

Justice, Access to the Courts, and the Right to Free
Counsel for Indigent Parents: The Continuing
Scourge of *Lassiter v. Department of Social Services
of Durham*

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I. INTRODUCTION

Nearly a century ago, legal services pioneer Reginald Heber Smith observed that “substantive law, however fair and equitable itself, is impotent to provide the necessary safeguards unless the administration of justice, which alone gives effect and force to substantive law, is in the highest sense impartial.”¹ The expression of this lofty ideal introduced Smith’s sweeping indictment of the manner in which indigents seeking to enforce basic civil rights in the early twentieth century were routinely denied meaningful recourse to the courts:

The administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons.²

Eighty-five years after Smith issued his indictment, gaps in the ability of our civil courts to achieve the ideal of fair and equitable administration of justice are more profound than ever.³ Plainly, no

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1. REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 5 (Patterson Smith Publishing Co. 1972) (1919). Smith’s work has been widely cited and generally recognized as a landmark of the legal aid movement. See also, Ruth Bader Ginsburg, *Access to Justice: The Social Responsibility of Lawyers: In Pursuit of the Public Good: Access to Justice in the United States*, 7 WASH. U. J.L. & POL’Y 1, 5–6 (2001) (noting that Smith’s “groundbreaking” treatise “galvanized a national movement to provide lawyers for those who could not afford to pay counsel fees”).

2. SMITH, *supra*, note 1 at 8.

3. Douglas J. Besharov, *Terminating Parental Rights: The Indigent Parent’s Right to Counsel After Lassiter v. North Carolina*, 15 FAM. L.Q. 205, 219, 221 (1981) (examining the issues surrounding an indigent parent’s right to counsel in a termination of parental rights proceeding following *Lassiter v. Department of Social Services of Durham County, NC*, 452 U.S. 18 (1981)). Professor Deborah Rhode writes similarly of *Lassiter*: “It is a cruel irony that, in

meaningful discourse on the subject of “justice” can fully ignore important questions about who is entitled to access the courts to vindicate important rights, and how rights of access are distributed among litigants with and without means. Access to justice in the civil arena encompasses a broad spectrum of issues and concerns, though arguably none more compelling than the regulation of relationships between children and their parents—long recognized as “fundamental” and consequently entitled to the constitutional protections afforded by the Fourteenth Amendment.⁴ It is the purpose of this essay to explore obstacles facing indigent parents confronted with challenges to their relationships with their children, and to urge reconsideration of the 1981 decision of the Supreme Court⁵ that underpins the jurisprudence limiting indigents’ access to counsel in matters involving fundamental civil rights.

II. THE LEGACY OF *LASSITER*: *FRASE V. BARNHART*

In broad theory, all recognized family relationships are of course entitled to the same presumptive protections of the Constitution, regardless of the relative depth of the involved family members’ resources. In practice, however, there is little question that access to counsel continues to be a critical factor in determining the extent to which parents and children are able to successfully safeguard fundamental rights. This point is powerfully illustrated by the plight of a woman named Deborah Frase, whose recent battle to preserve her right to parent her three-year-old son was documented in *Frase v. Barnhart* in the Maryland Appellate Court.⁶ During an eight-week period of incarceration for charges related to her possession of marijuana, Ms. Frase made informal arrangements through her mother for an unrelated couple—Mr. and Mrs. Barnhart—to care for her son Brett.⁷ Following her release, Ms. Frase recovered custody of her son, but several days later the Barnharts filed an action to regain custody of the child.⁸

domestic violence cases, defendants who face little risk of significant sanctions are entitled to counsel, while victims whose lives are at risk are expected to seek legal protection without legal assistance.” Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1799 (2001).

4. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (citing a long list of Supreme Court cases acknowledging parents’ fundamental and constitutionally protected liberty interests in the companionship, care, custody, and management of their children).

5. *Lassiter*, 452 U.S. at 18.

6. *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003).

7. *Id.* at 116.

8. *Id.*

In the proceedings that followed, Ms. Frase was forced to proceed *pro se*, unable to afford a private attorney and unable to secure counsel through any of the overwhelmed legal services agencies offering legal representation to indigent clients.⁹ Prior to the hearing, she conducted no discovery or preparation of her defense. During the hearing itself, she failed to prevent the admission of irrelevant and prejudicial hearsay evidence, challenge the characterization of the competing litigants as “good samaritans” who had formed an important bond with her son during the six weeks he had been in their care, or present any applicable law or legal argument as to the limits of the assigned domestic relations master’s authority to interfere with the custodial rights and responsibilities of a fit parent.¹⁰ Perhaps even more damaging was Ms. Frase’s failure to discover or raise in a timely fashion a claim of conflict of interest based on a past attorney-client relationship between the master and Ms. Frase’s mother. In the previous case, Ms. Frase had been sued by her mother for custody of an older child, based on nearly identical allegations that Ms. Frase was not a responsible parent.¹¹ In *Barnhart*, Ms. Frase’s mother not only orchestrated the placement of the child, but also testified as a witness on behalf of the Barnharts,¹² leaving the master’s alignment with one of the parties unmistakably clear and giving rise to a conflict of interest that ought to have been readily apparent to any young lawyer.¹³

It is difficult to escape the conclusion that Ms. Frase’s case was “badly compromised” by her proceeding *pro se*.¹⁴ At the conclusion of the proceedings in the trial court, though Ms. Frase was found to be fit and was allowed to recover custody of her child, her rights as a

9. *Id.* at 116–17.

10. Brief for Appellant at 29–32, *Frase v. Barnhart*, 849 A.2d 114 (Md. 2003) (No. 6) (brief on file with author) [hereinafter Clinic Brief].

11. *Id.* at 14–15.

12. *Id.* at 15.

13. Maryland’s Code of Conduct for Judicial Appointees prohibits “participat[ion] in a proceeding in which the judicial appointee’s impartiality might reasonably be questioned, including but not limited to instances where: (a) the judicial appointee has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; [or] (b) the judicial appointee served as lawyer in the matter in controversy . . .” Md. Rules, Rule 16-814, CCJA Canon 3(c)(1) (West 2004).

