

Terminating Parental Rights: The Indigent Parent's Right to Counsel after *Lassiter v. North Carolina**

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In recent years, dramatically higher levels of reported child abuse and neglect,¹ coupled with sustained efforts to reduce the number of children in long term foster care through permanency planning² have resulted in a substantial increase in the number of proceedings to terminate parental rights. Although no one knows exactly how many proceedings are initiated, it appears that at least 20,000 new petitions are filed annually.³

Late last term, in *Lassiter v. Department of Social Services of Durham County, North Carolina*,⁴ the United States Supreme Court ruled that an indigent mother did not have a right to appointed counsel in a termination proceeding in which she permanently lost custody of her child. The Court was narrowly divided on the issue, splitting 5 to 4. In a dissent which the *New York Times* called "one of the most emotionally charged of this Court term,"⁵

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1. In 1979, about one million children were reported to the authorities for known and suspected child abuse and neglect. U.S. National Center on Child Abuse and Neglect, National Study of the Incidence and Severity of Child Abuse and Neglect (U.S. Dept. of Health and Human Services, 1981).

2. See, e.g., *Proposals Related to Social and Child Welfare Services, Adoption, and Foster Care, Hearings before the Subcommittee on Public Assistance of the Committee on Finance*, U.S. Senate, Sept. 24, 1979 (U.S. Gov't Printing Office, 1979).

3. Author's estimate based on: W. Meezan, *Adoption Services in the United States* (U.S. Dept. of Health and Human Services, 1980).

4. *Lassiter v. Department of Social Services of Durham County, North Carolina*, 101 S. Ct. 2153 (1981).

5. *Right to Aid in Custody Cases is Upset*, N.Y. Times, June 2, 1981, § B, at 9, col. 1.

Justice Blackmun, who took the unusual step of announcing his dissent from the bench, characterized the Court's decision as "virtually incredible."⁶

Many articles will no doubt be written analyzing *Lassiter*. This article takes a preliminary look at the case and its possible impact.

The Parent's Need for Legal Representation

State intrusion into private family relations has become the subject of increasing public and professional concern. The most severe form of state intervention into family life is the permanent termination of parental rights. As Justice Blackmun described, in termination proceedings:

[T]he State's aim is not simply to influence the parent-child relationship but to *extinguish* it. A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, and physical development. . . . Surely there can be few losses more grievous than the abrogation of parental rights.⁷

Some parents are willing, and a few are even eager, to relinquish their parental rights. But most parents, even inadequate or "bad" ones, do not want to do so. Without legal counsel, though, they are at a severe disadvantage if they seek to contest the state's petition. As the American Bar Association's *Amicus* Brief in *Lassiter* points out: "Skilled counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal."⁸ Writing for the majority in *Lassiter*, Justice Stewart described some of the obstacles faced by unrepresented parents:

Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented. The parents are likely to be people with little education, who had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounselled parent is evident. . . .⁹

6. 101 S. Ct. 2163, (Blackmun, J., *dissenting*).

7. 101 S. Ct. at 2166 (Blackmun, J., *dissenting*) (footnote omitted).

8. *Amicus* Brief of the American Bar Association, *Lassiter v. Department of Social Services of Durham County, North Carolina*, No. 79-64323.

9. 101 S. Ct. at 2161.

Abby Lassiter's attempt to cross examine the state's caseworker is the best evidence of how these conditions can "overwhelm an uncounselled parent":

- The Court:* All right. Do you want to ask any questions?
- Lassiter:* About what? About what she—
- The Court:* About this child.
- Lassiter:* Oh, yes.
- The Court:* All right. Go ahead.
- Lassiter:* The only thing I know is that when you say—
- The Court:* I don't want you to testify.
- Lassiter:* Okay.
- The Court:* I want to know if you want to cross-examine her or ask any questions.
- Lassiter:* Yes, I want to. Well, you know the only thing I know about is my part that I know about it. I know—
- The Court:* I am not talking about what you know. I want to know if you want to ask her any questions or not.
- Lassiter:* About what?
- The Court:* Yes. Do you understand the nature of this proceeding?
- Lassiter:* Yes.
- The Court:* And that is to terminate any rights you have to the child and place it for adoption, if necessary.
- Lassiter:* Yes, I know.
- The Court:* Are there any questions you want to ask her about what she has testified to?
- Lassiter:* Yes.
- The Court:* All right. Go ahead.
- Lassiter:* I want to know why you think you are going to turn my child over to a foster home? He knows my mother and he knows all of us. He knows her and he knows all of us.
- The Court:* Who is he?

