note 27.
[69] 452 U.S. at 24. *See supra* note 29.
[70] 452 U.S. at 24.
[71] *In re* William L. Lassiter, 43 N.C. App. 525, 259 S.E.2d 336 (1979).
[72] *In re* William L. Lassiter, 299 N.C. 121, 262 S.E.2d 6 (1980).
[73] Lassiter v. Department of Social Services, 449 U.S. 819 (1980).
[74] 452 U.S. at 31.
[75] *Id.* at 26-27.
[76] *Id.* at 27. *See infra* text and notes at notes 89-91.

sufficient magnitude in all cases to overcome the presumption against appointed counsel.[77] The Court concluded that in some cases, however, the presumption would be overcome.[78] The Court therefore found that the right to counsel in termination proceedings was to be determined on a case-by-case basis.[79] Examining the facts of Ms. Lassiter's case, the Court then determined that the failure to appoint counsel for her did not constitute a violation of due process.[80]

The dissenting Justices rejected the majority's conclusion that precedent supported a presumption against a right to appointed counsel in any case where physical liberty was not at stake.[81] The dissenters asserted that the balancing of the parent's interest, the state's interest and the risk of error in termination proceedings should lead to the conclusion that due process requires that all indigent parents in such proceedings have a right to appointed counsel.[82]

The *Lassiter* decision is significant in two respects. First, the majority opinion in *Lassiter* inaugurates a new, and more restrictive, approach to right to counsel issues than has prevailed in the Court's past decisions. The *Lassiter* analysis thus will have a significant impact on the future development of the right to counsel in state courts. Second, the *Lassiter* Court's treatment of the right to counsel issue in parental rights termination proceedings raises questions about the constitutional status of parental rights. Prior decisions established that rights relating to family and children are fundamental and thus entitled to the highest degree of constitutional protection. The *Lassiter* case raises serious questions about the continued force of these earlier decisions.

This casenote will begin with a description of the reasoning of the majority and dissenting opinions in *Lassiter*. A brief review of the development of the right to counsel in state courts will then be presented. The reasoning of the *Lassiter* Court will be analyzed against the background of this history. First, the casenote will examine the *Lassiter* Court's conclusion that a presumption against a right to counsel in cases not involving physical liberty may be derived from prior cases. It will be demonstrated that the use of a presumption is inconsistent with the flexible approach to due process issues which the Court has employed in past cases and is incompatible with the Court's past characterization of family rights as fundamental. Second, the Court's decision to adopt a case-by-case approach to the right to counsel in termination proceedings will be analyzed. It will be maintained that the reasoning of the *Lassiter* Court cannot

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[77] *Id.* at 31.

[78] *Id.*

[79] *Id.* at 31-32.

[80] *Id.* at 32-33.

[81] *Id.* at 40 (Blackmun, J., dissenting). Justice Stevens' dissenting opinion does not explicitly address the correctness of the majority's presumption. However, since Justice Stevens indicated that he agreed with the reasoning of the Blackmun dissent, it is reasonable to assume that Justice Stevens also rejected the presumption. *See id.* at 59-60.

[82] *Id.* at 47 (Blackmun, J., dissenting); *id.* at 59 (Stevens, J., dissenting).

be reconciled with traditional due process methodology or prior decisions establishing a fundamental right to family integrity. Finally, the implications of the *Lassiter* decision for the future development of the right to counsel will be explored. It will be suggested that if the *Lassiter* holding must stand, it should be confined to right to counsel cases and should not be extended to cases involving claims for other types of procedural protection.

I. THE SUPREME COURT'S REASONING IN *LASSITER*.

A. *The Majority's Approach*

As the first step in its analysis of the claim that due process requires appointed counsel in termination proceedings, the *Lassiter* Court reviewed prior cases which had addressed the issue of when fundamental fairness requires that an indigent litigant be furnished with appointed counsel.[83] The majority found that these precedents established the "pre-eminent generalization"[84] that the right has been recognized only when physical liberty is threatened by state action.[85] From these cases, the Court drew the presumption that an indigent need be provided with appointed counsel only when he is threatened with deprivation of his physical liberty.[86]

Since physical liberty is not the interest at stake in a parental rights termination proceeding, the Court found that the presumption against a right to counsel applies to such proceedings.[87] The Court then applied the traditional test for determining what process is due in a given situation.[88] This test involves a balancing of three elements.[89] The first factor to be weighed is the private interest affected by the state's action.[90] The second factor is the governmental interest implicated in the proceeding, including the financial and administrative burdens on the state in providing additional safeguards.[91] The third factor is the risk of erroneous deprivations of the private interest under existing procedures and the value of additional procedures in reducing that risk.[92]

The Court found that in the context of a parental rights termination proceeding, the private interest of the parent affected by the state's action is a "commanding one."[93] According to the Court, prior decisions had established that the parent's right to custody and control over the upbringing of the child is

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[83] *Id.* at 25-26.

[84] *Id.* at 25.

[85] *Id.*

[86] *Id.* at 26-27.

[87] *See id.*

[88] *Id.* at 27.

[89] *Id.* The Court referred to the case of Mathews v. Eldridge, 424 U.S. 319, 334-35 (1975), which set out the three-part test for determining what process is due. *Id.*

[90] *Lassiter*, 452 U.S. at 27.

[91] *Id.*; *Mathews*, 424 U.S. at 335.

[92] *Lassiter*, 452 U.S. at 27; *Mathews*, 424 U.S. at 335.

[93] 452 U.S. at 27. The Court noted that some parents may also face the possibility of criminal charges arising out of the alleged mistreatment of the child. *Id.* at 27 n.3. In such a case, the parent would have an additional interest to protect. *Id.*

such an important interest that only a powerful countervailing state interest would justify interference with the parent-child relationship.[94] The Court recognized that the goal of the state in a termination action is not merely to infringe on the parent's right to custody and control over the child but to eradicate these rights.[95] If the state succeeds in the termination proceeding the Court concluded, it will have "worked a unique kind of deprivation."[96]

The Court then considered the second factor in the balancing test, the state's interests in a parental rights termination proceeding.[97] The majority noted that the state has a vital interest in the welfare of the child and, therefore, a strong interest in ensuring that the termination proceeding results in a fair and accurate decision.[98] The Court observed that since the provision of counsel for the parent may increase the likelihood that termination decisions will be made correctly, the state's interest may also be promoted by making counsel available to indigent parents.[99] The Court also recognized, however, that the state has a countervailing interest in avoiding the costs associated with an obligation to appoint counsel for such parents.[100] The majority conceded that the state's interest in keeping the cost of termination proceedings to a minimum is legitimate but asserted that this interest is not significant enough to overcome individual interests as important as those implicated in a parental rights termination proceeding.[101] The Court also noted that the costs which would be incurred by the state if required to provide counsel to indigent parents in such proceedings would be far less than those imposed on the states by the decisions establishing a right to appointed counsel in state criminal proceedings.[102]

Continuing its application of the traditional test for determining what process is due, the Court found that the risk of error in parental rights termination proceedings conducted without counsel is potentially substantial.[103] The Court noted that expert medical and psychiatric testimony may be presented in some termination proceedings and that few parents are equipped to understand or respond to such testimony.[104] The Court also recognized that parents who become the subject of termination proceedings tend to have little education and to be less able than most to deal with the problems of life.[105] Consequently, the Court concluded, when faced with the prospect of defending against a state attempt to terminate their parental rights, they may become so upset and con-

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[94] *Id.* at 27.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 27-28.
[98] *Id.* at 27.
[99] *Id.* at 27-28.
[100] *Id.* at 28.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 30.
[104] *Id.*
[105] *Id.*

fused that they are unable to present their case against termination effectively.[106] Thus, the Court concluded, the complexity of the issues and the incapacity of the parent may create a significant risk of an erroneous decision to terminate parental rights.[107]

The Court then balanced the personal interest at stake in termination proceedings, the state's interest involved, and the risk of error in the absence of counsel, against the presumption that there is no right to counsel unless a deprivation of physical liberty is at stake.[108] The combination of the important interest of the parent in maintaining the relationship with the child, the state's shared interest in a correct decision and its relatively insignificant pecuniary interest, and the potentially high risk of an erroneous decision in the absence of counsel for the parent, according to the Court, would overcome the presumption against appointed counsel in some cases.[109] The Court declared, however, that the presumption would not be overcome in all cases because the relative weight of these factors may vary.[110] Thus, the Court concluded, due process does not require that counsel be provided to indigent parents in all termination proceedings.[111] The Court instead held that the right to counsel will be determined on a case-by-case basis and will depend on the result of the balancing test as applied to the facts of each case.[112] According to the Court, the trial judge will have the responsibility of making the initial determination as to whether due process requires appointed counsel in any particular case.[113]

The Court dismissed as imprudent any attempt to provide guidelines for lower courts to follow in determining whether counsel should be appointed because of the wide variety of factual situations which may arise in the context of parental rights termination proceedings.[114] The Court examined the facts of

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[106] *Id.* The Court noted that a number of state courts have determined that the risk of a parent being unable adequately to present his or her case against termination without the aid of an attorney is substantial. *Id.* The Court also recognized that two statistical studies had been conducted which attempted to measure how the lack of counsel affects the accuracy of termination decisions. *Id.* at 29 n.5. The Court indicated that it did not find these statistics "illuminating." *Id.* Both studies showed that hearings in which the parent was represented by counsel resulted in a lower percentage of findings against the parent than hearings in which the parent was unrepresented. *See* Note, *Representation in Child-Neglect Cases; Are Parents Neglected?*, 4 COLUM. J.L. & SOC. PROBS. 230, 241 (1968); Brief of Respondent at 38-39, 25a-31a, Lassiter v. Department of Social Services of Durham County, N.C., 452 U.S. 18 (1981) (study of state initiated termination actions in 73 North Carolina counties). The dissenters in *Lassiter* would give greater weight to this evidence. *See infra* note 143.

[107] 452 U.S. at 30.

[108] *Id.* at 31.

[109] *Id.* The Court stated that the presumption would be overcome if, in a given case, the parent's interest were at its strongest, the state's interest at its weakest, and the risk of error at its peak. *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* at 31-32.

[113] *Id.* The Court declared that the trial judge's decision would be subject to appellate review. *Id.* at 32.