14. Clinic Brief at 29, *Frase* (No. 6). In its *Amicus* Brief to the United States Supreme Court, the American Bar Association observed that individuals facing the termination of their parental rights are frequently even less equipped to represent themselves than most *pro se* litigants because they often lack more than a minimal education. Brief of Amicus Curiae American Bar Association at 9–10, *Lassiter v. Dep’t of Soc. Serv. of Durham*, 452 U.S. 18 (1981) (No. 79–6423).

custodial parent were seriously circumscribed.¹⁵ Not only was her custody of her child made contingent upon her willingness to reside in a “family support center,” but she was also obliged to permit visitation between her son and the Barnharts, at a location of the court’s choosing.¹⁶ Moreover, without any of the requisite findings that would have warranted initiating a child protection action,¹⁷ the trial court made Ms. Frase subject to the continuing supervision of both the court and the Department of Social Services.¹⁸ In the wake of the United States Supreme Court decision in *Troxel v. Granville*,¹⁹ all of these conditions were plainly unconstitutional.²⁰ Only with the able assistance of volunteer appellate counsel was Ms. Frase ultimately able to have her full panoply of custodial rights restored.²¹

Ms. Frase’s plight is highly reminiscent of that of Abby Gail Lassiter, whose *pro se* efforts to defend herself in an action to terminate her parental rights led in 1981 to a narrow 5–4 decision of the United States Supreme Court. In its holding, the Court declined to acknowledge a broad, constitutionally-based right to counsel for indigents in proceedings seeking to terminate parental rights.²² Justice Blackmun’s dissenting opinion in *Lassiter* documents examples of Ms. Lassiter’s utter inability to comprehend the legal proceedings going on around her, including her failures to discern the purpose of cross-examination, object to inadmissible testimony, or argue on her own behalf.²³ Despite the obvious prejudice to Ms. Lassiter arising from her lack of representation, the Court refused to require the same type of comprehensive requirement of counsel for indigents provided to

15. *Frase*, 840 A.2d at 117.

16. *Id.*

17. For example, courts may require, in limited circumstances, for the periodic review of custody situations for children identified as “children in need of assistance.” *Id.* at 126.

18. *Id.*

19. *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (limiting the power of the courts to impose conditions on a fit parent’s exercise of her custodial rights).

20. *Frase*, 840 A.2d at 117. The court in *Frase* relied on *Troxel* in striking down the Master’s interference with Ms. Frase’s custodial rights as a fit parent. *Id.* at 128–29.

21. *Id.* at 125–29.

22. *Lassiter v. Dep’t of Soc. Serv. of Durham*, 452 U.S. 18, 33–34 (1981). In the case, the indigent and incarcerated mother was without counsel at a hearing to terminate her parental rights. *Id.* at 21. However, because the mother did not assert at the hearing that she was indigent and required court-appointed counsel and because the trial court found that the mother completely failed to take any steps to obtain counsel prior to the hearing, the court allowed the hearing to proceed without counsel for the mother. *Id.* at 22. On appeal, the United States Supreme Court sustained this decision under the Fourteenth Amendment because, in the Court’s view, the trial court properly balanced the various interests involved in this civil case. *Id.* at 33.

23. *Id.* at 53–56 (Blackmun, J., dissenting).

criminal defendants under *Gideon v. Wainwright*.²⁴ Instead, while it recognized the fundamental, constitutionally-protected liberty interests at stake in a termination action, the Court nevertheless concluded that states should be free to conduct an individualized balancing of factors in each case, under the three-part test described in *Mathews v. Eldridge*.²⁵

III. THE POST-*LASSITER* LANDSCAPE: CURRENT PRACTICES GOVERNING APPOINTMENT OF COUNSEL FOR INDIGENT CIVIL LITIGANTS

Since 1981, the Court's opinion in *Lassiter* has served as a touchstone for every judicial consideration of the rights of access to the courts for poor people in civil cases. With the door left open to experimentation by the states, indigent civil litigants in the family law arena face a wide array of responses to requests for appointed counsel, as well as related obstacles to court access. In child protection cases involving state-initiated actions to terminate parental rights, the right of an indigent parent to appointed counsel continues to be widely recognized. At the time of the decision in *Lassiter*, all but seventeen states had recognized such rights, either as a matter of constitutional law²⁶ or statute.²⁷ Indeed, since 1979, only one state has curtailed rights to counsel available prior to *Lassiter*,²⁸ and seven states that had

24. In *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), the Court recognized an "indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty." *Lassiter*, 452 U.S. at 25. However, the Court then distinguished the present case by finding that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel." *Id.* at 26.

25. In the Court's holding, it identified three balancing factors established by *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Id.* at 31. First, the parent's interest must be extremely important. *Id.* Next, there is a high risk of error without parental counsel. *Id.* Finally, the state's interest is low. *Id.*

26. See, e.g., *State ex rel. Heller v. Miller*, 399 N.E.2d 66, 70 (Ohio 1980) ("In the absence of sufficient justification by the state, [indigent] parents must be provided with a transcript and appointed counsel or they will be unconstitutionally deprived of their right of appeal"); *Crist v. Div. of Youth & Family Servs.*, 320 A.2d 203, 211 (N.J. Super. Ct. Law Div. 1974) (discussing how substantial loss of privileges, including loss of child, should not occur without having the opportunity to have counsel assigned without cost); *State ex rel. Lemaster v. Oakley*, 203 S.E.2d 140, 145 (W. Va. 1974) (holding when parents face possible termination of parental rights, Due Process requires court-appointed counsel for parents); *In re Ella R.B.*, 285 N.E.2d 288, 290 (N.Y. 1972) (stating indigent person faced with loss of child and possible criminal charges is entitled to assistance of counsel).

27. See Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: the States' Response to Lassiter*, 14 *TOURO L. REV.* 247, 262, 278 tbl.3 (1997) (listing and describing the statutory grant of parental counsel in several states).

28. *Id.* at 262 (noting that although a Mississippi statute granted parental counsel at the time the complaint in *Lassiter* was filed, that statute was repealed in 1979, before the Court reached a decision in the case). A 1997 study of counsel for parents in termination cases concluded that

previously limited appointments now provide statutorily for the mandatory appointment of counsel in termination cases, either automatically or on request of a financially-eligible parent.²⁹ As a consequence, despite the limitations of the Fourteenth Amendment described in *Lassiter*, most indigent parents continue to be entitled to free counsel when they are forced to respond to charges of parental unfitness brought by the state.³⁰

However, in situations other than state-initiated actions to terminate parental rights, the entitlement to counsel is far less certain, even when the potential consequences of the action are every bit as dire. Most significantly, when a suit to terminate parental rights is brought by a private individual rather than by the state, indigent parents commonly have no guarantee of free counsel.³¹ Not uncommonly, in private

indigent parents are rarely afforded counsel in that state. *Id.* at 263 n.80 (stating that in Mississippi parents must find counsel or represent themselves as counsel rarely appointed).