Lassiter: My son, William.

Social Worker: Ms. Lassiter, your son has been in foster care since May of 1975 and since that time—

Lassiter: Yeah, yeah and I didn't know anything about it either.¹⁰

After the county attorney made a closing statement, the judge asked Ms. Lassiter if she had any final remarks. She responded: "Yes. I don't think it's right."¹¹

The imbalance of the adversaries in termination proceedings is striking. Marshalled against the unaided parent are "the full panoply of traditional weapons of the state."¹² In many states, the petitioning agency is represented by counsel.¹³ But even if the petitioning agency is not represented, it "has access to public records concerning the family and to professional social workers who are empowered to investigate the family situation and to testify against the parent. . . . [It] may also call upon experts in family relations, psychology, and medicine to bolster [its] . . . case."¹⁴

A thirteen year old study of child protective cases in New York City is apparently the only attempt to determine the effect that legal representation has on the outcome of court proceedings.¹⁵ Justice Stewart called the study "unilluminating,"¹⁶ presumably because its methodology was flawed.¹⁷ Nevertheless, the study does tend to document the positive impact of counsel. (See accompanying chart.) In addition, Stewart cited, with apparent approval, the results of the study's survey of Family Court Judges who preside over termination proceedings. The study found that "72.2 percent of them agreed that when a parent is unrepresented, it becomes more difficult to conduct a fair hearing (11.1 percent of the judges disagreed); 66.7 percent thought it became more difficult to develop the facts (22.2 percent disagreed)."¹⁸

10. 101 S. Ct. at 2173 (Blackmun, J., *dissenting*).

11. 101 S. Ct. at 2174 (Blackmun, J., *dissenting*).

12. *Danforth v. State*, 303 A.2d 794, 799 (Me. 1973).

13. *See, e.g.*, CAL. CIV. CODE §§ 232(b), 231.9 (West Supp. 1978).

14. 101 S. Ct. at 2168 (Blackmun, J., *dissenting*).

15. Note, *Representation in Child-Neglect Cases: Are Parents Neglected?* 4 COLUM. J. OF L. & SOC. PROB. 230, 241-42 (1968).

16. 101 S.Ct. at 2161, n.5.

17. The representation by counsel was not random. Only parents who could afford to hire an attorney or who made the effort to obtain one from a legal aid or legal services agency were represented. Even without counsel, such parents would be more likely to prevail in a termination proceeding.

18. 101 S. Ct. at 2161, n.5.

DISPOSITION	Percentage REPRESENTED BY COUNSEL	Percentage NOT REPRESENTED BY COUNSEL
Children placed outside the home	18.2	40.6
Discharged under court supervision	45.4	39.6
Discharged without court supervision	9.1	5.0
Petition dismissed after initial adjudication	9.1	3.0
Other	18.2	11.8

The presence of an attorney to guard the parent's legal rights undoubtedly makes it harder for the authorities to terminate parental rights. But that is as it should be. The termination of parental rights is an extreme remedy—which should be pursued only in accord with traditional American values of due process and basic fairness. If the child's best interests require termination, the petitioner, through sufficient planning and preparation, should be able to prove it in court. To protect children, the state needs no tools and needs no advantages greater than those it ordinarily possesses. It should not need the assistance of an unrepresented parent to make its case stick.

For all these reasons, most standard setting organizations, such as the American Bar Association,¹⁹ the National Council on Crime and Delinquency,²⁰ and the U.S. Children's Bureau,²¹ recommend that parents be represented by counsel in termination proceedings.

Past Precedents

There would have been ample precedent to support Abby Lassiter's request for legal representation. In a long line of decisions stretching back many years, the Supreme Court has steadily expanded the right of indigent defendants in criminal cases to appointed

19. AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, Standard 2.3(b) (1980).

20. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL RULES FOR JUVENILE COURTS, Rule 39 (1969).