[114] *Id.*

the *Lassiter* case, however, and concluded that the failure to appoint counsel for Ms. Lassiter did not constitute a violation of due process.[115]

The Court noted that the grounds on which the state sought to terminate Ms. Lassiter's parental rights would not provide the basis for criminal charges against her.[116] Ms. Lassiter, therefore, could not have claimed that she required counsel to protect herself against possible criminal charges.[117] The Court also pointed out that the state did not offer any expert witnesses in support of its petition for termination and that no particularly complex issues of either substantive or procedural law were involved in the case.[118] On the basis of these observations, the Court apparently concluded, without so stating, that the risk of error in the proceeding was not significant even though Ms. Lassiter was not afforded the assistance of counsel. The Court conceded that hearsay evidence was admitted which an attorney for Ms. Lassiter might have attempted to exclude.[119] The Court also recognized that an attorney might have developed certain defenses to the termination petition.[120] For example, the Court noted that Ms. Lassiter did not develop the argument that the Social Services Department had failed to make diligent efforts to strengthen her relationship with her child and that, therefore, termination was not justified.[121] The Court also acknowledged the possibility that counsel might have presented more effectively Ms. Lassiter's suggested alternative to termination — that custody of the child should be placed with his grandmother.[122] The Court concluded, however, that the evidence of the disinterest that both Ms. Lassiter and her mother had displayed toward the child since the state had assumed custody of him was sufficiently strong that further development of these defenses would not have affected the outcome of the proceeding.[123]

In so concluding, the Court also observed that Ms. Lassiter failed to attend the initial neglect proceeding and failed to mention the pending termination proceeding to the attorney she was consulting regarding her criminal appeal.[124] These failures, according to the Court, demonstrated that Ms. Lassiter was not very interested in contesting the termination.[125] A parent's demonstrated lack of interest in attending a hearing, the majority stated, should be considered in determining whether counsel should be appointed.[126] Since the termination proceeding did not expose Ms. Lassiter to potential criminal liability, involve

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[115] *Id.* at 33.
[116] *Id.* at 32.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 32-33.
[121] *Id.* at 32.
[122] *Id.* at 33.
[123] *Id.* at 32-33.
[124] *Id.* at 33.
[125] *Id.*
[126] *Id.*

expert testimony, complex issues, or provoke a very interested response from Ms. Lassiter, the Court concluded that the failure of the trial court to appoint counsel for Ms. Lassiter did not render the proceeding fundamentally unfair.[127]

The *Lassiter* majority recognized that the North Carolina court's decision that due process did not require appointed counsel for Ms. Lassiter conflicted with recent holdings of other courts that have considered the right to counsel issue in termination proceedings.[128] The Court also noted that many states have established, by statute, a right to counsel in termination proceedings[129] and that numerous model acts relating to juvenile court proceedings also have included provisions for the appointment of counsel for parents in such proceedings.[130] The Court emphasized that its decision that counsel was not constitutionally required in all cases should not be read to question the wisdom or desirability of the higher standards adopted by these decisions, statutes, and model acts.[131] The Court stated that wise public policy may lead to the establishment of higher standards than those required by the Constitution.[132]

Thus, while recognizing that the weight of judicial and scholarly opinion would find that due process requires the appointment of counsel for all indigent parents faced with state attempts to terminate their parental rights, the *Lassiter* majority held that no such absolute right was constitutionally mandated. The Court found that the result of the balancing of the parent's interest, the state's interest, and the risk of error in the absence of counsel was not sufficiently weighted in favor of the parent in all termination cases to overcome the presumption against the right to counsel. The Court instead decided that the existence of such a right should be decided on a case-by-case basis.

Chief Justice Burger, in a brief concurring opinion, asserted that he found Ms. Lassiter's claim that she was denied due process totally without merit.[133]

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[127] *Id.*

[128] *Id.* at 30-31. The Court noted that there was "no presently authoritative case, except for the North Carolina judgment now before us, holding that an indigent parent has no due process right to appointed counsel in termination proceedings." *Id.* For state cases that have held that a parent in a termination or neglect proceeding has a right to appointed counsel, see, e.g., Department of Public Welfare v. J.K.B., 1979 Mass. Adv. Sh. 2202, 393 N.E.2d 406, 407 (1979); Danforth v. State Dept. of Health and Welfare, 303 A.2d 794, 795 (Me. 1973); Crist v. N.J. Div. of Youth and Family Services, 128 N.J. Super. 402, 416, 320 A.2d 203, 211 (1974); State *ex rel.* Heller v. Miller, 61 Ohio St. 2d 6, 13, 399 N.E.2d 66, 70 (1980); In re Chad S., 580 P.2d 983, 985 (Okla. 1978); In re Myricks, 85 Wash. 252, 253, 533 P.2d 841 (1975).

[129] 452 U.S. at 34. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-225 (Supp. 1981); CAL. CIV. CODE § 237.5 (West Supp. 1981); COLO. REV. STAT. § 19-1-106(1)(b)(ii) (1978); D.C. CODE ENCYCL. § 16-2304(b) (West Supp. 1979); GA. CODE ANN. § 15-11-30(b) (1982); IDAHO CODE §§ 16-1606(c), 1608(b) (1979); ILL. ANN. STAT. ch. 37 § 701-20(1) (Smith-Hurd Supp. 1981); IOWA CODE ANN. § 232.113 (West Supp. 1981); KY. REV. STAT. ANN. § 199.603(8) (Bobbs-Merrill Supp. 1980).

[130] 452 U.S. at 34. *See, e.g.*, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, STANDARD 2.3(b) (I.J.A.-A.B.A. 1970); MODEL ACTS FOR FAMILY COURTS AND STATE-LOCAL CHILDREN'S PROGRAMS, § 25 (Office of Youth Development, H.E.W. 1975).

[131] 452 U.S. at 34.

[132] *Id.* at 33.

[133] *Id.* at 34 (Burger, C.J., concurring).

The Chief Justice apparently found the evidence supporting the state's claim that termination was required to safeguard the child's welfare to be so compelling that the presence or absence of counsel for Ms. Lassiter could not possibly have influenced the decision. He emphasized the fact that Ms. Lassiter had been convicted of murder and faced a lengthy prison sentence as a result of this conviction.[134] He also noted that she had demonstrated little interest in her child.[135] The Chief Justice concluded that Ms. Lassiter's claim that the termination decision was made unfairly because she did not have the aid of counsel was so devoid of merit that a denial of certiorari might have been justified.[136] Since the Court chose to hear the case, however, the Chief Justice acquiesced in the holding of the majority that the right to counsel in termination proceedings should be determined on a case-by-case basis.[137]

B. *The Dissenting Opinions*

There were two dissenting opinions in *Lassiter*. In an opinion joined by Justices Brennan and Marshall, Justice Blackmun rejected the majority's conclusion that due process does not require an absolute right to counsel in parental rights termination proceedings.[138] The dissent agreed with the majority that the appropriate test to determine what process is due involves a weighing of the interests of the individual and the state and the risk of error in the proceeding in the absence of the requested procedural protection.[139] Noting that prior decisions have recognized a fundamental liberty interest in freedom of choice in matters involving the family,[140] the dissent agreed with the Court's conclusion that the termination of parental rights by the state constitutes a unique kind of deprivation and that the parent's interest in ensuring that unwarranted terminations do not occur is a commanding one.[141] The dissent also agreed with the majority's characterization of the state's pecuniary interest in avoiding an obligation to appoint counsel as insignificant when compared to the parent's interest.[142] Finally, the dissent found, as did the majority, that the risk of error in a parental rights termination proceeding in which the parent is not represented by counsel is potentially substantial.[143] In fact, the dissent asserted that the majority's conclusion that there exists a risk that an unrepresented

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[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.* at 34-35.
[138] *Id.* at 35 (Blackmun, J., dissenting).
[139] *Id.* at 37-38.
[140] *Id.* at 38-39.
[141] *Id.* at 35, 40.
[142] *Id.* at 47.
[143] *Id.* at 42-47. The dissent gave greater weight than did the majority to the statistical studies indicating that fewer terminations resulted when the parent was represented at the hearing. *Id.* at 46 n.15. The dissent asserted that since no evidence in the studies indicated that parents who can afford counsel are less culpable than those who cannot, "it seems reasonable to infer that a sizable number of cases against unrepresented parents end in termination solely because of the absence of counsel." *Id.*

parent will not be able to defend effectively against a termination action was a "profound understatement."[144]

The dissent discussed several characteristics of termination actions which lead to high risk of error when a parent is not represented by counsel.[145] To begin, the dissent emphasized that the termination proceeding is a formal judicial proceeding in which the state and the parent occupy adversarial positions.[146] Further, they noted that the state has access to resources, such as experienced counsel and expert witnesses, that enhance its ability to present its case in favor of termination and that are not available to indigent parents.[147] According to the dissent, this imbalance in resources creates a serious risk of erroneous decisions. [148] In addition, the dissenters asserted that the generally imprecise nature of the standards by which the need to terminate is measured enhances the risk of error.[149] They pointed out that, under the North Carolina statute,[150] the termination inquiry involves determinations about the "willfulness" of parental failures to demonstrate concern for the child, the "diligence" of Social Service Department efforts to strengthen the parent-child relationship after initial removal of the child from the home, and the "positiveness" of parental responses to these efforts.[151] The dissent argued that the imprecise nature of the statutory standards increases the risk of error because the unrepresented parent may be unable adequately to present arguments countering the state's assertions that these standards were satisfied.[152] The parent's failure to recognize these arguments, or to present them effectively, the dissent concluded, may lead to a substantial risk of an erroneous decision.[153]

Having determined that the parent's interest was fundamental, the state's interest was far less significant, and the risk of error was substantial, the dissent concluded that due process requires appointed counsel in all termination proceedings.[154] The dissent rejected the majority's conclusion that prior cases established a presumption against a right to appointed counsel in cases, such as termination proceedings, which do not involve a potential deprivation of physical liberty.[155] Prior decisions relating to the right to counsel established,

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[144] *Id.* at 46.

[145] *Id.* at 42-47.

[146] *Id.* at 42-44.

[147] *Id.* at 43.

[148] *Id.* at 44.

[149] *Id.* at 44-45.

[150] The language of the statute is set out at notes 27 and 29 *supra*.

[151] 452 U.S. at 44-45.

[152] *Id.* at 45-46. Justice Blackmun concluded that a parent cannot prevail without being able to "identify material issues, develop defenses, gather and present sufficient supporting nonhearsay evidence and conduct cross-examination of adverse witnesses." *Id.*

[153] *Id.* at 46. The dissent also asserted that the imprecise nature of termination standards increases the risk of error because such standards may lead judges to evaluate the evidence using subjective standards of proper parental conduct, or to defer too readily to the opinions of the state's social services experts. *Id.*

[154] *Id.* at 48.

[155] *Id.* at 40.

according to the dissent, that the presence or absence of an interest in physical liberty is neither a necessary nor sufficient condition for the recognition of the right.[156] The dissent also asserted that the use of a presumption is inconsistent with the Court's traditional approach to due process issues which is based on a balancing of the interests of the parties and the risk of error in the particular context under consideration.[157] According to the dissent, since the Court recognized the parent's interest as fundamental, the state's interest as less important, and the risk of error as significant, the majority should have concluded that due process requires the appointment of counsel in all termination cases.[158]

The dissenting Justices also rejected the majority's decision to adopt a case-by-case approach to the right to appointed counsel in parental rights termination proceedings.[159] They asserted that the Court's adoption of a case-by-case approach is inconsistent with traditional due process analysis.[160] This analysis, according to the dissent, involves consideration of the interests of the individual and the state and the risk of error in the context under consideration.[161] The dissenters maintained that, in the past, the Court has balanced these factors to develop general rules applicable to all cases within a particular context.[162] The dissent asserted that the application of this analysis in the context of parental rights termination proceedings requires a finding that all indigent parents involved in state-initiated termination proceedings have a right to appointed counsel.[163]

The dissent also pointed out the practical problems that the administration of the majority's case-by-case approach will entail.[164] For example, appellate review of the record of a termination proceeding in which a parent was not represented by counsel will not provide adequate protection against unfair and inaccurate decisions.[165] The contributions that counsel for the parent might have made to the fairness of the proceeding, according to the dissent, cannot be determined with any certainty through the process of appellate review.[166] The dissent further asserted that the problem facing an appellate court in trying to estimate the effect of the absence of counsel on the fairness of the proceeding will be duplicated on the trial court level.[167] The dissenters maintained that it will be as difficult for the trial judge to determine before the

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[156] *Id.*

[157] *Id.* at 41-42.