29. Some of the states which recognized the right of an indigent parent to counsel include: Florida (FLA. STAT. ANN. § 39.807(1)(a) (West 2003)); FLA. R. JUV. PROC. R. 8.515(a)(2) (2003); North Carolina (N.C. GEN. STAT. § 7B-1101 (2003)); South Carolina (S.C. CODE ANN. § 20-7-1570 (Children's Code 2004)); Texas (TEX. FAM. CODE ANN. § 107.013(a)(1), (2) (2004)); Vermont (VT. STAT. ANN. TIT. 33, § 5519(c) (2003)); Virginia (VA. CODE ANN. § 16.1-266(C) (2004)); and West Virginia (W. VA. CODE ANN. 49-6-2(a) (2004)). For additional information about state-specific statutes and practices, see Patricia C. Kussmann, Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 92 A.L.R. 5th 379 (2001).

30. See, e.g., *In re J.C.*, 108 S.W.3d 914, 916 (Tex. App. 2003) (describing how the appointment of an attorney for indigent parents contesting the termination of their parental rights is mandatory); *J.A.H. v. Calhoun County Dep't of Human Res.*, 846 So. 2d 1093, 1095 (Ala. Civ. App. 2002) (stating that failure to appoint counsel for indigent father was improper); *In re Jeisean M.*, 812 A.2d 80, 84 (Conn. App. Ct. 2002) (holding indigent parent in termination of parental rights case statutorily entitled to counsel); *In re Adoption of Olivia*, 761 N.E.2d 536, 541 (Mass. App. Ct. 2002) (stating that an "indigent parent is entitled to court-appointed counsel in proceedings that terminate parental rights"); *Little v. Little*, 487 S.E.2d 823, 824-25 (N.C. Ct. App. 1997) (explaining that if parent is present and does not waive counsel, appointment is mandatory); *Wofford v. Eid*, 671 So. 2d 859, 863 (Fla. Dist. Ct. App. 1996) (failing to advise parent of right to counsel required reversal of termination order); *In re R.R.*, 587 N.E.2d 1341, 1343 (Ind. Ct. App. 1992) (holding that failure to appoint counsel for disabled mother in dependency hearings leading to termination action required reversal of order terminating parental rights); *In re S.R.H.*, 809 P.2d 1, 3 (Kan. Ct. App. 1991) (stating that constitutional rights of due process not contingent on an indigent parent making request for an attorney); *In re M. E. M.*, 635 P.2d 1313, 1317 (Mont. 1981) (appointing counsel is mandatory for indigent Native American parent facing termination action under Indian Child Welfare Act, 25 U.S.C. § 1912(b) (2000)); *In re Keifer*, 406 N.W.2d 217, 219 (Mich. Ct. App. 1987) (noting that failure to appoint counsel for indigent father at outset of proceedings leading to termination of parental rights was reversible error); *State ex rel. Dep't of Human Serv. v. Perlman*, 635 P.2d 588, 589-91 (N.M. Ct. App. 1981) (failing to explain right to counsel to indigent mother in parental rights termination proceeding violates Due Process).

31. See, e.g., *Rosewell v. Hanrahan*, 523 N.E.2d 10, 12 (Ill. App. Ct. 1988) (responding parent not entitled to free counsel in termination action brought by private individuals); *Baird v. Harris*, 778 S.W.2d 147, 148 (Tex. App. 1989) (finding that a statute providing for indigent counsel for

custody and adoption disputes, parties frequently trade allegations of child abuse or neglect that are integral to a charge of unfitness against the parent or parents whose rights are threatened. As a consequence, in cases where the involvement of child protection services is significant, an indigent client may be able to establish the necessary element of state action, and thus at least argue for the application of *Lassiter's* balancing test. For example, in *In re Adoption of K.L.P.*, a mother whose fitness was challenged in an adoption proceeding sought and was denied appointed counsel by the trial court.³² The trial court then found the mother unfit and granted the request for termination of parental rights.³³ On the mother's appeal, the court first appointed her appellate counsel, and then remanded to the trial court after finding that the failure to grant her free trial counsel was a violation of her constitutional rights.³⁴ On review of the County's objection to the order requiring it to pay appellate counsel, the Illinois Supreme Court subsequently agreed to apply the constitutional test of *Lassiter*, finding the necessary element of state action in the history of prior juvenile court proceedings involving the same minors.³⁵ Moreover, the court held that the mother was entitled to free legal counsel, both with respect to the appeal, and on remand in the trial court.³⁶

To be sure, the end result in *K.L.P.* was positive, from the perspective of indigent parents seeking assistance in the protection of fundamental rights. However, as long as *Lassiter* continues to be the law of the land, *K.L.P.'s* application will be limited. The court in *K.L.P.* considered and rejected an argument by the mother that the use of the judicial system to terminate parental rights is, by definition, state action, no matter who initiates the petition.³⁷ The decision that the mother was entitled to free counsel instead was based on the specific procedural history of the case, a history which the court itself noted was particularly unusual.³⁸ While the presence of child protection investigators in family disputes that land in adoption court may occur with some frequency, it is much less

parents in termination actions brought by a governmental agency did not clearly extend to private termination proceedings).

32. *In re Adoption of K.L.P.*, 735 N.E.2d 1071 (Ill. 2002).

33. *Id.* at 1074.

34. *Id.* at 1080–82.

35. *In re Adoption of K.L.P.*, 763 N.E.2d 741, 749–53 (Ill. 2002).

36. *Id.* at 755.

37. *Id.* at 750–51. This argument was based primarily on the decision of the United States Supreme Court in *Shelley v. Kraemer*, in which the Court held that use of the state's judicial process to enforce a racially restrictive covenant was state action violating the equal protection clause of the fourteenth amendment. *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948).

38. *K.L.P.*, 763 N.E.2d. at 746.

common for a private adoption to be predicated on a prior proceeding in the juvenile court, taking *K.L.P.* out of the norm of private infant or step-parent adoptions.