21. U.S. CHILDREN'S BUREAU, LEGISLATIVE GUIDE FOR DRAFTING FAMILY AND JUVENILE COURT ACTS, § 25(b) (1969).

counsel.²² In a similarly long and distinguished line of decisions, the Court has protected the rights of parents to raise their children free from unreasonable state interference.²³

Moreover, as Justice Stewart commented: "Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well. Most significantly, thirty-three states and the District of Columbia provide statutorily for the appointment of counsel in termination cases."²⁴

As a result, prior to *Lassiter*, lower federal courts as well as state courts considering the issue seem to have been unanimous in holding that indigent parents are entitled to appointed counsel in termination proceedings,²⁵ and in appeals therefrom.²⁶ Justice Stewart noted that: "The respondent is able to point to 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."²⁷ (Courts had been equally unanimous in finding a right to counsel in child protective proceedings.)²⁸ Only in one case, *Cleaver v. Wilcox*, did a court rule

22. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1971). But see *Scott v. Illinois*, 404 U.S. 367 (1971).

23. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645 (1972).

24. 101 S.Ct. at 2163.

25. See, e.g., *Matter of Chad S.*, 580 P.2d 983 (Okla. 1978); *Crist v. New Jersey Div. of Youth and Family Services*, 128 N.J. Super. 402, 415, 320 A.2d 203 (1974), *mod. on other grounds*, 135 N.J. Super. 573, 343 A.2d 815 (1975); *Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794, 795 (Me. 1973); *In re Adoption of R.I.*, 455 Pa. 29, 312 A.2d 601 (1973); *In re Friesz*, 190 Neb. 347, 208 N.W.2d 259 (1973); *Shappy v. Knight*, 251 Ark. 943, 475 S.W.2d 704 (1972); *State v. Jamison*, 251 Or. 114, 118, 444 Pac.2d 1005 (1968).

26. See, e.g., *State ex rel. Heller v. Owens*, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980); *In re Brehm*, 3 Kan. App. 325, 594 P.2d 269 (1979); *Dept. of Public Welfare v. J.K.B.*, 79 Ma. Adv. Sh. 2202 393 N.E.2d 406 (1979); *Reist v. Bay Circuit Judge*, 396 Mich. 326, 346, 241 N.W.2d 55 (1976); *In re Luscier*, 84 Wash. 135, 138, 524 P.2d 906 (1974); *Chambers v. District Court of Dubuque County*, 261 Iowa 31, 152 N.W.2d 818 (1967) (dictum).

27. 101 S.Ct. at 2161.

28. See, e.g., *Cleaver v. Wilcox*, 499 F.2d 940, 945 (9th Cir. 1974) (case-by-case basis); *Davis v. Page*, 442 F. Supp. 258, 263 (S.D. Fla. 1977); *Smith v. Edmiston*, 431 F. Supp. 941 (W.D. Tenn. 1977); *In re Welfare of Myricks*, 85 Wash. 2d 252, 533 P.2d 841 (1975); *Crist v. New Jersey Div. of Youth and Family Services*, 128 N.J. Super. 402, 415, 320 A.2d 203 (1974), *mod. on other grounds*, 135 N.J. Super. 573, 343 A.2d 815 (1975); *State ex rel. Lemaster v. Oakley*, 157 W. Va. 590, 203 S.E.2d 140 (1974); *Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794, 795 (Me. 1973); *In re Ella B.*, 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288 (1972). But see e.g., *In re Robinson*, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970), *cert. denied sub nom.*; *Kaufman v. Carter*, 402 U.S. 964 (1971), denying the right to

that the existence of the right to counsel had to be determined on a "case-by-case basis."²⁹

Generally, these decisions rest on a finding that parents have a "fundamental interest," or at least a "liberty interest," in the continued legal custody of their children, which, under the Fifth and Fourteenth Amendments, can be disturbed only in accord with due process of law. And, such cases hold, the process "that is due" includes the appointment of counsel. In the words of the New York Court of Appeals:

In our view, an indigent parent, faced with the loss of a child's society, as well as the possibility of criminal charges, is entitled to the assistance of counsel. A parent's concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right to be relinquished without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer.³⁰

Impressive though it was, past precedent suffered one weakness that appears to have been fatal to Abby Lassiter's cause. *All* of the Supreme Court's previous decisions in favor of the right to appointed counsel had involved criminal proceedings, or at least quasi-criminal ones.³¹ (*In re Gault* was a landmark case because the Court looked beyond the "civil" label attached to juvenile delinquency proceedings to recognize that they "may result in commitment to an institution in which the juvenile's freedom is curtailed.")³² In summarizing the Court's prior decisions, Justice Stewart said that the right to appointed counsel "has been recognized to exist only where the litigant may lose his liberty if he loses the litigation."³³ Although Justice Blackmun challenged this characterization of past precedent,³⁴ undisputed is the fact that the Court had never before ap-

counsel in child protective proceedings; *In re Joseph T.*, 25 Cal. App. 3d 120, 101 Cal. Rptr. 606 (1974). *Cf.*, *Potvin v. Keller*, 313 So. 2d 703 (Fla. 1975), where the parents requested state care for the child (in effect, *rev'd by Davis v. Page, supra.*)