[158] *Id.* at 48.

[159] *Id.* at 49.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.* at 48-49. The Blackmun dissent emphasized that its conclusion that indigent parents should have a right to counsel would apply only to cases where the state initiates the termination action. *Id.* at 48 & n.17. Thus, according to the dissent, parents litigating between themselves the custody of a child would not have a right to counsel. *Id.*

[164] *Id.* at 50.

[165] *Id.* at 50-51.

[166] *Id.* at 51.

[167] *Id.* at 51 n.19.

fact whether counsel is necessary to ensure fairness as it will be for the appellate court to make the same determination after the fact.[168] The dissent also noted that the case-by-case approach requires *ad hoc* review of state court termination decisions.[169] Such review of state decisions, the dissent asserted, will involve a significant degree of federal interference in state proceedings and transform the Court into a "super family court."[170]

The *Lassiter* dissenters thus found that the case-by-case approach was not only inadequate to ensure fairness, but also that the supposed advantages such an approach was thought to have in minimizing federal interference with state proceedings were largely illusory.[171] They therefore rejected the majority's case-by-case approach.[172] The dissent would adopt instead an absolute rule that counsel be provided to indigents facing state attempts to terminate their parental rights.[173]

Under the dissent's analysis, since due process requires the appointment of counsel for indigent parents in all termination proceedings, the failure to provide counsel to Ms. Lassiter constituted a violation of due process. Moreover, the dissent maintained that the facts of the *Lassiter* case provide a clear example of the need for counsel in such proceedings.[174] They emphasized that most of the evidence which the state offered to support termination was hearsay testimony to which Ms. Lassiter made no objection.[175] The dissent also observed that Ms. Lassiter did not develop three possible defenses to the termination action.[176] First, they noted that she might have defended against the charge of "willful" failure to demonstrate concern for the child by pointing out that her incarceration precluded contact with the child.[177] A second defense which the dissenters claimed Ms. Lassiter might have been able to raise was that the suggestion of granting custody to the grandmother constituted a constructive plan for the child's future.[178] Such a defense would have countered the state's claim that her failure to engage in such planning justified the termination of her parental rights.[179] Third, according to the dissent, Ms. Lassiter might have argued that the Department of Social Services had failed to execute its statutory duty to make diligent efforts to strengthen her relationship with her child.[180] The dissent asserted that these potential defenses were not clearly presented at the termination hearing.[181] They indicated that an important fac-

[168] *Id.*
[169] *Id.* at 51.
[170] *Id.* at 51-52.
[171] *Id.*
[172] *Id.* at 48-49.
[173] *Id.* at 48.
[174] *Id.* at 52.
[175] *Id.* at 53.
[176] *Id.* at 56.
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.* at 54-57.

tor in Ms. Lassiter's failure to present effectively these potential defenses was her inability to conduct an adequate cross-examination of the state's witness.[182] According to the dissent, the transcript of the trial court proceeding demonstrated that Ms. Lassiter did not understand that the purpose of cross-examination was to develop testimony favorable to her through questioning of the witness.[183] The dissent noted that Ms. Lassiter's attempts at cross-examination consisted largely of declarative statements.[184] These statements, in the dissent's view, might have been developed by an experienced attorney into substantive arguments against termination.[185] Ms. Lassiter's inability to develop these arguments effectively in the absence of counsel, the dissent pointed out, resulted in a proceeding which did not conform to the standard of fundamental fairness established by the due process clause.[186]

The dissent recognized that the provision of counsel to Ms. Lassiter and the development of these defenses would not necessarily have changed the result of the termination proceeding.[187] According to the dissent, however, the issue was not whether the presence of counsel might have led to a different decision but rather whether counsel was required to ensure that the parent has a meaningful opportunity to be heard.[188] The dissent asserted that because Ms. Lassiter was unable effectively to present her case against termination without counsel, she was not given a meaningful opportunity to be heard.[189] The dissent found, therefore, that the failure to provide counsel for Ms. Lassiter deprived her of due process.

In a separate dissenting opinion,[190] Justice Stevens also reached the conclusion that due process requires that all parents facing state attempts to terminate their parental rights be afforded the assistance of counsel.[191] He agreed with the conclusion of the other dissenting Justices that the proper application of the balancing test for the determination of what process is due leads to a finding that counsel should be provided in all termination proceedings.[192] Justice Stevens maintained, however, that the balancing test is appropriate only in cases involving property rather than liberty interests.[193] He asserted that the

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[182] *Id.*

[183] *Id.*

[184] *Id.* at 56.

[185] *Id.* at 57.

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Id.* The dissenters found "virtually incredible" the Court's conclusion that Ms. Lassiter's hearing was fundamentally fair. *Id.*

[190] *Id.* at 59-60 (Stevens, J., dissenting).

[191] *Id.* at 60.

[192] *Id.* at 59.

[193] *Id.* The Court, however, has not limited the application of the balancing test to property cases. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 495 (1980) (transfer of prisoners to mental institutions); Parham v. J.R., 442 U.S. 584, 599 (1979) (commitment of minors to mental institutions); Ingraham v. Wright, 430 U.S. 651, 675 (1977) (corporal punishment of school children); Morrissey v. Brewer, 408 U.S. 471, 480-84 (1972) (parole revocation).

cost-benefit analysis which the balancing test entails is appropriate in cases involving property interests where the issue is the procedures required to ensure fairness in the allocation of material resources.[194] When the interest at stake is a liberty interest, however, such as that involved in a criminal prosecution or in a parental rights termination proceeding, Justice Stevens concluded, such a cost-benefit analysis is not appropriate.[195] This conclusion was based on his perception that the value of protecting such an interest against unwarranted state interference is immeasurable.[196] Thus, according to Justice Stevens, regardless of the strength of the state's interest in not appointing counsel, the parents' interest in maintaining their relationship with their child is so significant that counsel must be appointed in all termination proceedings.[197]

As the preceding discussion points out, the *Lassiter* majority applied a balancing test and then weighed the result of that test against a presumption against a right to counsel in parental rights termination proceedings. Finding that the presumption would not be overcome in all cases, the Court held that due process does not require an absolute right to counsel for indigent parents in termination proceedings. Conversely, the dissenting opinions, applying the same balancing test but rejecting the majority's presumption, concluded that due process requires appointed counsel in all such cases. The following sections will examine the reasoning of the *Lassiter* majority and explore the analytical and policy problems raised by the majority's approach.

II. ANALYSIS OF THE MAJORITY'S REASONING

The *Lassiter* majority held that due process does not provide indigent parents an absolute right to counsel in termination proceedings.[198] The Court established a presumption against a right to counsel in termination proceedings because they do not involve a threat to physical liberty.[199] According to the majority, the balancing of the parent's interest in avoiding termination, the state's interest in not appointing counsel and the risk of error in the absence of counsel does not weigh sufficiently in favor of the parent to overcome the presumption in all cases.[200] Consequently, the Court determined that a case-by-case approach to the right to counsel in termination proceedings was sufficient to satisfy due process.[201] The next section will analyze the reasoning of the *Lassiter* Court. First, the historical development of the right to counsel in state courts will be examined. The *Lassiter* Court's conclusion that prior cases establish a presumption against a right to counsel in cases that do not involve the individual interest in physical liberty will be evaluated. It will be demonstrated

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[194] 452 U.S. at 59.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.* at 31.
[199] *See supra* text and notes at notes 83-87.
[200] 452 U.S. at 31.
[201] *Id.* at 31-32.

that the Court's prior decisions regarding the right to counsel do not support the *Lassiter* presumption. It will also be shown that the case-by-case approach has been rejected by the Court in past right to counsel cases and that the analytical and policy reasons which compelled this rejection render the approach inadequate for termination proceedings. It will further be demonstrated that the *Lassiter* approach not only constitutes a departure from traditional due process analysis but also raises questions about the continued vitality of prior decisions which recognized the fundamental nature of rights relating to the family.

A. *A Review of Prior Right to Counsel Cases*

The sixth amendment guarantees the right to counsel in all federal criminal prosecutions.[202] This guarantee has been interpreted by the Supreme Court to require, in the absence of a knowing, intelligent waiver, that indigent defendants be provided counsel, at government expense.[203] In a series of cases, the Court has addressed the issue of the extent to which the due process clause of the fourteenth amendment establishes a corresponding right in state criminal and non-criminal proceedings.[204]

Initially, the Court rejected the idea that the right to counsel was required in all state criminal prosecutions.[205] Instead, the Court examined the proceedings in each case to determine if the absence of counsel rendered the trial fundamentally unfair.[206] *Powell v. Alabama* was the first case in which the Court reversed a state criminal conviction because the lack of assistance of counsel had resulted in an unfair trial.[207] In *Powell*, the Court held that, in a capital case, where the indigent defendant is unable adequately to present his case due to ignorance, feeble-mindedness, or illiteracy, counsel must be appointed for him.[208]

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

[203] Johnson v. Zerbst, 304 U.S. 458, 463-64 (1938).

[204] *See infra* text and notes at notes 205-65.

[205] The question of whether the sixth amendment right to counsel extended to the states was part of the larger controversy concerning which provisions of the Bill of Rights were imposed on the states through the fourteenth amendment. For a comprehensive description of the Court's struggle with this larger controversy see G. GUNTHER, CONSTITUTIONAL LAW, 476-501 (10th ed. 1980); W. LOCKHART, Y. KAMISAR, & J. CHOPER, CONSTITUTIONAL RIGHTS AND LIBERTIES 103-17 (5th ed. 1981). The Court has rejected the broad "incorporationist" reading of the fourteenth amendment, which would require that the states conform to all provisions of the Bill of Rights. *See, e.g.*, Adamson v. California, 332 U.S. 46, 53 (1947); Palko v. Connecticut, 302 U.S. 319, 323 (1937). Instead, the Court has determined that the requirements of due process are to be satisfied by an examination of the proceedings in each case to ascertain if they were conducted in accordance with natural, inherent and fundamental principles of fairness. *See* Adamson v. California, 332 U.S. at 54 & n.13; Betts v. Brady, 316 U.S. 455, 462 (1942); Palko v. Connecticut, 302 U.S. at 328.

[206] *See supra* cases cited at note 205.

[207] 287 U.S. 45 (1932).

[208] *Id.* at 71. In *Powell*, the defendants were young, illiterate black men. *Id.* at 51-52. They were convicted of capital charges and sentenced to death. *Id.* at 50. The Court noted the

The issue of whether the right to counsel recognized in *Powell* extended beyond capital cases was considered by the Court in *Betts v. Brady*.[209] The Court found that Betts' felony trial was not fundamentally unfair although the defendant was not represented by counsel.[210] The Court recognized that, in some cases, lack of counsel may result in a trial which does not satisfy the requirements of due process but rejected the notion that the fourteenth amendment "embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."[211]

The Court applied the case-by-case approach exemplified by *Betts* for twenty years.[212] Then, in *Gideon v. Wainright*,[213] the Court rejected the *Betts* holding that the fourteenth amendment did not require that all indigent defendants in state felony prosecutions be afforded the assistance of counsel.[214] The *Gideon* Court extended the sixth amendment right to counsel to all state felony prosecutions.[215] The Court reasoned that, in an adversary system of criminal justice, no defendant could be assured a fair trial in the absence of assistance of counsel.[216] The Court recalled language in *Powell v. Alabama* which explicitly described the defendant's need for counsel and emphasized the danger of unfair convictions when the defendant is forced to face his accusers alone:[217]

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and

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difficulty which even intelligent and educated laymen would have in presenting an adequate defense without the assistance of counsel. *Id.* at 69. In a case where the defendants were ignorant and illiterate, the Court found that requiring them to defend against capital charges without the aid of counsel was a clear denial of due process. *Id.* at 71.