Even assuming that the logic of *K.L.P.* would be found persuasive in other states, individuals facing the possible termination of their parental rights may confront a broad range of other barriers to access to the courts left untouched by the constitutional parameters of *Lassiter*, *K.L.P.*, and *Lassiter's* other progeny. These barriers come in many forms, both direct and indirect. Even when an indigent's right to counsel is recognized, many people clearly lacking the means to hire an attorney may not be able to satisfy applicable standards of indigence that vary widely in their degrees of strictness.³⁹ The constitutional guarantee of a right to counsel is of little comfort to an individual who is too poor to hire an attorney, but insufficiently impoverished to qualify as a pauper.⁴⁰

Poor people facing the termination of parental rights may be effectively prevented from meaningful access to justice not only by the deprivation of counsel, but also by the imposition of litigation access fees,⁴¹ necessary ongoing litigation expenses,⁴² the requirement of advance security or payment for litigation expenses,⁴³ and the taxation

39. See Young, *supra* note 27, at 263 n.81 (discussing the various "indigence" standards used in different states and listing several statutory examples).

40. Federal law prohibits individuals earning more than one-hundred and twenty-five percent of poverty guidelines from receiving federally-funded free legal services. 45 C.F.R. § 1611.3(b) (2004). Current poverty limits for the forty-eight contiguous states and the District of Columbia are \$9,310 annually for an individual, and \$18,850 annually for a family of four. Annual Update of the Health & Human Services Poverty Guidelines, 69 Fed. Reg. 7335 (Feb. 13, 2004).

41. E.g., Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1158–60 (1973) (comparing *Boddie v. Connecticut*, 401 U.S. 371 (1971) (striking down divorce filing fee as violative of due process) with *United States v. Kras*, 409 U.S. 434 (1973) (upholding filing fee charged to indigent petitioner seeking bankruptcy) and *Ortwein v. Schwab*, 410 U.S. 656 (1973) (refusing to overturn appellate court filing fee imposed on welfare recipients challenging benefit cuts)). Professor Michelman criticizes the Court's emphasis on the nature of the interest at stake as a basis for determining when indigents are constitutionally entitled to the waiver of litigation access fees. Michelman, *supra*, at 1162.

42. Professor Michelman uses the term "equipage" to describe the ongoing necessary expenses associated with the effective presentation of a case, including costs and fees for consultants, expert witnesses, investigators, stenographers, and printing. Michelman, *supra*, note 41, at 1163; see also SMITH, *supra*, note 1, at 20–30 (exploring history of trial costs, present costs and costs at the appeals stage and how these costs negatively impact the judicial process); David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 281, 285–89 (1990) (discussing how extra expense of expert testimony can adversely effect indigent litigants); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1873–84 (2002) (exploring the concept of "equipage equality" and adverse impact on the merit and validity of judicial outcomes when litigants bring unequal resources to the table).

43. See *Selletti v. Carey*, 173 F.3d 104, 112 (2d Cir. 1999) (discussing whether plaintiff's

of costs.⁴⁴ Each of these categories of barriers, though subject to significant differences in the legal and policy arguments made in support of their validity, brings with it the same practical result for an indigent potential litigant whose ability to pursue a cause is dependent on satisfaction of a debt. The relationship between the imposition of court costs and indigent access is hardly news; Reginald Heber Smith concluded in 1919 that the financial costs of bringing and prosecuting a civil action “work[ed] daily to close the doors of the courts to the poor.”⁴⁵ The scope of an indigent’s right to access appellate courts in particular has been the subject of much more recent litigation, guided in large part by the Supreme Court’s decision in *M.L.B. v. S.L.J.*⁴⁶

M.L.B. affirmed the right of an indigent parent in a termination action to be free from the imposition of a substantial fee for trial transcripts.⁴⁷ While courts and commentators have argued over the scope of the Court’s ruling,⁴⁸ its only certain application is to indigent parents whose

inability to post security warrants dismissal); *Johnson v. Kassovitz*, No. 97 Civ. 5789, 1998 U.S. Dist. LEXIS 15059, at *5 (S.D.N.Y. Sept. 17, 1998) (requiring plaintiff to file a \$50,000 bond for potential costs); *Bressler v. Liebman*, No. 96 Civ. 9310 (LAP), 1997 U.S. Dist. LEXIS 11963, at *26 (S.D.N.Y. Aug. 14, 1997) (ordering dismissal of plaintiff’s action unless, within five days, plaintiff files a \$50,000 bond as security for defendants’ fees and costs); John A. Gliedman, *Access to Federal Courts and Security for Costs and Fees*, 74 ST. JOHN’S L. REV. 953 & n.1 (Fall 2000) (“Federal courts often entertain motions as to whether security should be posted for potential costs and attorney fees that may be awarded at the end of the action.”). *See also* *Crocker v. First Hudson Associates*, 569 F. Supp. 97, 104 (D. N.J. 1983) (holding that permission to proceed under federal *in forma pauperis* statute does not relieve plaintiff of the obligation to bond for damages).

44. *See, e.g.*, *People v. Nicholls*, 359 N.E.2d 1095, 1104 (Ill. App. Ct. 1977) (stating practice of assessing costs and fees against indigent criminal defendants seeking civil post-conviction relief not unconstitutional). In the federal system, the pauper’s statute, authorizes a judgment to be rendered for costs at the conclusion of an unsuccessful action brought by a litigant who has been permitted to sue *in forma pauperis*. 28 U.S.C. § 1915(e) (2000); *see, e.g.*, *Moore v. McDonald*, 30 F.3d 616, 621 (5th Cir. 1994) (noting district court properly ordered indigent plaintiff to pay court costs upon dismissal of complaint as frivolous); *Weaver v. Toombs*, 948 F.2d 1004, 1008 (6th Cir. 1991) (explaining section 1915(e) allows both district and circuit courts to enter judgments for costs against indigents bringing unsuccessful actions).

45. SMITH, *supra*, note 1, at 28. Smith traces the historical development of court-imposed costs, which were unknown under English common law and developed entirely as creatures of statute. *Id.* at 20–22.

46. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

47. *Id.* at 129.