29. *Cleaver v. Wilcox*, *id.* note 28, at 945: "The determination should be made with the understanding that due process requires the state to appoint counsel whenever an indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or of prolonged separation from the child."

30. *In re Ella B.*, 30 N.Y.2d 352, 356-57, 334 N.Y.S.2d 133, 136, 285 N.E.2d 288, 293, citations omitted.

31. *See, e.g.*, *Vitek v. Jones*, 445 U.S. 480 (1980), finding a right to appointed counsel in a proceeding to transfer a prisoner from a jail to a mental hospital, although as Justice Blackmun pointed out, "no new incarceration was threatened." 101 S.Ct. at 2167 (Blackmun, J., *dissenting*).

32. *In re Gault*, 387 U.S. 1, 41 (1967).

33. 101 S.Ct. at 2158 (emphasis added).

34. 101 S.Ct. at 2166-67 (Blackmun, J., *dissenting*).

plied the right to purely "civil" cases, even when the proceedings effected deeply significant personal interests, such as parental rights.

Hence, the "civil" nature of termination proceedings presented a major barrier to a decision in favor of the right to counsel. Termination proceedings are only one of many different types of "civil" proceedings in which the state moves against important personal interests. Justice Blackmun, in his dissent, said that he "suspect[ed]" that the Court "fear[ed]" that a different decision would "open the 'floodgates.'"³⁵ There is strong evidence that he was correct. At different times during the oral argument, for example, the Chief Justice and three Associate Justices (Blackmun, Brennan, and Rehnquist) asked the mother's attorney whether the right to counsel being asserted would apply to other "civil" proceedings, such as proceedings to condemn property, to suspend occupational licenses, and to review the foster care status of children.³⁶ He answered in the affirmative for condemnation and foster care proceedings, but claimed that licensing proceedings were "distinguishable."³⁷ During the last of these exchanges, Justice Brennan pointed out: "If we agree with you on this case, we would not be able to defend limiting the rule to this case."³⁸

The Decision

To determine whether due process requires the appointment of counsel, both the majority and dissenting opinions applied, as expected, the three-pronged test established by *Mathews v. Eldridge*:

Identification of the specific dictates of due process requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of 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.³⁹

But Justice Stewart added a new and somewhat controversial twist. He drew from the Court's prior decisions a "presumption that an

35. 101 S.Ct. at 2176 (Blackmun, J., *dissenting*).

36. *Argument Heard, Parental Rights Termination*, 7 FAM. L. REP. 2282 (March 3, 1981).

37. *Id.*

38. *Id.*

39. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his *physical* liberty. It is against this presumption," he said, "that all the other elements in the due process decision must be measured."⁴⁰

The private interests at stake: Justice Stewart cited *Stanley v. Illinois*⁴¹ for the proposition that "a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection."⁴² However, Justice Stewart carefully avoided finding the parent's interest was "fundamental,"⁴³ a determination somewhat casually made by many courts and which, of course, would have helped tip the decision toward the right to counsel. Instead, he said that the interest was a "commanding one."⁴⁴ (Similarly, Stewart did not require that the countervailing state interest be "compelling," merely that it be "powerful.")

In a potentially important footnote,⁴⁵ Justice Stewart added: "Some parents will have an additional interest to protect. Petitions to terminate parental rights are not uncommonly based on alleged criminal activity. Parents so accused may need counsel to guide them in understanding the problems such petitions may create."⁴⁶ For example, the parent's testimony in the civil termination proceeding, if damaging, might be introduced by the prosecution in a subsequent criminal proceeding.⁴⁷

The government's interest: After determining that the state "shares the parent's interest in an accurate and just decision," and

40. 101 S.Ct. at 2159 (emphasis added).

41. 405 U.S. 645 (1972).

42. 101 S.Ct. at 2160.