[209] 316 U.S. 455 (1942).

[210] *Id.* at 472-73. The Court noted that the determinative issue in Betts' robbery trial — the relative veracity of the state's witnesses who placed Betts at the scene of the robbery as opposed to that of Betts' witnesses who claimed he was elsewhere at the time — was a simple one. *Id.* at 472. The Court also pointed out that the defendant was of ordinary intelligence and had some prior experience with the criminal process. *Id.* These factors led the Court to conclude that the lack of assistance of counsel did not so handicap the defendant in presenting his defense as to render the trial fundamentally unfair. *Id.* at 472-73.

[211] *Id.* at 473.

[212] *See, e.g., infra* cases cited at note 314.

[213] 372 U.S. 335 (1963).

[214] *Id.* at 343-45.

[215] *Id.* at 342. *Gideon* was one of a series of decisions in which the Court selectively incorporated certain provisions of the Bill of Rights into the fourteenth amendment, thus making them obligatory on the states. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (sixth amendment right to trial by jury); Washington v. Texas, 388 U.S. 14, 17-18 (1967) (sixth amendment right to compulsory process for obtaining witnesses); Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967) (sixth amendment right to a speedy trial); Pointer v. Texas, 380 U.S. 400, 403 (1965) (sixth amendment right to confront opposing witnesses); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (fifth amendment right to be free from self-incrimination); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (fourth amendment right to be free from unreasonable searches and seizures); In re Oliver, 333 U.S. 257, 273 (1948) (sixth amendment right to a public trial).

[216] 372 U.S. at 344.

[217] *Id.* at 344-45.

> educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[218]

The Court thus recognized that innocent defendants face a substantial risk of unjust conviction if they are not represented by counsel.[219] The *Gideon* Court also noted that in every felony case the state uses the services of expert prosecutors and that defendants who have the resources to do so invariably employ attorneys to assist them in their defense.[220] The Court concluded that fairness could not be assured unless indigent defendants were aided by counsel.[221]

In *Argersinger v. Hamlin*,[222] the right to counsel in state felony prosecutions recognized by *Gideon* was extended to state misdemeanor trials in which the penalty imposed on conviction was incarceration.[223] While the Court noted that both *Powell* and *Gideon* involved felonies, it concluded that similar reasoning is applicable to any criminal proceeding where the defendant faces loss of liberty.[224] The Court recognized that imprisonment, even for a short time, involves a serious intrusion on constitutionally protected liberty interests.[225] The Court also noted that the legal issues involved in a misdemeanor trial which results in the incarceration of the defendant are not necessarily less complex than those involved in a felony prosecution.[226] In addition, the Court observed that the pressure on judicial resources which is created by the large volume of misdemeanor prosecutions encourages state courts to emphasize speed and efficiency rather than fairness to litigants.[227] The Court concluded that the risk of error in such an "assembly line" system of justice is substantial.[228] In order to prevent unjustified deprivations of liberty, the Court held that counsel must be provided to defendants in misdemeanor prosecutions where conviction results in incarceration.[229]

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[218] 287 U.S. at 68-69.
[219] 372 U.S. at 344-45.
[220] *Id.* at 344.
[221] *Id.*
[222] 407 U.S. 25 (1972).
[223] *Id.* at 37.
[224] *Id.* at 32.
[225] *Id.* at 37.
[226] *Id.* at 33.
[227] *Id.* at 34.
[228] *Id.* at 36. The Court noted that a statistical study had indicated that defendants with counsel were five times more likely to have charges dismissed than unrepresented defendants. *Id.* The Court cited the AMERICAN CIVIL LIBERTIES UNION, LEGAL COUNSEL FOR MISDEMEANANTS, PRELIMINARY REPORT (1970). *Id.*
[229] 407 U.S. at 40. The Court noted that in many cases the defendant is unlikely to be

In *Scott v. Illinois*,[230] the most recent case involving the right to counsel in state criminal proceedings, the Court held that the right does not extend to defendants involved in misdemeanor prosecutions where the penalty on conviction is a fine.[231] The Court noted that the holding in *Argersinger*, that the right to counsel must be extended to a defendant who will be deprived of liberty if convicted, was based largely on the recognition of imprisonment as a severe sanction.[232] The *Scott* Court maintained that a fine is not a serious enough infringement on constitutionally protected interests to demand the same degree of procedural protection.[233] Moreover, the Court determined that requiring counsel for all indigent defendants in misdemeanor prosecutions would impose substantial costs on the states.[234] The Court declined to hold that the sixth and fourteenth amendments require the states to incur these costs.[235]

As a result of the series of decisions from *Powell* to *Scott*, the sixth amendment right to counsel has been made obligatory on the states through the due process clause of the fourteenth amendment only in felony cases and in misdemeanor cases where imprisonment is actually imposed on conviction. The Court has held, however, that the fourteenth amendment due process requirement, operating of its own force, necessitates the appointment of counsel in some state non-criminal proceedings.

Thus, in *In re Gault*,[236] the Court held that juveniles in delinquency proceedings must be afforded the assistance of counsel notwithstanding the state's characterization of the proceedings as non-criminal.[237] The Court emphasized the similarities between the delinquency proceeding and a criminal trial,[238] and observed that the ultimate result of a delinquency proceeding could be the lengthy confinement of the juvenile.[239] Noting that the juvenile's interests could not adequately be protected in the absence of counsel,[240] the Court stated that the juvenile needs such assistance to ensure that the facts bearing on his

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sentenced to prison if convicted. *Id.* at 38 & n.10. The "run of misdemeanor cases," according to the Court, would thus not be affected by the extension of the constitutional requirement of appointed counsel beyond felony cases. *Id.* at 40. In those cases where incarceration is imposed, however, the Court determined that the states must bear the cost of appointing counsel. *Id.*

[230] 440 U.S. 367 (1979).

[231] *Id.* at 373-74.

[232] *Id.* at 372-73.

[233] *Id.* at 373. The Court also found that the mere threat of imprisonment, as opposed to actual imprisonment, was not a sufficiently serious imposition on individual interests to require the appointment of counsel. *Id.* The Court interpreted *Argersinger* to require that counsel be provided only in cases where the defendant is actually sentenced to prison. *Id.* at 372-73. As a result of the decisions in *Argersinger* and *Scott*, trial judges must appoint counsel or lose the option of sentencing the defendant to prison if he is convicted. *See id.* at 369 (quoting *Argersinger*, 407 U.S. at 37, 40).

[234] *Id.*

[235] *Id.* at 373-74.

[236] 387 U.S. 1 (1967).

[237] *Id.* at 36-37.

[238] *Id.*

[239] *Id.*

[240] *Id.*

case are adequately developed, that issues of law are properly resolved, and that any available defense is adequately presented.[241] The Court acknowledged that juvenile proceedings are generally conducted in a more informal manner than criminal trials,[242] and recognized that the purpose behind such informal procedures is to promote an atmosphere of concern for rehabilitation rather than punishment.[243] The Court concluded that counsel was nevertheless necessary to prevent unfair and arbitrary decisions in juvenile cases.[244]

Apart from its application to juvenile delinquency proceedings, the due process clause of the fourteenth amendment also has been recognized as the source of a right to appointed counsel in state proceedings in which a prisoner challenges an attempt to transfer him to a mental institution. The Supreme Court, in *Vitek v. Jones*,[245] employed a balancing analysis and concluded that due process requires such prisoners to be afforded the assistance of counsel.[246] The factors which the Court weighed were the prisoner's interest in avoiding an unwarranted transfer, the risk of erroneous decisions if counsel is not provided to the prisoner, and the state's interest in segregating and treating mentally ill prisoners.[247] The Court recognized the strength of the prisoner's interest in avoiding the stigma of being labelled mentally ill and the changes in the conditions of his confinement which a transfer would entail.[248] The Court deemed the risk of error when the prisoner is unrepresented to be substantial, noting that it was likely that a prisoner thought to be mentally ill would be unable to understand and exercise his rights.[249] Thus, the Court concluded, such prisoners have a strong need for the assistance of counsel to protect those rights.[250] The Court conceded that the state has an important interest in segregating and treating mentally ill prisoners.[251] Nonetheless, the combination of the strong interest of the prisoner and the risk that this interest will not be adequately protected if counsel is not provided led four justices to conclude that the state must make counsel available to indigent prisoners in transfer proceedings.[252] Justice Powell, in a concurring opinion, agreed that a prisoner in this situation was entitled to independent assistance.[253] He noted, however, that since the inquiry as to the need for transfer is essentially medical in nature, this assistance might be provided as effectively by a psychiatrist or other mental health professional as by an attorney.[254]

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[241] *Id.*
[242] *Id.* at 14-17.
[243] *Id.* at 15-16.
[244] *Id.* at 18-19, 36-37.
[245] 445 U.S. 480 (1980).
[246] *Id.* at 495-97.
[247] *Id.* at 495.
[248] *Id.* at 493-95.
[249] *Id.* at 496-97.
[250] *Id.*
[251] *Id.* at 495.
[252] *Id.* at 496-97.
[253] *Id.* at 497.
[254] *Id.* at 500. Since Justice Powell's vote was required to achieve a majority, the *Vitek*

The due process clause of the fourteenth amendment also has been held to require a right to counsel for some probationers involved in hearings in which their right to continued enjoyment of probationary status is challenged by the state.[255] In *Gagnon v. Scarpelli*,[256] the Court found that the probationer's interest in remaining free from confinement, although weighty, was weaker than that of a criminal defendant because the probationer's right to physical liberty has been made conditional as a result of his prior conviction.[257] The Court also noted the important state interest in being able to act quickly, and at minimal cost, to reincarcerate a probationer who poses a danger to the community.[258] The Court further found that the risk of an erroneous decision was not great because of the informal nature of the revocation proceeding.[259] The Court therefore concluded that, in general, counsel would not be required to ensure fairness in probation revocation proceedings.[260]

In two types of probation cases, however, the Court found a higher risk of error.[261] The Court indicated that this higher risk exists, first, in cases in which the probationer contests the allegation that he violated the conditions of his parole.[262] The risk also is present, according to the Court, in cases where the probationer makes a "timely and colorable claim" that there are mitigating circumstances too complex or difficult for the probationer to explain adequately without the aid of counsel.[263] The Court concluded that in these types of cases, due process requires that the probationer be afforded the assistance of counsel.[264] The Court left to the officials in charge of the probation hearing the responsibility of determining whether counsel is required in a particular case.[265]

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decision can be seen as establishing a right to an appointed mental health professional rather than a right to counsel. In either case, the principle is the same — the state must provide an indigent with assistance in defending against potential deprivations of important liberty interests where there is a substantial risk of erroneous deprivations in the absence of such assistance. The *Lassiter* Court implicitly recognized this similarity by including *Vitek* in its discussion of prior decisions establishing a right to counsel. *See* 452 U.S. at 25-26.