48. *See, e.g.*, *In re J.M.C.H.*, No. M2002-01097, 2002 WL 31662347, at *5 (Tenn. Ct. App. 2002) (reversing termination order entered without supporting record or transcript); *In re Joshua M.*, 78 Cal. Rptr. 2d 110 (Cal. 1998) (declining to extend *M.L.B.* to require payment for reunification services); Lloyd C. Anderson, *The Constitutional Right of Poor People to Appeal Without Payment of Fees: Convergence of Due Process and Equal Protection in M.L.B. v. S.L.J.*, 32 U. MICH. J.L. REFORM 441 (1999) (stating that the *M.L.B.* decision could have sweeping effects but suggesting *M.L.B.* may not be viable precedent); J.T. Price, *An Improper Extension of Civil Litigation by Indigents: M.L.B. V. S.L.J.*, 20 HARV. J.L. & PUB. POL’Y 905 (1996)

rights have been terminated in a child protection proceeding initiated by the state. Other parents in private termination actions not covered even by the limited constitutional protections of *Lassiter* remain subject to the kinds of fees struck down in *M.L.B.* A potential litigant who lacks the resources to pay a \$500 bill is just as effectively barred from court, regardless of whether that charge is intended to cover the cost of an expert or transcript, rather than an attorney.

IV. THE NEED FOR A “CIVIL *GIDEON*”

Many of the indigent parents who face termination of their rights, to borrow the often cited words of Justice Black, are “haled into court”⁴⁹ to defend themselves, against charges brought either by the state or by individuals seeking to adopt their children against their will. However, the reality of adoption includes as well a world of gray market practices that operate under the radar of both the courts and child welfare agencies responsible for regulatory oversight. Twenty-five years ago, Richard Posner and Elisabeth Landes imagined a free market in which babies could be bought and sold unfettered by oppressive government regulation, resulting hypothetically in a reduction in the production of less “desirable” children and a concomitant increase in permanence for children deemed easier to place by market forces.⁵⁰ Posner’s utopia seems distant indeed from the lucrative and loosely-regulated world of private adoptions, where financial incentives to cut corners of ethics and law abound. Stories are told of adoption agencies in Chicago and

(criticizing *M.L.B.* because decision has no basis in Constitution and failing to promote test to determine when litigant entitled to free appeals); Jason T. Jacoby, Note, *M.L.B. v. S.L.J.*: “*Equal Justice*” for *Indigent Parents*, 32 U. RICH. L. REV. 571 (1998) (discussing how holding in *M.L.B.* has far reaching implications including greater demands on state resources); Kathleen Prieto, Casenote, *M.L.B. v. S.L.J.*: *Constitutional Guarantees of Equal Justice for the Poor in Proceedings to Terminate Parental Rights*, 3 LOY. POVERTY L.J. 183 (1997) (examining the problems with the Court’s holding in *M.L.B.* but noting that the Court came close to achieving equal justice for indigent parents).

49. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”).

50. Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 334–39 (1978). Posner refined his theory in several subsequent publications, most notably in a 1987 article. Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B. U. L. REV. 59, 64 (1987) (analogizing “for heuristic purposes (only!) . . . the sale of babies to the sale of an ordinary good, such as an automobile or a television set”). Posner’s market theory has been roundly criticized. *See also*, Tamar Frankel & Francis H. Miller, *The Inapplicability of Market Theory to Adoptions*, 67 B.U. L. REV. 99, 99–101 (1987) (discussing how infants, unlike adults, have no control over their actions and therefore government and society should regulate adoption); Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 NEW ENG. L. REV. 913, 914–15 (1994) (stating Posner’s economic theory is flawed because it would allow agencies to manipulate prices of first-rate and second-rate babies).

elsewhere that prey upon populations of financially and emotionally vulnerable women, in particular Caucasian immigrant communities capable of feeding a lucrative market for healthy white babies. Recurring predatory practices designed to free such infants for adoption include threats,⁵¹ false or unenforceable promises,⁵² and the provision of financial or other incentives that border on the illegal purchasing of children, such as “loan agreements” that are forgiven once an adoption is finalized.⁵³

Women who fall victim to such predatory practices, for various reasons, may have little incentive to report abuses or violations of law. Disincentives to disclosure may include shame, fear of reprisals, or lack of support from family. But even for those birth parents who do seek to raise questions about abusive adoption practices, obstacles to gaining access to the courts may be virtually insurmountable. Recently, the Loyola ChildLaw Clinic represented a woman who fell victim to a particularly unscrupulous adoption agency. The client was a poor, non-English speaking immigrant mother from Poland, who gave birth to her fourth child in September 2003. Her financial and emotional circumstances were dire; though still married, she had been abandoned in turn by both her husband and her newborn child’s father, leaving her to face the prospect of supporting four young children on the income from several part-time, menial, low-wage jobs.

Out of concern for her ability to provide for her newborn baby, the mother, on the day of his birth, contacted an adoption agency about the possibility of placing the child up for adoption. The caseworker who responded to the call met with the mother twice over three days, accompanied during the second meeting by her agency’s executive director. During both meetings, the agency representatives dispensed with any approximation of adoption best practice; offering the mother

51. Two recent cases brought to the attention of the Loyola ChildLaw Clinic involved adoption agencies that called, or threatened to call child protective services, to have older siblings removed if birth parents refused to surrender their infant children for adoption.

52. Adoption agencies in Illinois routinely promise birth parents continuing contact with their children post-adoption, suggesting through phone book ads and promotional materials that aspects of the adoption will be “open.” Less scrupulous agencies routinely fail to disclose that such promises are absolutely unenforceable under Illinois law. See *In re M.M.*, 619 N.E.2d 702, 711–12 (Ill. 1993) (noting that the Illinois Adoption Act precludes the enforcement of any conditions attached to the surrender of parental rights).