43. Historically, the Court has been reluctant to label a parent's interest in a child "fundamental." In *Stanley v. Illinois*, this reluctance is demonstrated, but rarely noted, in perhaps the Court's most widely cited statement on the subject:

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*. . . "basic civil rights of man," *Skinner V. Oklahoma*, . . . and [r]ights far more precious . . . than property rights," *May v. Anderson* . . . [*Stanley v. Illinois*, 405 U.S. 649, 652, (1972).]

44. 101 S.Ct. at 2160.

45. 101 S.Ct. at 2160, n. 3.

46. *Id.*

47. *Cf. In re Roman*, 94 Misc. 2d 796, 405 N.Y.S.2d 899 (Fam. Ct., Onondaga Co., 1978), holding that the need to explain a child's suspicious injuries does not contravene the parent's right to remain silent in a child protective proceeding, even though a criminal prosecution may follow.

after noting the small costs involved, Justice Stewart concluded that, "though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here. . . ."48

Risk of erroneous result: From the point of view of the Court's ultimate decision, this was the most crucial consideration. After reviewing the nature of the factual and legal issues involved in termination proceedings, Justice Stewart concluded that "the complexity of the proceeding and the incapacity of the uncounselled parent could be, *but would not always be*, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high."⁴⁹

Concluding that the significance of these factors could vary from case to case, Justice Stewart said that the "presumption against the right to counsel" would not be "overcome" in *all* cases.⁵⁰ Therefore, he held that, under the Due Process Clause, indigent parents do not have an *automatic* right to appointed counsel in proceedings to terminate their parental rights. Instead, the determination that counsel is required must be made on a case-by-case basis, "in the first instance by the trial court, subject, of course, to appellate review."⁵¹

Justice Stewart expressly refused to specify the factors to be considered. Quoting *Gagon v. Scarpelli*,⁵² he said that "[i]t is neither possible nor prudent to attempt to formulate a precise or detailed set of guidelines to be followed in determining when the providing of counsel is necessary" since "[t]he facts and circumstances . . . are susceptible of almost infinite variation. . . ."⁵³

Nevertheless, Justice Stewart's opinion suggests that one or more of the following four factors might lead the Court to hold that counsel is constitutionally required:

1. the presence of allegations of "neglect or abuse upon which criminal charges could be based";⁵⁴
2. the use of "expert witnesses" and the presence of "troublesome points of law, either procedural or substantive";⁵⁵

48. 101 S.Ct. at 2160.

49. 101 S.Ct. at 2162 (emphasis added).

50. 101 S.Ct. at 2162.

51. 101 S.Ct. at 2162, citing *Wood v. Georgia*, 101 S.Ct. 1097 (1981).

52. 411 U.S. 778 (1972).

53. 101 S.Ct. at 2162.

54. 101 S.Ct. at 2162.

55. 101 S.Ct. at 2162.

3. a less than clear cut case, in which “the weight of the evidence . . .” is not clearly in favor of terminating parental rights;⁵⁶ and
4. the parent’s demonstrated interest in the care and well-being of the child.⁵⁷

The child’s interest in the finality of the termination order seems to be an added reason for the third and fourth factors. Justice Stewart began his evaluation of the factors in this case with the statement that: “child-custody litigation must be concluded as rapidly as is consistent with fairness. . . .”⁵⁸ In an accompanying footnote, he expanded on this possible consideration: “According to the respondent’s brief, William Lassiter is now living ‘in a preadoptive home with foster parents committed for formal adoption to become his legal parents.’ He cannot be legally adopted, nor can his status otherwise be finally clarified, until this litigation ends.”⁵⁹ In effect, the Court seems to be saying that it will not perform an empty gesture (i.e., reversing and ordering a new trial whose outcome is preordained) if the resultant delay in finalizing the termination order will be unnecessarily detrimental to the child’s interests.

In a separate concurring opinion, Chief Justice Burger, while joining in the Court’s opinion, suggested that he would have decided against the right to counsel (even on a case-by-case basis) without recourse to an *Eldridge* analysis. He wrote:

The purpose of the termination proceeding at issue here is not “punitive.” On the contrary, its purpose was *protective* of the child’s best interests. Given the record in this case, which involves the parental rights of a mother under lengthy sentence for murder who showed little interest in her son, the writ might well have been a “candidate” for dismissal as improvidently granted. However, I am content to join the narrow holding of the Court, leaving the appointment of counsel in termination proceedings to be determined by the state courts on a case-by-case basis.⁶⁰

Dissenting, Justice Blackmun, joined by Justices Brennan and Marshall, criticized the majority’s case-by-case approach, which,

56. 101 S.Ct. at 2162.