[255] Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973). In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court held that parolees faced with state attempts to terminate their parole had a due process right to certain procedural safeguards. *Id.* at 482. The Court determined that due process requires that two hearings be conducted before parole is revoked. *Id.* at 484. The first hearing would establish whether there was probable cause to believe that a parole violation had been committed. *Id.* at 485. The second hearing would consist of an evaluation of any contested facts and determination of whether the facts justified revocation. *Id.* at 488. The *Morrissey* Court expressly reserved the issue of the right to counsel in parole revocation hearings. *Id.* at 489. The *Gagnon* Court's analysis of the issue of the right to counsel in probation and parole revocation hearings relied heavily on the reasoning of the *Morrissey* Court. 411 U.S. at 783.

[256] 411 U.S. at 778.

[257] *Id.* at 781. *See also* Morrissey v. Brewer, 408 U.S. at 480.

[258] 411 U.S. at 785, 788. *See also* 408 U.S. at 483.

[259] 411 U.S. at 789.

[260] *Id.* at 790.

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *Id.* at 790-91.

As the cases outlined above demonstrate, the Supreme Court has recognized a right to appointed counsel in state criminal proceedings by selectively incorporating the sixth amendment guarantee into the due process clause of the fourteenth amendment.[266] The Court also has found that the due process clause, operating of its own force, may be the source of a right to counsel in certain state non-criminal proceedings.[267] In the next two sections, the *Lassiter* Court's analysis will be examined against the background of these prior right to counsel cases. First, it will be shown that the Court's creation of a presumption against appointed counsel in cases where physical liberty is not at stake is not supported by precedent and is inconsistent with the balancing approach which the Court has traditionally employed to determine what process is due under the fourteenth amendment. Second, the Court's adoption of a case-by-case approach to the right to counsel in parental rights termination proceedings will be demonstrated to be at variance with the Court's traditional approach to issues of both the right to counsel and of procedural due process generally. It will be submitted that the *Lassiter* Court's departures from traditional due process methodology will result in inadequate protection of the fundamental liberty interest in matters relating to the family.

B. *The* Lassiter *Court's Presumption*

From its review of prior cases the *Lassiter* Court derived the "pre-eminent generalization"[268] that the right to counsel has been recognized only in cases where the individual's physical liberty is at stake.[269] The Court then inferred from this generalization a presumption that there is no right to counsel where the interest at stake is other than physical liberty.[270] Using the cases in which the Court has considered whether due process requires appointed counsel for indigent litigants, this section will analyze the *Lassiter* Court's creation of this presumption. First, it will be shown that, contrary to the *Lassiter* Court's conclusion, the presence or absence of an interest in physical liberty has not always been the determinative factor in decisions concerning the right to counsel. Second, it will be demonstrated that the *Lassiter* Court's presumption against a right to counsel in cases where physical liberty is not at stake is inconsistent with the balancing approach which the Court has traditionally used to resolve due process issues. Finally, it will be submitted that this deviation from traditional due process analysis can be explained only by an unwarranted judgment by the Court that the interest in physical liberty is entitled to a greater degree of constitutional protection than any other liberty interest.

The generalization that the right to counsel has been recognized only where the defendant faces a loss of physical liberty appears to be valid in the

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[266] *See supra* text and notes at notes 213-35.
[267] *See supra* text and notes at notes 236-65.
[268] 452 U.S. at 25.
[269] *Id.*
[270] *Id.* at 26-27.

criminal area. The Court in *Gideon v. Wainright* established the right to appointed counsel for all defendants in state felony prosecutions.[271] Clearly, the defendant's interest in maintaining his physical liberty is threatened by such a prosecution. Similarly, in *Argersinger v. Hamlin*, the right to counsel was extended to defendants who face the loss of physical liberty in state misdemeanor prosecutions.[272] In contrast, in *Scott v. Illinois*, defendants in state misdemeanor prosecutions who faced only a fine or the threat of imprisonment and were not actually sentenced to incarceration were held not to have a right to appointed counsel.[273] The right to counsel cases in the criminal context thus support the generalization that the right exists only where physical liberty is threatened.

In contrast, however, the cases in which the Court has considered the right to counsel in non-criminal proceedings do not uniformly support the *Lassiter* Court's generalization. The Court has established a right to counsel in one case where physical liberty was not the interest which the individual sought to protect. Specifically, in *Vitek v. Jones*, the Court held that counsel should be provided to prisoners faced with state attempts to transfer them to mental institutions.[274] The individual interest in physical liberty is not implicated in such a proceeding since the prisoner remains incarcerated regardless of whether the transfer occurs. The *Vitek* Court explicitly recognized that the prisoner's interest in freedom from confinement was extinguished by his criminal conviction.[275] The Court found, however, that the transfer to a mental institution involved adverse consequences for other liberty interests of the prisoner.[276] The Court noted that the prisoner may be subject to involuntary psychiatric treatment.[277] The Court also recognized that the prisoner, if transferred, is exposed to the stigma of being labelled mentally ill.[278] The *Vitek* Court concluded that the prisoner's interest in avoiding these consequences of the transfer was sufficiently important to require the state to incur the cost of providing the prisoner with counsel in order to ensure against unjustified transfer decisions.[279]

The *Lassiter* Court cited *Vitek* as support for the generalization that the right to counsel has been extended only to cases where physical liberty is the individual interest at stake.[280] Significantly, in *Lassiter* the Court used the term "personal freedom" rather than "physical liberty" to describe the interest implicated in *Vitek*.[281] The term "personal freedom" could comprehend the interests which the *Vitek* Court found warranted the protection of appointed counsel. The generalization which the *Lassiter* Court derived from prior cases

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[271] 372 U.S. at 344. *See supra* text and notes at notes 213-21.
[272] 407 U.S. at 37. *See supra* text and notes at notes 222-29.
[273] 440 U.S. at 373-74. *See supra* text and notes at notes 230-35.
[274] 445 U.S. at 496-97. *See supra* text and notes at notes 245-54.
[275] *Id.* at 491-93.
[276] *Id.* at 493.
[277] *Id.* at 492.
[278] *Id.*
[279] *Id.* at 495-97. *See supra* text and notes at notes 245-54.
[280] 452 U.S. at 25-26.
[281] *Id.* at 25.

was expressed, however, only in terms of physical liberty.[282] The *Lassiter* majority, citing *Vitek* to support its generalization, refused to recognize the Court's determination in *Vitek* that interests other than physical liberty could be deemed sufficiently important to require the protection of counsel.

As the preceding analysis demonstrates, the *Lassiter* Court's generalization that the right to counsel has been recognized only in cases involving a deprivation of physical liberty is not uniformly supported by prior cases. Of greater concern, however, is the *Lassiter* Court's transformation of this generalization into a presumption that due process does not require that the right to counsel extend beyond this class of cases. In cases involving the right to counsel in state criminal proceedings, the Court has indeed drawn a line between those cases that involve a deprivation of physical liberty and those that do not. In *Gideon* and *Argersinger*, the Court concluded that counsel is a fundamental right in felony cases and in misdemeanor cases where imprisonment is imposed on conviction.[283] The Court in those cases determined that counsel is necessary to ensure a fundamentally fair trial and that a defendant cannot be deprived of his liberty unless counsel is provided for him.[284] By contrast, in *Scott v. Illinois*, the Court held that the sixth and fourteenth amendments do not require that counsel be provided to criminal defendants in misdemeanor cases where the penalty is merely a fine.[285] In *Scott*, the Court stressed that the *Argersinger* decision marked the outer limit of the state's obligation to provide counsel for indigent criminal defendants.[286]

The Court's distinction, for purposes of the right to counsel in state criminal proceedings, between cases which involve a deprivation of physical liberty and those where only a fine is imposed, recognizes the difference in severity between these sanctions. The Court pointed out that imprisonment is a penalty "different in kind" from a fine.[287] A person who is imprisoned is deprived of his freedom of movement and his freedom to associate with family and friends. A person who is subject only to a fine escapes these consequences of imprisonment. Moreover, as the Court in *Argersinger* recognized, imprisonment, even for a short time, may have serious adverse consequences for a defendant's career and reputation.[288] The Court's conclusion that it was necessary to distinguish between the two very different sanctions which may be imposed in criminal cases in order to determine when counsel must be provided, however, does not justify the *Lassiter* Court's extension of this distinction to termination cases and a fortiori, does not warrant a presumption against a right to counsel in all cases where physical liberty is not involved.

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[282] *Id.* The *Lassiter* Court stated that "such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." *Id.*

[283] 372 U.S. at 344; 407 U.S. at 37.

[284] 372 U.S. at 344; 407 U.S. at 37.

[285] 440 U.S. at 373-74.

[286] *Id.* at 373.

[287] 407 U.S. at 37.

[288] *Id.* at 37 & n.6 (quoting Baldwin v. New York, 399 U.S. 66, 73 (1970) and Marston v. Oliver, 324 F. Supp. 691, 696 (E.D. Va. 1971)).

very existence and survival of the race.''[299] The Court also has recognized that parents have a basic right to make certain important decisions regarding the upbringing of their children.[300] The Court has often held that only an important state interest will justify intrusion in the family relationship.[301] The interest in family integrity has thus been recognized as a vital component of the liberty protected by the due process clause,[302] yet the *Lassiter* Court failed to accord that interest sufficient procedural protection.

Despite its recognition of the fundamental nature of a parent's right to maintain the relationship with his or her child and the commanding nature of the parent's interest in avoiding an unjustified termination of parental rights,[303] the *Lassiter* Court held that there is no absolute right to counsel in parental rights termination proceedings.[304] Yet the Court identified no state interest which outweighed the interest of the parent. Although the Court recognized that the state has an important interest in protecting the welfare of the child,[305] the Court did not find that this factor weighed against the parent's interest in securing appointed counsel. In fact, the Court noted that the state's interest in protecting the welfare of the child may be promoted by providing counsel to the parent because accurate decisions are more likely if both parties are represented.[306] The Court also recognized that the state's interest in minimizing the cost of termination proceedings was not significant when compared to the interests of the parent.[307] Finally, the Court concluded that there is

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[299] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[300] Meyer v. Nebraska, 262 U.S. at 401-03 (invalidating a state statute which made teaching German to public school children a crime on the ground that such an interference with the right of parents to direct the upbringing of their children could be justified only by an emergency which made the need to prohibit such instruction compelling); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (invalidating state statute which required compulsory public school education on the ground that it unreasonably interfered with the right of parents to control the upbringing and education of their children). *See also* Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972) (finding parents' interest in directing the upbringing of their children, in combination with first amendment right to freedom of religion, sufficient to overcome state's interest in compulsory education).

[301] *See supra* cases cited at note 300.

[302] For further instances where the Court recognized the importance of family life, see Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (''[F]reedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.''); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972) (''It is plain that the interest of a parent in the companionship, care, custody and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'' (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (''It is cardinal with us that the custody, care and nurture of the child reside first in the parents.'').

[303] 452 U.S. at 27. The Court recognized that prior decisions have established that the parent's right to the companionship, care, custody and management of their children merits a high degree of constitutional protection. *Id.* Noting that termination is ''a unique kind of deprivation,'' the Court deemed commanding the parent's interest in ensuring that any decision to terminate his or her parental rights is made in a fair and accurate manner. *Id.*

[304] *Id.* at 31.

[305] *Id.* at 27.