53. Illinois, like most states, permits the payment of “reasonable living expenses” to a parent contemplating the surrender of a child for adoption, but otherwise prohibits the buying and selling of children. Illinois Adoption Compensation Prohibition Act, 720 ILL. COMP. STAT. 525/4.1(a) *et seq.* (2002); see also NEV. REV. STAT. § 127.287(1) (2004) (prohibiting payment to or acceptance by natural parent of compensation in return for placement for or consent to adoption of child); S.C. CODE ANN. § 16-3-1060 (2003) (codifying the same prohibitions as Nevada).

neither arms length counseling, nor even the most basic assistance of a proper translator. More significantly, as inducements to the mother to give up her child for adoption, they made and repeated promises about continuing post-adoption contacts that, as noted above, were utterly unenforceable.⁵⁴ In reliance on these hollow promises, the mother signed an irrevocable surrender of her parental rights some 74 hours after the child's birth.⁵⁵ For its limited efforts, the agency received a staggering fee of \$50,000 from the family receiving the child.⁵⁶

In Illinois, a surrender to adoption may be set aside upon proof of either fraud or duress.⁵⁷ However, the governing statute provides no free counsel to parents, unless they are alleged to be unfit based on a charge of mental impairment, illness, or retardation.⁵⁸ Had this mother been charged by the state in a petition to terminate her parental rights, she would unquestionably have been entitled to counsel under state statute.⁵⁹ As a petitioner claiming that her rights were violated in the procurement of her surrender to adoption, she had no entitlement to free legal assistance, despite the fact that her relationship with her child was no less in jeopardy than if she had been named as a respondent in a petition charging her as an unfit parent.

This mother was fortunate to secure volunteer legal counsel able to assist her in bringing a claim against the adoption agency seeking the

54. *See, supra* note 52 (recounting how adoption agencies in Illinois promise birth parents contact with their child after adoption, which is unenforceable under Illinois law). Illinois does not allow for the enforcement of post-adoption contacts, however, some states do recognize post-adoption contacts. *See, e.g.*, N.M. STAT. ANN. § 32A-5-35 (Michie 2004) (allowing for contact between parents of adopted child and petitioner or relatives of adoptee if agreed upon or in adoption decree); OR. REV. STAT. § 109.305(2) (2004) (dictating that nothing in adoption laws of Oregon shall prevent birth parents and adoptive parents from entering into written agreement providing for contact with adoptee and birth parents); WASH. REV. CODE ANN. § 26.33.295(1) (West 2004) (mandating that nothing in Washington Code will be construed to prohibit parties to an adoption proceeding from entering into agreements regarding adoptee contact with adoptive parents or birth parents).

55. Under Illinois law, surrenders to adoption may not be signed until seventy-two hours after the child's birth. 750 ILL. COMP. STAT. 50/9(A) (2002).

56. This exorbitant charge is permitted under Illinois law, which requires adoption agencies to account for their fees but neither limits what an agency can require an adopting family to pay in return for the placement of a child, nor sets standards defining what constitutes a reasonable fee. 750 ILL. COMP. STAT. 50/14(A) (2002). In contrast, the Department of Health and Human Services' National Adoption Information Clearinghouse reports that the most expensive categories of domestic adoptions typically cost adopting parents a maximum of \$40,000. *See* NAT'L ADOPTION INFO. CLEARINGHOUSE, COSTS OF ADOPTING: A FACTSHEET FOR FAMILIES I (June 2004) (providing information about the potential costs of adoption through several sources), available at http://naic.acf.hhs.gov/pubs/s_cost/s_costs.pdf.

57. 750 ILL. COMP. STAT. 50/11(a) (2002 & Supp. 2004).

58. 750 ILL. COMP. STAT. 50/13(B)(c) (2002).

59. 705 ILL. COMP. STAT. 405/1-5 (2002).

recovery of her child,⁶⁰ but her situation nevertheless went rapidly from bad to worse. Her petition to vacate the surrender—brought two weeks after the birth of the child—charged the adoption agency with fraud in the circumstances surrounding the procurement of her surrender.⁶¹ At the outset of the case, the trial judge proposed the appointment of a guardian *ad litem* (“GAL”) to safeguard the “best interest” of the child. Attorneys for both the mother and the adoption agency objected to the appointment as premature, arguing that the claim of fraud framed a dispute in which the mother and the adoption agency were the only interested parties, and that the so-called “best interest” of the child would only become an issue if the charge of fraud was resolved in the mother’s favor and her claim for custody thereby became ripe for review. The court nevertheless appointed a GAL over objection, with no comment as to either the statutory authority for the appointment⁶² or how the GAL would be paid.

At the conclusion of an expedited two-day hearing, the trial court denied the mother’s claim of fraud and dismissed her petition. Subsequently, though she had participated only passively in the trial court proceedings, the court-appointed GAL, at the conclusion of the case, submitted a petition for an award of attorney’s fees in the amount of \$3,300. Without any regard for the relative circumstances of the parties, the trial judge apportioned the bill evenly between a profitable tax-paying adoption agency that had just been paid \$10,000 over the highest going rate for private adoptions⁶³ for a few short hours of work, and an indigent single mother with three young children. The trial court thus entered a judgment against the birth mother for \$1,650, imposing

60. Early in 2004, the Loyola ChildLaw Clinic assisted private volunteer counsel in a similar case, involving a challenge to an irrevocable surrender to adoption based on both fraud and duress. Counsel successfully sought to be appointed by the trial court under *K.L.P.*, based on the pendency of a child protection action initiated at the direction of the judge presiding over the petition to vacate the surrender. *See In re Adoption of K.L.P.*, 763 N.E.2d 741, 748–50 (Ill. 2002) (examining past US Supreme Court decisions that recognize indigent parent’s right to appointed counsel during parental rights termination process). This circumstance, like that in *K.L.P.*, was highly unusual; the author is aware of no other situation in which an indigent petitioner seeking to vacate a surrender to adoption in an independent action has been afforded with appointed counsel.

61. Contingent upon successful prosecution of this claim, the mother also sought a writ of *habeas corpus*, aimed at recovering custody of her child, who had been placed by the agency in a pre-adoptive foster home.

62. The Illinois Adoption Act mandates the appointment of a guardian *ad litem* in actions where a child is sought to be adopted, 750 ILL. COMP. STAT. 50/13(B)(a) (2002), but otherwise makes no mention of a broader authority to appoint a GAL, in situations encompassing challenges to the legitimacy of a surrender.

63. *See supra* note 56 and accompanying text (discussing the amount awarded to the agency and the Illinois law that allows this type of payment).

what amounted to a trial tax for her unsuccessful effort to vindicate her rights as a birth parent.⁶⁴

The judgment order against the mother in this case was, to say the least, jarring. Admittedly, she was not precluded outright from accessing the courts to bring a complicated legal claim.⁶⁵ Nevertheless, she was wholly dependent on volunteer legal counsel. Moreover, at the conclusion of the hearing, she was subjected to a substantial financial penalty well beyond her means, imposed on her for seeking to vindicate fundamental rights through the judicial process. The penalty was all the more disturbing in light of the considerable doubt over whether the appointment of a GAL had served any meaningful purpose.