57. Stewart’s actual words are potentially important enough to repeat them here: “Finally, a court deciding whether due process requires the appointment of counsel need not ignore a parent’s plain demonstration that she is not interested in attending a hearing.” 101 S.Ct. at 2163. *See also* the text accompanying *infra* note 70, *et seq.*

58. 101 S.Ct. at 2162.

59. 101 S.Ct. at 2162, n. 7.

60. 101 S.Ct. 2163 (Burger, Ch. J., *concurring*)(citations omitted).

he said, was "thoroughly discredited nearly twenty years ago in *Gideon v. Wainwright*, 372 U.S. 335 (1963)."⁶¹ He called the Court's decision "illogical" and claimed that it "marks a sharp departure from the due process analysis consistently applied heretofore."⁶² Blackmun said that, like himself, the Court:

finds the private interest weighty, the procedure devised by the State fraught with risks of error, and the countervailing governmental interest insubstantial. Yet, rather than follow this balancing process to its logical conclusion, the Court abruptly pulls back and announces that a defendant parent must await a case-by-case determination of his or her need for counsel.⁶³

Justice Blackmun went on to challenge the legal and practical appropriateness of the case-by-case approach adopted by the Court, concluding that it "may transform the Court into a 'super-family-court.'"⁶⁴

Justice Stevens, in a separate dissent, also criticized the Court's case-by-case approach. He found that the "deprivation of the parental rights" is often "more grievous" than imprisonment.⁶⁵ Hence, he concluded that "the reasons supporting the conclusion that the Due Process Clause of the Fourteenth Amendment entitles the defendant in a criminal case to representation by counsel apply with equal force to a case of this kind. This issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits."⁶⁶

Is There or Isn't There a Right to Counsel?

The *Lassiter* decision can be interpreted in two diametrically opposed ways. First, it can be viewed as a rejection of the indigent parent's right to counsel in termination proceedings. On the day after the decision was announced, for example, the *front page* headline in the *Washington Post* read: "Courts Can Take Child Away From Parents Without Providing Lawyer, Justices Say."⁶⁷

61. 101 S.Ct. at 2164 (Blackmun, J. *dissenting*).

62. 101 S.Ct. at 2171 (Blackmun, J., *dissenting*).

63. 101 S.Ct. at 2171 (Blackmun, J., *dissenting*).

64. 101 S.Ct. at 2172 (Blackmun, J. *dissenting*).

65. 101 S.Ct. 2176 (Stevens, J., *dissenting*).

66. 101 S.Ct. 2176 (Stevens, J., *dissenting*).

67. *Courts Can Take Child Away From Parents Without Providing Lawyer, Justices Say*, *Washington Post*, June 2, 1981, at 1, col. 2. *Accord* *Greenhouse, Federal Authority Affirmed in High Court's Latest Term*, *N.Y. Times*, July 9, 1981, p. A16, col. 3.

On the other hand, *Lassiter* can also be viewed as a cautious, but nevertheless striking, expansion of due process doctrine to include the right to counsel in "civil" proceedings. Focusing on the fate of Abby Lassiter's appeal obscures the historical potential of the Court's decision. *Lassiter* may be the first evolutionary step in an ultimately revolutionary recognition of the due process right of indigents to appointed counsel in "civil" proceedings. In three opinions, eight out of nine Justices opened the door to the future provision of counsel in some, if not all, termination proceedings. Only the Chief Justice seemed willing to foreclose the possibility.⁶⁸ The four dissenting Justices, of course, would have held that there is an automatic right to counsel in all termination proceedings. That four Justices unambiguously adopted this position was, in itself, a major step toward a holding in favor of the right to counsel. But perhaps more importantly, four other Justices, speaking through Justice Stewart, all but said that there is a right to counsel under certain circumstances. The key passage in Stewart's opinion reads:

If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.⁶⁹

Moreover, the factors that the Justices seemed to consider crucial suggest that they would find a right to counsel in many, if not most, termination proceedings. Basically, the grounds for most involuntary terminations divide into three broad categories: (1) severe abuse or neglect; (2) severe, and apparently long term, parental inability to care properly for the child; and (3) constructive abandonment. Cases in the first category, because of the possibility of criminal prosecution, seem to fall within the Court's guidelines for the appointment of counsel. So would cases in the second category, because they usually require expert testimony about the parent's prognosis for improvement. Only cases in the third category seem to fall outside of the Court's holding. These cases involve parents who, for no good cause, fail to maintain contact with a child over a sufficient period of time, or otherwise demonstrate a clear lack of con-

68. 101 S.Ct. 2163 (Burger, Ch. J., *concurring*).