[306] *Id.* at 27-28.

[307] *Id.* at 28.

a potentially substantial risk of error in termination proceedings when the parent is unrepresented.[308]

Under the traditional due process balancing test, the combination of the commanding interest of the parent in avoiding an unjustified termination of parental rights and the potentially substantial risk of error in the absence of counsel for the parent would certainly have been found to outweigh the state's concededly less substantial interest in avoiding an obligation to appoint counsel. If the *Lassiter* Court had followed the method of analysis of prior fourteenth amendment due process cases, it would have concluded that indigent parents have an absolute right to counsel in termination proceedings. Instead, the *Lassiter* Court weighed the result of the balancing test against the presumption of no right to counsel where physical liberty is not involved and found that the presumption would not be overcome in all cases.[309] The Court therefore adopted a case-by-case approach to the right to counsel in termination proceedings, which requires that the result of the balancing test, as applied to the facts of each case, be weighed against the presumption against a right to counsel in parental rights termination proceedings.[310]

As the preceding analysis indicates, the *Lassiter* Court's injection of a presumption against a right to counsel into the analysis of the due process requirements for termination proceedings constitutes a departure from the Court's usual method of resolving due process issues. The balancing approach of prior cases is no longer determinative. Instead, indigent parents in termination proceedings who claim a right to appointed counsel must demonstrate not only that they are entitled to counsel on the basis of the balancing test, but must also overcome the presumption against a right to counsel in any case where physical liberty is not at stake. This additional hurdle is unjustifiable in cases where the right which the litigant seeks to protect by securing the aid of counsel has been recognized as fundamental, such as parental rights in termination proceedings. If the recognition of parental rights as fundamental is to have meaning, the protection accorded against unwarranted state interference with those rights must be commensurate with that accorded to litigants facing the deprivation of their fundamental right to physical liberty.

The *Lassiter* Court, having recognized the importance of the individual interest at stake in a parental rights termination proceeding, the potentially high risk of error in the absence of counsel for the parent, and the less significant state interest in avoiding the obligation to appoint counsel, should have held that due process requires the appointment of counsel for all indigent parents faced with state attempts to terminate their rights with respect to their children. Instead, the Court found that counsel was not required in all cases because the presumption against the right to counsel would not always be overcome.[311] The Court therefore held that the right to counsel in termination proceedings is to

[308] *Id.* at 30.
[309] *Id.* at 31.
[310] *Id.* at 31-32.
[311] *Id.* at 31.

The Court's decisions in the criminal cases demonstrate that the interest in physical liberty is fundamental, and, therefore, entitled to the highest degree of constitutional protection. In non-criminal cases as well, the Court has concluded that counsel must be provided if the individual faces a possible deprivation of physical liberty.[289] The *Lassiter* Court's analysis is deficient in that it transforms the premise that freedom from confinement is a fundamental liberty interest that merits the protection of counsel into a presumption that it is the *only* interest which requires this degree of procedural protection. The creation of this presumption is inconsistent with the flexible, balancing approach which the Court has traditionally employed in fourteenth amendment due process cases.

The Court has repeatedly emphasized that due process is a flexible concept.[290] Giving content to the due process clause involves, as the *Lassiter* Court recognized, a determination of what procedures are required to ensure that state action which impinges on constitutionally protected interests is conducted in a fundamentally fair manner.[291] The method which the Court has devised for the determination of the requisites of due process in state civil and administrative proceedings involves a balancing of three elements.[292] These elements are: the individual interest threatened by the state's action; the state's interests implicated in the proceeding, including the interest in minimizing costs; and the risk of error in the proceeding in the absence of the requested procedural protection.[293] The Court has applied this three-part balancing test to determine the content of due process in a wide variety of contexts.[294] For example, in the case of proceedings where the state attempts to transfer prisoners to mental institutions, the Court's application of the three-part balancing test

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[289] *See* In re Gault, 387 U.S. at 36-37 (establishing a right to counsel in juvenile proceedings); Gagnon v. Scarpelli, 411 U.S. at 790 (establishing a right to counsel in probation revocation proceedings where the probationer cannot effectively present his case without assistance).

[290] *See, e.g.*, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (" '[D]ue process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances."); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

[291] 452 U.S. at 24-25.

[292] Mathews v. Eldridge, 424 U.S. 319, 334-35.

[293] *Id.* The Court stated that prior decisions established that the due process determination requires consideration of the following elements:

> 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.

Id.

[294] *See, e.g.*, Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 14 (1979) (release on parole); Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 & n.3 (1978) (dismissal from medical school); Smith v. Organization of Foster Families, 431 U.S. 816, 848-49 (1977) (removal of children from foster homes); and cases cited *infra* at notes 346-66.

led to the conclusion that the prisoner was entitled to a number of procedural safeguards, including the right to counsel.[295] The Court, in *Vitek v. Jones*, determined that the prisoner's interest in avoiding mandatory psychiatric treatment and the stigma of being diagnosed as mentally ill, combined with a potentially high risk that the prisoner would be unable adequately to protect his interests on his own, outweighed the state's interest in summary proceedings.[296]

In effect, the *Lassiter* Court's creation of a presumption against a right to counsel in any case where physical liberty is not at stake adds an additional step to the Supreme Court's due process analysis. It appears that the balancing approach of prior cases will no longer be determinative. Under *Lassiter*, in any case where the interest at stake is other than physical liberty, it will be necessary to overcome the presumption against the right to counsel, even though the individual interest at stake in the proceeding outweighs the state's interest in not appointing counsel and the risk of an erroneous decision in the absence of counsel is high. This result can logically rest only on a determination that the interest in physical liberty is somehow more fundamental than any other liberty interest. The *Lassiter* majority made no attempt to justify such a premise. The proposition that the individual interest in avoiding deprivation of physical liberty, for however short a time, merits greater protection than does the interest in avoiding a permanent separation of parent and child is difficult to rationalize. Further, there is no compelling legal justification for the conclusion that physical liberty merits a higher degree of protection than any other individual interest. The Court has stated explicitly that the "liberty" encompassed by the due process clause includes far more than the interest in physical liberty:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by men.[297]

The importance of non-physical aspects of liberty, including family association has thus long been recognized by the Court.

The *Lassiter* Court's presumption against the right to counsel in termination cases also ignores the fundamental nature of rights relating to the family. The Court, in numerous decisions, has recognized the fundamental nature of these rights. For example, the Court has stated that "the right to marry is of fundamental importance."[298] Similarly, the right to bear children has been characterized as "one of the basic civil rights of man . . . fundamental to the

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[295] 445 U.S. at 495-97. *See supra* text and notes at notes 245-54.

[296] *Id.*

[297] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[298] Zablocki v. Redhail, 434 U.S. 374, 383 (1978). *See also* Loving v. Virginia, 388 U.S. 1, 12 (1967); Meyer v. Nebraska, 262 U.S. at 399.

be determined on a case-by-case basis.[312] The problems raised by the Court's decision to adopt a case-by-case approach to the right to counsel in parental rights termination proceedings will be examined in the following section.

C. *The Case-by-Case Approach*

As indicated by the preceding section, the *Lassiter* Court's acceptance of a presumption against a right to counsel in cases where physical liberty is not at stake led the majority to conclude that due process does not require an absolute right to appointed counsel for indigent parents involved in proceedings aimed at the termination of their parental rights. The Court instead held that the determination of whether counsel must be provided to satisfy the due process requirement of fundamental fairness is to be made on a case-by-case basis. This section will begin with an examination of the Court's previous experience with a case-by-case approach to the right to counsel in criminal cases. The Court's response to the lessons learned regarding the disadvantages of such an approach will then be considered. It will be shown that the problems inherent in such an approach to the right to counsel in criminal cases are equally present in the context of parental rights termination proceedings. In addition, the Court's general approach to due process issues will be examined. It will be demonstrated that the *Lassiter* Court's adoption of a case-by-case approach to the right to counsel is incompatible with the Court's traditional due process methodology, and ignores the Court's longstanding respect for familial rights.

A case-by-case approach to the right to counsel in criminal cases was established in *Betts v. Brady*, where the Court held that the right to counsel is not required in all state felony proceedings.[313] For twenty years after the *Betts* decision, when a defendant claimed that the failure to provide him with counsel denied him due process, the Court examined the trial record to determine if it had been conducted fairly.[314] An examination of the cases decided using this approach reveals that the Court became less willing over time to assume that the presence of counsel would not have had a signficant effect on the fairness and accuracy of the trial.[315] At the beginning of the period in which the Court applied the case-by-case approach, a defendant was required to demonstrate that he was actually prejudiced by the state's refusal to furnish him with counsel.[316] In later cases, the defendant was required to demonstrate only that his defense was potentially prejudiced by the absence of counsel, a far less ex-

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[312] *Id.* at 31-32.

[313] 316 U.S. at 473.

[314] *See, e.g.*, Chewning v. Cunningham, 368 U.S. 443, 443-47 (1962); Uveges v. Pennsylvania, 335 U.S. 437, 440-42 (1948); Wade v. Mayo, 334 U.S. 672, 682-84 (1948); Bute v. Illinois, 333 U.S. 640, 644, 670-77 (1948).

[315] Commentators have described this development. *See* Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 251-64; Kamisar, Betts v. Brady *Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219, 278-81 (1962).

[316] *See, e.g.*, Townsend v. Burke, 334 U.S. 736, 739 (1948); Foster v. Illinois, 332 U.S. 134, 137 (1947).

acting standard.[317] Ultimately, the Court repudiated the case-by-case approach entirely. In *Gideon v. Wainright*, the Court established an absolute right to appointed counsel in state felony proceedings.[318] The progressive liberalization of the Court's application of the case-by-case approach suggests that the Court became less confident over time that appellate review could yield reliable estimates of the prejudicial effect the lack of counsel might have had on the fairness of the trial. The case-by-case approach thus created the risk that defendants would be tried and convicted unfairly and that the unfairness would not be detected by appellate review. The Court's decision to replace the case-by-case approach with an absolute rule that counsel must be provided to all indigent defendants in state felony proceedings indicates that the Court deemed this risk unacceptable.

Since *Gideon*, the Court has rejected the use of a case-by-case approach in state misdemeanor prosecutions where the defendant faces imprisonment if convicted.[319] The Court has also adhered to a general approach to the right to counsel in certain non-criminal state proceedings, such as juvenile delinquency proceedings[320] and hearings on prisoner transfers to mental institutions.[321] In *Argersinger v. Hamlin*, Chief Justice Burger, in a concurring opinion, explicitly recognized the inherent risk that unfair convictions will not be detected through a case-by-case approach to the issue of the right to counsel in misdemeanor prosecutions.[322] The Chief Justice noted that an appeal from an uncounselled trial is likely to be of little value since "the die is usually cast when judgment is entered on an uncounselled trial record."[323] The risks involved in a case-by-case approach have thus caused the Court to adopt a general rule providing a right to counsel where certain important individual interests are at stake.

The only exception to the Court's practice of deciding right to counsel cases on a general basis is the Court's decision in *Gagnon v. Scarpelli* that the right to counsel for indigent probationers at revocation proceedings is to be determined on a case-by-case basis.[324] The adoption of a case-by-case approach in *Gagnon* was a clear departure from the general approach which the Court has favored in right to counsel cases since the repudiation of the *Betts* rule. The

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[317] *See, e.g.*, Chewning v. Cunningham, 368 U.S. 443, 447 (1962); Hudson v. North Carolina, 363 U.S. 697, 702-04 (1960).