The threat of being taxed with such significant costs, notwithstanding the client's inability to pay, presents disturbing implications about the fundamental ability of civil courts to provide a forum responsive to the needs of poor people. Commentators have acknowledged that even though post-adjudication taxation orders may not have the same preclusive effect on access to judicial remedies as front-end litigation access fees, they nevertheless stand as a powerful deterrent to a litigant seeking to vindicate legitimate, though uncertain rights.⁶⁶ Even for the judgment-proof indigent client, against whom such costs cannot be collected, both the threat of garnishment and the prospect of negative credit reports are significant considerations in any calculation about whether to risk the incursion of any litigation costs.⁶⁷ As one commentator noted, a rule hinging the taxation of costs on the litigant's degree of success turns judicial recourse into a "high stakes economic gamble for the indigent litigant."⁶⁸ For clients aware that they will be obliged to pay post-judgment litigation costs without regard to the outcome of the case, the deterrent effect is even greater. It is virtually inconceivable that the mother discussed above would have been able to

64. On appeal, counsel alleged that the taxation of the GAL's fees and costs against her amounted to a violation of her rights to both equal protection and due process of law, as well as a violation of public policy. The GAL ultimately agreed to settle her claim for a nominal payment.

65. Indigent litigants in Illinois, as in many states, are eligible for the waiver of fees and costs upon the filing of a pauper's petition in the trial court. 735 ILL. COMP. STAT. 5/5-105 (2002). Appellate rules require the payment of a \$25 filing fee for civil appellants unless excused by law, though in practice the appellate courts routinely consider motions for leave to proceed *in forma pauperis*. For indigent clients in civil cases represented by civil legal services providers, the Illinois Code of Civil Procedure also allows for the waiver of all fees and costs relating to filing, appearing, transcripts on appeal, and service of process, upon the submission of a certification of indigence by the client's lawyer. 735 ILL. COMP. STAT. 5/5-105.5 (2002).

66. See Medine, *supra* note 42, at 293 (considering adverse effects of post-judgment taxation of costs on an indigent clients).

67. *Id.* at 293 n.56.

68. *Id.* at 293.

proceed with her case had she been confronted in advance with a \$1,650 fee.

Nor is it particularly satisfying to deem this penalty proper simply because the mother stood in the posture of a petitioner rather than a respondent. Much of the commentary questioning the ongoing legitimacy of *Lassiter* has suggested tying the extension of a right to counsel to civil litigants who are haled into court unwillingly as respondents.⁶⁹ Indeed, the majority opinion in *Lassiter* lends support for this view, by opening the door to the consideration of individual circumstances that may have little to do with the nature of the interests at stake. However, to the extent that the Supreme Court's jurisprudence regulating the imposition of barriers to judicial access truly turns on the nature of the interests involved, it seems to make little conceptual sense to mete out procedural protections based solely on the positioning of the parties. Justice Blackmun's dissenting opinion in *Lassiter* points out that prior to that decision, the Court's tradition in applying the test of *Mathews* had been to conduct case-by-case consideration of different *decision-making contexts*, not of different *litigants'* circumstances within a given context.⁷⁰ What ought to weigh in the *Mathews* calculus, according to Justice Blackmun, are not the particular facts of each case, but rather the nature of the generic interests shared by all parents threatened with termination of parental rights, and by the State in all cases where a parent's conduct implicates the State's role as *parens patriae*.⁷¹ Similarly, Justice Harlan's opinion in *Boddie v. Connecticut* urges that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard,"⁷² without regard to the accidents of procedural posture. Indeed, especially in the family law arena, procedural posture may well be nothing more than an unhappy chance of circumstance, reflecting only the results of the race to court between competing litigants.⁷³

69. E.g., Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel For Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y 1, 2 (2003) (arguing for special protection of indigent civil defendants, who unlike indigent civil plaintiffs lack even the prospect of a contingent recovery).

70. *Lassiter v. Dep't of Soc. Serv. of Durham*, 452 U.S. 18, 49 (1981) (Blackmun, J., dissenting).

71. *Id.*

72. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

73. Even outside the family law arena, the procedural posture in which a litigant stands may reflect little about the nature of the interests sought to be vindicated. Professor Michelman begins his exploration of the theoretical underpinnings of the Court's decisions on litigation access fees with two posited hypotheticals, both involving a party's efforts to seek recourse for a finance company's wrongful possession of a vehicle. Michelman, *supra* note 41, at 1154-55. The distinctions in his hypotheticals are substantively inconsequential, but leave one litigant in the

Much more significant are the concerns about the extent to which the state exercises exclusive control over the mechanism by which a party's rights may be adjusted or circumscribed, and the fundamental nature of the interests involved. The court in *K.L.P.* considered and rejected the argument that a finding of state action can be based on the mere fact that a state court must necessarily provide a forum for the dispute.⁷⁴ However, this conclusion seems implicitly to have more to do with financial and practical concerns about extending the right to counsel than with defensible logic. Professor Michelman argues persuasively against reliance on procedural posture as a basis for regulating waiver of access fees, noting with particular respect to divorce disputes that the states exercise exclusive control over the regulation of marital relationships.⁷⁵ This observation is every bit as applicable to the termination of parental rights, where the states' *parens patriae* interest in regulating parent-child relationships requires even so-called "private" termination actions to be heard by the courts.⁷⁶ Most importantly, the stakes for the mother in this case were exactly the same as for a parent charged as a respondent with unfitness: the threatened permanent loss of her relationship with a child.

All of the concerns discussed above may reasonably be traced back to the refusal of the Supreme Court in *Lassiter* to recognize the applicability of the same fundamental constitutional protections as are routinely provided to criminal defendants. In each and every circumstance in which parents facing the threatened loss of consortium with their children challenge barriers to meaningful judicial access, the constitutional analysis of those barriers must now begin with a decision that fails to recognize indigents' absolute right to the protections of due process, even when fundamental rights are threatened. In the criminal arena, the Court has consistently treated the right to free counsel as entrenched, extending the holding of *Gideon* to juveniles charged with acts of delinquency,⁷⁷ misdemeanor proceedings where actual imprisonment is imposed,⁷⁸ and suspended sentences that may lead to

posture of a plaintiff, obliged to pay a filing fee, and one in the posture of a defendant with no such obligation. *Id.*

74. *In re Adoption of K.L.P.*, 763 N.E.2d 741, 751 (Ill. 2002).