69. 101 S.Ct. at 2162.

cern about the child's care and welfare. Given the realities of current practice in such cases, the appointment of counsel is unlikely to have more than a marginal effect on the outcome of the proceeding.

Many observers will warn against taking the majority too seriously; they will accuse Justice Stewart's decision of being a tortured escape from the logic of past precedents—which will be distinguished or otherwise watered down in subsequent cases. But beyond basic respect for the Court, there are other good reasons for taking the Justices who joined in Stewart's opinion at their collective word.

First, if they did not share his views, the other Justices could have joined in the Chief Justice's opinion, or written one of their own. Second, if one believes, as they said they did, that the existence of the right to counsel depends on the circumstances, then there were sufficient reasons for rejecting Ms. Lassiter's appeal. In 1975, a North Carolina court found her to be a neglectful parent, and had placed her infant son in foster care. In 1976, she was convicted of murder and given a 25 to 40 year sentence. Since her son was first taken away from her in 1975, Ms. Lassiter had apparently made no attempt to see him. In their opinions, both Stewart and Burger were critical of Ms. Lassiter's apparent lack of concern for her son. Justice Stewart claimed that "the weight of the evidence" was that Ms. Lassiter had "few sparks" of "interest in her son."⁷⁰ He pointed to her:

plain demonstration that she was not interested in attending a [prior] hearing. . . . Ms. Lassiter had not even bothered to speak to her retained lawyer after being notified of the termination hearing, and the court specifically found that Ms. Lassiter's failure to make an effort to contest the termination proceeding was without cause.⁷¹

Similarly, Chief Justice Burger said that Ms. Lassiter "showed little interest in her child."⁷² Perhaps the case-by-case approach will eventually prove to be impractically cumbersome, but this was hardly the kind of fact situation upon which to expect a major departure from past Constitutional doctrine.⁷³

70. 101 S.Ct. at 2162.

71. 101 S.Ct. at 2163.

72. 101 S.Ct. at 2163 (Burger, Ch.J., *concurring*).

73. For example, in discussing the *Gault* case, *supra* note 32, Professor Henry Foster said: "Even those who question the wisdom of the proliferation of constitutional protections for adults accused of crime should be shocked by what transpired in the *Gault* case." H. Foster, *Notice and "Fair Procedure": Revolution or Simple Revision?* in *GAULT: WHAT NOW FOR*

Unfortunately, there is no way of knowing whether the nascent doctrine enunciated in *Lassiter* will form the basis of a full blown right to counsel, in much the same way that *Betts v. Brady*⁷⁴ eventually lead to *Gideon v. Wainwright*,⁷⁵ or whether it was merely an awkward retreat from past liberalism. Only time and the future membership of the Court will decide. We will have to wait and see how the Court applies, in subsequent cases, the guidelines that it seems to have established in *Lassiter*. We will have to see what the Court does in cases where there is the possibility of a criminal prosecution, where the issues are complicated or require the use of expert witnesses, where the parent has demonstrated at least a minimal interest in the welfare of the child, or where the weight of the evidence is not clearly in favor of termination.

Unfortunate Symbolism

The unfortunate symbolism of the Court's decision should be troubling—even to those who agree with Justice Stewart's opinion.

First, the Court's ruling may lead state legislatures and state courts to conclude that indigent parents do not need—or do not deserve—legal representation. Although the decision should be seen as an expansion, however tentative, of the right to counsel, it is already being viewed in just the opposite light.⁷⁶ Unfortunately, most Americans, and even many lawyers, tend to equate what is unconstitutional with what is bad, and what is constitutional with what is good.⁷⁷ Recognizing this, Justice Stewart took pains to note that:

In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. . . . The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.⁷⁸

However, many of the States that decided, prior to *Lassiter*, to pro-

THE JUVENILE COURT? 51, 65 (Nordin ed. 1968). See generally BESHAROV, JUVENILE JUSTICE ADVOCACY 6-7 (1974).