[318] 372 U.S. at 344-45. Justice Harlan, in a concurring opinion, explicitly recognized the extent to which the *Betts* approach had been eroded over time. *Id.* at 350-51 (Harlan, J., concurring). He noted that, in effect, the mere fact that the defendant was the subject of a felony prosecution had become a sufficient condition, under the case-by-case approach, for the appointment of counsel. *Id.* at 351.

[319] 407 U.S. at 37. The suggestion that the Court adopt a case-by-case approach to the right to appointed counsel in misdemeanor prosecutions was made in a concurring opinion by Justice Powell. *Id.* at 63 (Powell, J., concurring in the result).

[320] 387 U.S. at 36-37. *See supra* text and notes at notes 236-44.

[321] 445 U.S. at 496-97. *See supra* text and notes at notes 245-54.

[322] 407 U.S. at 41 (Burger, C.J., concurring in the result).

[323] *Id.*

[324] 411 U.S. at 790.

presence of an important, but less than complete, liberty interest in the probationer and the ability to specify a discrete sub-set of cases where the assistance of counsel could make a significant contribution to the fairness and accuracy of the proceeding appear to be crucial factors to the decision. The conditional nature of the probationer's interest in *Gagnon* led the Court to conclude that while an absolute right to counsel was not warranted, a flat rule that counsel need not be appointed in any case was also not appropriate.[325] The acceptable risk of error in a probation revocation proceeding thus fell somewhere between the minimal risk permissible in state prosecutions where incarceration is the consequence of conviction and the far greater risk permitted in misdemeanor prosecutions that result only in the imposition of a fine.

In most revocation proceedings, according to the *Gagnon* Court, the risk of an erroneous decision to terminate probation is sufficiently low that counsel need not be provided.[326] The Court was able to identify, however, a class of cases in which the risk of error would be significantly higher.[327] This class of cases included those where the probationer either disputed the allegation that he had violated the conditions of his probation or alleged that there were significant mitigating circumstances which made revocation inappropriate.[328] In order to ensure that the probationer's conditional liberty interest was given protection commensurate with its semi-fundamental nature, the Court held that counsel must be provided in this set of cases.[329]

The Court's ability to identify, with some degree of specificity, that subset of cases where the risk of error is higher than that generally existing in probation revocation proceedings reduces the uncertainty inherent in a case-by-case approach to right to counsel issues. As the Court conceded, however, there is still a risk that counsel will not be provided in some cases where fairness would require that the probationer have such assistance.[330] This risk exists because an arguable defense might not be uncovered except by an attorney and thus the probationer would be unable to make the preliminary showing of disputed issues or mitigating circumstances which would entitle him to appointed counsel under the standards established in *Gagnon*.[331] This possibility did not render the case-by-case approach inadequate, according to the *Gagnon* Court, because the acceptable risk of error in probation revocation proceedings, given the conditional nature of the probationer's liberty interest, is higher than that which would be permitted in criminal proceedings where a defendant's unconditional liberty interest in freedom from confinement is at stake.[332]

The reasoning which justifies the adoption of a case-by-case approach to the right to counsel in probation revocation proceedings is not applicable to

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[325] *Id.*
[326] *Id.*
[327] *Id.*
[328] *Id.*
[329] *Id.*
[330] *Id.* at 789.
[331] *Id.* at 789-90.
[332] *Id.* at 789.

proceedings in which the state seeks to terminate the parent-child relationship. The Court has indicated in numerous decisions that there is a basic liberty interest in the family.[333] The *Lassiter* Court itself noted that prior decisions have "made plain beyond the need for multiple citation"[334] that a parent's right to custody and control over the upbringing of the child is entitled to a high degree of protection.[335] The parents' interest in ensuring that any decision to terminate their parental rights is made accurately is, as the *Lassiter* Court recognized, a commanding one.[336] This interest is thus not analagous to that of a probationer facing a revocation proceeding whose continuing freedom from confinement is, as a result of his criminal conviction, subject to conditions imposed by the state.

Consequently, while the risk of error inherent in a case-by-case approach to the right to counsel may have been acceptable in the context of probation revocation proceedings, it should not be permitted when the consequence of an erroneous decision is an unwarranted permanent abrogation of the parents' fundamental rights relating to the custody and care of their child. Given the commanding nature of the parents' interest in a correct decision, which, as the *Lassiter* Court recognized, is shared by the state, the acceptable risk of erroneous terminations should be no higher than that deemed permissible in other cases where fundamental rights are threatened by state action. Thus, a case-by-case approach to the right to counsel in termination proceedings is inappropriate. The risk inherent in such an approach — that counsel will not be provided in a case where the termination proceeding cannot be conducted fairly in the absence of counsel — should be unacceptable where the result may be the permanent disruption of the parent-child relationship.

The *Gagnon* rationale is also distinguishable because there the Court was able to reduce the uncertainty inherent in a case-by-case approach. The Court identified a specific sub-set of cases where, presumptively, counsel should be provided to indigents in probation revocation proceedings.[337] The *Lassiter* Court offered no similar guidelines for the determination of when counsel should be provided for indigent parents facing state attempts to terminate their parental rights. This failure to fashion such guidelines is not surprising. Before-the-fact estimates of either the complexity of the issues likely to arise or the parents' ability to deal with them effectively are unreliable predictors of the need for counsel.

The Court's general rejection of the *Betts* rule[338] suggests that determinations as to the need for counsel could not be made in advance with any certainty in criminal cases. The *Lassiter* Court offered no reason to believe that judges presiding over termination proceedings will have any greater success in predicting accurately whether a particular parent requires the assistance of

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[333] *See supra* text and notes at notes 297-303.
[334] 452 U.S. at 27.
[335] *Id.*
[336] *Id.*
[337] *See supra* text and notes at notes 261-64.
[338] *See supra* text and notes at notes 313-18.

counsel. While the specific statutory standards for termination vary from state to state, common bases for termination are that the parent has abused, neglected or abandoned the child and that this conduct is unlikely to be altered in the future.[339] These standards are broad and imprecise.[340] In a number of states, after one or more of the statutory grounds for termination have been established, the judge must make the further determination that termination is in the best interests of the child.[341] Such a determination requires consideration of all facets of the parent-child relationship. The range of possible parental responses to the claim that termination is warranted is thus very broad. It is, therefore, not realistic to expect a judge to determine before the proceeding has begun what kinds of arguments the parent may have as to why termination is not appropriate or to estimate with any degree of certainty the parent's ability to recognize and communicate those arguments in the context of a judicial proceeding. Inevitably, mistaken decisions as to the need for counsel will be made. As a result of such decisions, some parents will be permanently deprived of their children after proceedings which do not meet the standards of fairness required by the due process clause.

Further, it is unlikely that appellate review of termination proceedings will significantly reduce the risk that termination decisions will be made unfairly. The Court has recognized the impossibility of making an adequate post-conviction determination as to the effect of the absence of counsel on the fair-

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[339] *See supra* statutes cited at note 4.

[340] The statutes have been criticized frequently for their failure to define with greater precision the standards for termination. *See* Wald, *supra* note 4, at 633-34, 639-41; Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 230-40 (1979).

Several courts have also been critical of the vagueness of the statutory standards. *See, e.g.*, Davis v. Smith, 266 Ark. 112, 124, 583 S.W.2d 37, 44 (1979) (Court held that ARK. STAT. ANN. § 56-128(2)(h), which provided for termination on a finding that parents are "not fit and competent to have custody and control of said children and are unable to provide a proper home for the children," was unconstitutionally vague. After this decision, the provision in question was repealed. 1980 Ark. Acts (1st Ex. Sess.) No. 66, §§ 2, 3). *See also* Roe v. Conn, 417 F. Supp. 769, 777, 779 (M.D. Ala. 1976) (Court held ALA. CODE, Title 13, § 352(4), which authorized summary removal of a child from his home if "it appears that the child is in such condition that its welfare requires" and ALA. CODE, Title 13, § 350, which defined "neglected" child as one who has "no proper parental care" or whose home, "by reason of neglect, cruelty, or depravity . . . is an unfit or improper place for such child," unconstitutionally vague. The statutory provisions challenged in *Roe* were later repealed by 1975 Acts of Alabama No. 1205, § 5, which made major changes in the structure of the Alabama judicial system. The juvenile courts of Alabama are now governed by ALA. CODE §§ 12-15 (1975).). *See also* Alsager v. District Court, 406 F. Supp. 10, 17-20 (S.D. Iowa 1975), *aff'd in part*, 545 F.2d 1137 (8th Cir. 1976). In *Alsager*, the federal district court held that a portion of Iowa's termination statute was unconstitutionally vague. 406 F. Supp. at 21. The Eighth Circuit Court of Appeals, although finding that resolution of the constitutional issue was unnecessary to decide the case, stated that the vagueness and overbreadth attacks on the statutory provisions were serious ones. 545 F.2d at 1138. The statute at issue, IOWA CODE ANN. § 232.41 (West 1949), provided for termination on a finding that the "parents have continuously or repeatedly refused to give the child necessary parental care and protection" or on a finding that the parents are unfit by reason of "conduct found by the court likely to be detrimental to the physical or mental health or morals of the child."

[341] *See, e.g.*, *supra* statutes cited at note 4. The Supreme Court has recognized that the "best interests" standard is very broad. *See* Smith v. Organization of Foster Families, 431 U.S. 816, 835 n.6, 862-63 (1977).

ness of state criminal trials.[342] There is no reason to believe that an appeal based on the record of a termination proceeding will be any more likely to be an adequate safeguard against unfair and arbitrary decisions. In both cases, the inquiry attempts to predict what might have occurred had counsel been present. In neither case can such post hoc predictions be made with any certainty. There may be facts relating to the parent-child relationship that are highly relevant to the decision which, as a result of the parent's failure to appreciate their importance, would be totally absent from the trial court record. Appellate review can be of little value in the absence of the very information which would indicate that counsel might have had a significant impact on the fairness and accuracy of the decision.

Moreover, even where all of the pertinent facts appear in the record, appellate review cannot ensure that an uncounselled parent in a termination proceeding has been given a fair hearing because those facts which do appear in the record are subject to varying interpretations by the reviewing court. In the *Lassiter* case itself, for example, five Justices found that the failure to appoint counsel for Ms. Lassiter did not render the proceeding in which her parental rights were terminated unfair.[343] The dissenting Justices, in contrast, found that the facts of the *Lassiter* case clearly demonstrated the need for counsel in termination proceedings.[344] This disagreement is evidence of the uncertainty which inheres in a case-by-case approach to the right to appointed counsel. In cases where the individual interest is less than fundamental, as in the case of probation revocation proceedings, this uncertainty may be tolerable. It should not be acceptable in the context of parental rights termination proceedings. Where the consequence of an erroneous decision is the permanent severance of the parent-child relationship, a much higher degree of certainty as to the fairness of the proceeding in which the decision is made should be required. In order to ensure that the parents' commanding interest in a correct decision is given adequate protection, a general rule that counsel must be provided in all parental rights termination proceedings should have been established.

A general rule that counsel must be provided would also be more consistent with the Court's traditional approach to due process issues other than the right to counsel. The method of analysis which the Court has traditionally employed in dealing with procedural due process issues consists of an examination of the competing interests of the individual and the state and of the risk of error in the absence of further procedural safeguards as general characteristics of the context under consideration.[345] The Court then balances these factors and develops procedural rules to govern the entire class of cases within that context.