75. Michelman, *supra* note 41, at 1198 ("[T]he state is the author of both the rules imposing special restrictions on the freedom of married persons and the rule forbidding self-help retrieval of one's liberty from the grip of those restrictions.").

76. *See K.L.P.*, 763 N.E.2d at 751 (noting that adoption exists only as a creature of statute, and that "[p]rospective adoptive parents cannot achieve their goal of parenthood by contract or other private means; they must involve the court").

77. *In re Gault*, 387 U.S. 1, 72-73 (1967).

78. *Argersinger v. Hamlin*, 407 U.S. 25, 26, 31-32, 37 (1972).

imprisonment.⁷⁹ In the civil arena, however, even in the limited circumstances where a parent's fundamental liberty interest in safeguarding a relationship with a child is acknowledged, the most that a parent is constitutionally entitled to is the individualized balancing of factors under *Mathews*, with no certainty that the outcome will result in the assistance of counsel. As Douglas Besharov pointedly observed in the immediate wake of the decision, "*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."⁸⁰

The continuing failure of the American legal system to approach the ideals mapped out by Reginald Heber Smith has been well documented. Studies have repeatedly explored the inability of the great majority of United States citizens to access the assistance of counsel to help protect basic rights and needs.⁸¹ California Appellate Justice Earl Johnson Jr., a frequent critic of barriers limiting indigent access to the courts, recently compared the United States unfavorably to a long list of other Western democracies that guarantee counsel for indigents in civil cases, concluding that Smith's concept of "equal justice" is nothing more than an illusory ideal.⁸²

Building on this uninspiring history, a steady stream of commentators have issued calls for a "civil *Gideon*," and for the reversal of the pinched view of due process applied to fundamental family relations by

79. *Alabama v. Shelton*, 535 U.S. 654, 661–62 (2002).

80. See Besharov, *supra* note 3, at 221 (arguing that the *Lassiter* decision limits the constitutionally-protected status of the family relationship by denying indigent parents the right to counsel but that courts continue to mandate counsel for other indigent persons facing jail time, no matter how short).

81. See, e.g., Alan W. Houseman, *Civil Legal Assistance for Low-income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1213–17 (2002) (discussing how recent changes and restrictions imposed upon legal aid facilities, which are funded by the Legal Services Corporation Act, contribute to the growing inability of Americans to access legal aid); AM. BAR ASSN., AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE, FINAL REPORT ON THE IMPLICATIONS OF THE COMPREHENSIVE LEGAL NEEDS STUDY, EXECUTIVE SUMMARY (1996) (reviewing the growing disconnect between Americans and affordable legal services), at www.abanet.org/legalservices/downloads/sclaid/agendaforaccess.pdf.

82. Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L. J. S83 (2000). See also Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MD. J. CONTEMP. LEGAL ISSUES 199 (1994); Earl Johnson, Jr., *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341 (1985); Earl Johnson, Jr. & Elizabeth Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases For Indigent California Litigants Part One: The Legal Arguments*, 11 LOY. L.A. L. REV. 249 (1978).

the narrow majority in *Lassiter*.⁸³ Professor Rhode, for example, condemns the case law governing access to the effective assistance of counsel as a “conceptual embarrassment,”⁸⁴ noting that “the right to sue and defend is a right ‘conservative of all other rights, and lies at the foundation of orderly government.’”⁸⁵ Occasionally, these calls have been echoed in judicial opinions. Most significant among these, of course, is Justice Blackmun’s dissent in *Lassiter* itself,⁸⁶ exploring both the compelling practical obstacles faced by an indigent parent seeking to defend herself against a termination action,⁸⁷ and the legal illogic of requiring an individualized judgment of the need for counsel, even after consideration of the *Mathews* factors compels acknowledgment of the parent’s fundamental protected liberty interests.⁸⁸ Similarly, Deborah Frase’s hapless efforts to represent herself prompted one Maryland Appellate Justice—cognizant of the strictures of *Lassiter*—to argue eloquently for the interpretation of state constitutional provisions to encompass a broader right to counsel for indigent parents threatened with intrusions into their parent-child relationships.⁸⁹ For all their powerful and persuasive rhetoric, however, these voices will almost certainly remain in dissent as long as *Lassiter* stands as the law of the land.

Notably, Justice Black’s landmark opinion in *Gideon* came twenty-one years after the low-water mark decision in *Betts v. Brady*,⁹⁰ which refused to recognize a comprehensive right to counsel for indigents charged with felonies in criminal court. With the added years of perspective, the Court in *Gideon* took a markedly different tack, acknowledging that *Betts* had been a clear break with the Court’s precedents recognizing the fundamental nature of the right to counsel

83. See, e.g., Bindra & Ben-Cohen, *supra* note 69; Rhode, *supra* note 3; Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL’Y REV. 503, 506 (1998); Bindra & Ben-Cohen, *supra* note 69; Johnson, *supra* note 82; William L. Dick, Jr., Note, *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627 (1989) (analyzing *Gideon* and the Court’s justifications for the holding); Joan Grace Ritchey, Note, *Limits on Justice: The United States’ Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 337–41 (2001) (examining other countries and suggesting that the United States follow in the same pattern to provide legal counsel for all civil litigants).

84. Rhode, *supra* note 3, at 1786.

85. *Id.* at 1799, citing *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907).

86. *Lassiter*, 452 U.S. at 35 (Blackmun, J., dissenting).

87. *Id.* at 45–46, 52–56.

88. *Id.* at 48–49.

89. *Frase v. Barnhart*, 840 A.2d 114, 134–36 (Md. 2003) (Cathell, J., concurring).

90. *Betts v. Brady*, 316 U.S. 455 (1942).

2005]

The Continuing Scourge of *Lassiter*

381

and its relationship to Fourteenth Amendment protections.⁹¹ By this reckoning, reassessment of *Lassiter*'s treatment of parents' fundamental liberty interest in their relationships with their children is now at least two years overdue.

91. *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963) (citing *Powell v. Alabama*, 287 U.S. 45 (1932); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); and *Johnson v. Zerbst*, 304 U.S. 458 (1938)).