74. 316 U.S. 455 (1941).

75. 372 U.S. 335 (1962).

76. See the text accompanying *supra* note 68, *et seq.*

77. See, e.g., Goodman, *There's No Prince Charming at the Supreme Court*, Washington Post, July 7, 1981, § A, at 15, col. 2.

78. 101 S.Ct. at 2163.

vide counsel to parents undoubtedly did so because they assumed that parents had a constitutional right to representation, and that the Supreme Court would eventually force them to do so anyway.⁷⁹ Freed from this prospect at a time when state budgets are under great pressure, there is a real possibility that additional states will not provide counsel. In addition, states that already provide counsel may reverse their policies. Those who assume that legal services, once provided, will not be withdrawn should be reminded of the prospective weakening of the Legal Services Corporation.

Reversing past legislation and court decisions in favor of the provision of counsel would be a serious mistake. Whatever the constitutional status of their right to counsel, parents *need* legal representation in termination proceedings. Without the "guiding hand of counsel,"⁸⁰ parents are at a severe and irremedial disadvantage *vis-à-vis* the State. As Justice Blackmun wrote: "By intimidation, inarticulateness, or confusion, a parent can lose forever contact and involvement with his or her offspring."⁸¹ If American society is committed to protecting the family from unreasonable state interference, then indigent parents facing the termination of their parental rights should be provided with legal representation—representation which a parent who could afford to do so would not hesitate to purchase.

Second, the Court's ruling tends to undermine the protected status of family relations under the Due Process Clause. As mentioned earlier, most courts and commentators have assumed, up to now, that a parent's interest in a child is a "fundamental" one, that can be disturbed only for a compelling state interest.⁸² In declining to adopt this view, the Court has placed constitutional doctrine in an anomalous posture. The Court's earlier decisions have granted the right to counsel to all indigents who are jailed, no matter how

79. For example, in 1979, the Supreme Court accepted certiorari in an Ohio case that raised the right of indigent parents to court appointed counsel during an appeal of an order terminating parental rights. [*In re Angela Marie Otis*, No. 79-5215, *cert. granted*, 48 U.S. L.W. 3290 (Oct. 30, 1979), *vacated and remanded* February 19, 1980.] The Ohio Supreme Court denied the parent's request for appointed counsel and for a free transcript. But before the *Otis* case was argued in the United States Supreme Court, the Ohio Supreme Court, in an entirely different proceeding, ruled that parents enjoyed these rights under the *Ohio* constitution. [*State ex rel. Heller v. Owens*, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980).] Since the Ohio Court had apparently reversed its earlier position, the Supreme Court vacated and remanded for reconsideration by the Ohio courts.

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

81. 101 S.Ct. at 2170 (Blackmun, J., *dissenting*).

82. See the text accompanying *supra* note 42, *et seq.*

short the actual incarceration.⁸³ Thus, *Lassiter*, for all practical purposes, stands for the proposition that a drunken driver's night in the cooler is a greater deprivation of liberty than a parent's permanent loss of rights in a child. As Justice Blackmun points out, the Court, by its holding, found that the permanent abrogation of parental rights "somehow is less serious."⁸⁴ At a time when the legal community, and American society as a whole, are struggling to achieve a wise balance among parents' rights, children's rights, and the right of the state to intervene into private family relationships, one must be troubled by a legal doctrine that seems to attach such low priority to the rights of parents—and one must worry about how it will affect future cases involving state regulation of the family.

Conclusion

Reasonable people will differ about the wisdom of the Supreme Court's decision in *Lassiter*. While the appointment of counsel for indigent parents is undoubtedly sound public policy, there are also strong reasons why the Court should not have entered this uncharted area of constitutional interpretation. In this article, I have tried to avoid expressing an opinion on the subject because I believe that the question cannot be considered in isolation from its impact on other "civil" proceedings in which the state takes action adverse to important personal interests—an analysis far beyond the scope of this article. But however one feels about the decision, it demonstrates, at least to this writer, that constitutional litigation under the Due Process clause can be an exceedingly clumsy method of shaping public policy toward the family.

83. As Justice Stewart described: *Argersinger v. Hamlin*, *supra* note 22, "established that counsel must be provided before any indigent may be sentenced to prison, even where the crime is petty and the prison term brief." 101 S.Ct. at 2158.

84. 101 S.Ct. at 2166 (Blackmun, J., *dissenting*).