Thus, in *Goldberg v. Kelly*, the Court held that a hearing is required before termination of welfare benefits.[346] This holding was based, first, on the Court's

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[342] *See supra* text and notes at notes 313-23.

[343] *See supra* text and notes at notes 115-27.

[344] *See supra* text and notes at notes 174-89.

[345] *See infra* cases cited at notes 346-66.

[346] 397 U.S. 254 (1970).

recognition that the individual interest in the continued receipt of such payments was strong since in many cases welfare payments are the recipient's sole source of income.[347] Second, the Court recognized that while the state has an interest in minimizing costs, this interest does not outweigh the recipient's interest in avoiding erroneous terminations.[348] Third, the Court considered the risk of error in the absence of a pretermination hearing.[349] The Court noted that credibility and veracity are often at issue in termination actions.[350] Written submissions would not, therefore, provide an adequate basis for decision.[351] Thus, a hearing was deemed necessary.[352] The risk of error in a decision based on written submissions was further heightened, according to the Court, because most welfare recipients do not have the necessary skills to make an effective written presentation.[353] The Court concluded that the risk of unwarranted terminations in the absence of a pretermination hearing was sufficiently high, when considered in conjunction with the strong personal interest in avoiding such a result, to require a pretermination hearing in all cases.[354]

In *Mathews v. Eldridge*, by contrast, the Court held that a hearing is not required prior to the termination of social security medical disability benefits.[355] Here, the Court viewed the personal interest in uninterrupted benefits as less compelling than that of the welfare recipient in *Goldberg*.[356] The Court based this view on the notion that disability benefits are not likely to constitute the recipient's sole source of income.[357] Since the individual interest was deemed less compelling, the state's interest in conserving fiscal and administrative resources was given greater weight.[358] Thus, written submissions were deemed sufficient to ensure accurate decisions in the majority of cases since the issues are essentially medical.[359] The Court recognized that, in some cases, credibility and veracity may be important issues and, thus, written submissions may not necessarily ensure accurate decisions in all cases.[360] The Court declined to formulate specialized rules for this sub-set of cases, however, noting that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions."[361]

This general or "context" approach to procedural due process issues has

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[347] *Id.* at 261.
[348] *Id.* at 264.
[349] *Id.* at 265-66.
[350] *Id.* at 268-69.
[351] *Id.* at 269.
[352] *Id.*
[353] *Id.*
[354] *Id.*
[355] *Id.* at 266.
[356] 424 U.S. at 349.
[357] *Id.* at 342.
[358] *Id.*
[359] *Id.* at 347-48.
[360] *Id.* at 344.
[361] *Id.*

been applied also in cases involving summary suspensions of driver's[362] and horse-training[363] licenses, commitments of minor children to mental institutions,[364] and corporal punishment of school children.[365] The Court in each of these cases examined the interest of the individual, the state, and the risk of error, then formulated general rules applicable to all cases within that context based on the balancing of these factors.

The application of this "context" approach to the issue of the right to counsel in parental rights termination proceedings would have resulted in the establishment of a general rule requiring the appointment of counsel for parents in such proceedings. Having characterized the parent's interest as commanding, the state's interest as comparatively insignificant, and the risk of error as potentially substantial,[366] the Court could not reasonably have concluded that counsel is not generally required.

The *Lassiter* Court's adoption of a case-by-case approach to the right to counsel in termination proceedings thus constitutes a departure from the traditional method of resolving procedural due process issues. More importantly, as the preceding analysis indicates, the adoption of a case-by-case approach creates a significant risk of unfair decisions. The Court found a similar risk unacceptable in criminal proceedings where the consequence of an unfair decision may be an unjustified deprivation of physical liberty. It should be equally intolerable where the result may be an unwarranted termination of the relationship between parent and child.

The analysis of the *Lassiter* majority thus departs in two significant respects from the Court's usual approach to procedural due process issues. First, the Court's recognition of a presumption against a right to counsel in any case where the individual interest in physical liberty is not at stake adds an additional element to the balancing test which, in the past, has been the determinative method of resolving due process issues. Second, the Court's adoption of a case-by-case approach to the issue of the right to appointed counsel in parental rights termination proceedings is a clear departure from the Court's practice of resolving right to counsel and other procedural due process issues on a general basis. As the analysis presented in the preceding sections demonstrates, the effect of both departures from traditional due process methodology is to decrease the protection afforded to parental rights in termination proceedings. This result is not consistent with a characterization of parental rights as fundamental. The *Lassiter* decision is, therefore, difficult to reconcile with the many prior decisions in which the Court emphasized the importance of individual rights with respect to the family. If, as the *Lassiter* Court's analysis implies, parental rights are not among those deemed fun-

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[362] *Id.*
[363] Bell v. Burson, 402 U.S. 535 (1971).
[364] Barry v. Barchi, 443 U.S. 55 (1979).
[365] Parham v. J.R., 442 U.S. 584 (1979).
[366] Ingraham v. Wright, 430 U.S. 651 (1977).

damental and thus entitled to the highest degree of constitutional protection, the force of these prior decisions is considerably undercut.

III. The Implications of *Lassiter* for the Future Development of the Right to Counsel.

The *Lassiter* decision has important implications for the future development of the right to counsel. The reasoning of the *Lassiter* Court divides the liberty protected by the due process clause, for right to counsel purposes, into two distinct categories. In cases where the indigent litigant claiming a right to appointed counsel faces a deprivation of physical liberty, he will benefit from a presumption in favor of the right to counsel.[367] In cases where the interest sought to be protected is other than physical liberty, the indigent will have to overcome a presumption against the right to counsel. Litigants who claim a right to counsel in order to ensure against unfair deprivations of liberty interests other than physical liberty will thus face an uphill battle. The *Lassiter* Court found that the combination of an admittedly commanding individual liberty interest, a far less significant state interest, and a potentially significant risk of error did not suffice to overcome the presumption against the right to counsel. This result indicates that the presumption against the right in cases involving interests other than physical liberty will be very difficult to overcome.

Thus, it is very unlikely that parents in dependency or neglect proceedings, whose interest is in avoiding a temporary loss of custody of the child, will be found to have an absolute right to counsel. In fact, the Court could conceivably conclude that the interest of the parent in avoiding a temporary loss of custody was so much less significant than the interest of a parent in a termination proceeding that the presumption against a right to appointed counsel is not overcome in any case.[368] It is not yet clear precisely how the Court will apply the *Lassiter* analysis in this type of case. It is clear, however, that the *Lassiter* reasoning will severely limit the further development of the right to appointed counsel.

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[367] *See supra* text and notes at notes 93-107.

[368] Thus, after *Lassiter*, a right to counsel claim by an indigent in a civil contempt proceeding, where a finding of contempt may result in incarceration, will likely be successful. For federal court decisions which have found a right to counsel in contempt proceedings, see e.g., Vail v. Quinlan, 406 F. Supp. 951, 960 (S.D. N.Y. 1976); In re DiBella, 518 F.2d 955, 959 (2d Cir. 1975).

Similarly, a right to counsel claim by an indigent involved in a civil commitment proceeding, who faces confinement in an institution if found incompetent, should find a receptive attitude on the Court. Several courts have already found a right to counsel in civil commitment proceedings. *See, e.g.*, In re Hop, 171 Cal. Rptr. 721, 728, 623 P.2d 282, 289 (1981); In re Fisher, 39 Ohio State 2d 71, 72, 313 N.E.2d 851, 858 (1974); Dixon v. Attorney General, 325 F. Supp. 926, 974 (M.D. Pa. 1971); Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968).

While the Supreme Court has not specifically addressed the issue of the right to counsel in civil commitment proceedings, the Court has recognized that commitment involves a substantial curtailment of liberty and thus requires extensive due process protection. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 425-27 (1978); Specht v. Patterson, 386 U.S. 605, 609-10 (1967).

The implications of the *Lassiter* reasoning with respect to claims for procedural safeguards other than the right to counsel are less clear. As indicated in the preceding sections,[369] the reasoning of the *Lassiter* Court seems ultimately to be based on a judgment that the interest in physical liberty is more fundamental, and therefore deserving of a higher degree of procedural protection, than any other liberty interest. It has been submitted that this judgment is unwarranted. In any event, the distinction made in *Lassiter* between physical liberty and other liberty interests should not be extended to the analysis of the availability of procedural safeguards other than the right to counsel. The presumption against a right to counsel in cases where physical liberty is not at stake is derived from the *Lassiter* Court's interpretation of prior right to counsel cases. If the presumption must exist, its application should, therefore, be limited to cases involving the right to counsel. In cases where the outcome of the suit will not impinge on physical liberty and the issue is the availability of other forms of procedural protection — the right to call witnesses and to present evidence, the right to confront and cross-examine adverse witnesses, the right to hold the state to a certain burden of proof — the traditional balancing approach for the determination of what process is due should continue to apply. The *Lassiter* decision should not be interpreted to justify a general reduction in the procedural protection to which vital individual interests other than physical liberty are entitled.[370]

CONCLUSION.

The *Lassiter* Court held that there is no absolute right to counsel in parental rights termination proceedings. In reaching this conclusion, the Court employed a new method of analysis for right to counsel issues. The *Lassiter* Court's acceptance of a presumption against a right to counsel in cases not involving physical liberty and its willingness to accept a case-by-case approach to the right to counsel in parental rights termination proceedings constitute clear departures from traditional due process methodology. The application of the *Lassiter* analysis will severely limit the further expansion of the right to counsel in state court proceedings. The protection afforded individual interests other than physical liberty will decrease. This result is not justified particularly when the individual interest is fundamental, such as the right of a parent to maintain

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[369] Before *Lassiter*, several state and federal courts had held that there is an absolute right to counsel in neglect and dependency proceedings. *See, e.g.*, Davis v. Page, 640 F.2d 599, 604 (5th Cir. 1981); Smith v. Edminston, 431 F. Supp. 941, 945 (W.D. Tenn. 1977); Crist v. Division of Youth and Family Services, 128 N.J. Super. 402, 416, 320 A.2d 203, 211 (1974).

[370] *See supra* text and notes at notes 296-97; 333-36.

his relationship with his child. In order to minimize the adverse effect of the *Lassiter* Court's reasoning on the constitutional protection accorded fundamental liberty interests, it is suggested that the *Lassiter* analysis be limited to right to counsel cases.[371]

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[371] In Santosky v. Kramer, 50 U.S.L.W. 4333 (1982), the Court employed the three-part balancing test to evaluate a claim that New York's preponderance of the evidence standard of proof for termination actions violated due process. *Id.* at 4333. The Court expressly stated that the presumption employed in *Lassiter* was not applicable to the issue of the burden of proof, limiting its relevance to right to counsel issues. *Id.* at 4335. Noting that the parents' interest was fundamental, *id.* at 4335, the state's interest was comparably insignificant, *id.* at 4338-39, and the risk of error was substantial, *id.* at 4337-38, the Court held that the preponderance of the evidence standard was too low to satisfy due process in termination proceedings. *Id.* at 4339. The Court declared that the states must employ the more stringent "clear and convincing evidence" standard of proof in termination cases, and may employ the even stricter "beyond a reasonable doubt" standard. *Id.* at 4339.