A Defined Right to Counsel: An Idea Whose Time Has Come?

By Michael D. Fox

Introduction

Michael Greco, president of the American Bar Association, has called for what some might consider a substantial modification to our system of ordered liberty. In Mr. Greco's own words, "No one in our nation should have to go to court unassisted when facing a problem that could result in loss of shelter, family dissolution or serious health consequences. Americans should not be subject to grievous harm at the hands of a legal system that they cannot navigate or even understand on their own."[1] Our inherent sense of justice and fair-play, he says—the very values upon which the most fundamental rights of due process rely—demand that we do "it." He even recently established a blue-ribbon task force to study "it." But just what is "it"?

The "it" he seeks to address is the question of whether the time has come for the establishment of a defined right to counsel in certain serious civil matters, such as those which threaten the integrity of one's family, health, or shelter.

My first read of Mr. Greco's call drew me into thinking in terms of constitutionality. And, I have to admit that, on first blush, I was quick to assume that there is no right to counsel in non-criminal cases in this post-*Gideon* era.[2] In fact, there does not even appear to be a right to counsel in criminal cases in which incarceration is not meted out as a punishment.[3] Despite my law-school *Gideon*-esque learning, I immediately questioned that assumption, wondering whether I could set that notion aside, at least temporarily. And, wondering if my

assumption was wrong, I began by looking at the presumptions and purposes behind the Sixth Amendment right to counsel enunciated in *Gideon* in the hope of further establishing the principal it seeks.

According to the University of Connecticut School of Law's Professor Timothy Everett, the Sixth Amendment right to counsel seeks to insure even-handedness in a system driven by the Leviathan—insuring that there is a strong presumption of legitimacy in "the criminal justice process that led to…conviction and punishment."[4]

Although this notion flows cleanly from the fount of the Sixth Amendment, the U.S. Supreme Court in *Lassiter* explained that the essence of the right to counsel rests in the protection of the individual from the sometimes all-too-powerful sovereign.

> That it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendment right to counsel in criminal cases, which triggers the right to appointed counsel is demonstrated by the Court's announcement in *In re Gault*, 387 U.S. 1 [(determining that a delinquency hearing in which could result in a juvenile's loss of freedom required the appointment of counsel, the proceeding's civil nature notwithstanding.)][5]

With this single statement, the Court unmistakably declares that the constitutionally granted right to counsel stems from something other than just the Sixth and Fourteenth Amendments. When taken together with the Court's earlier references to "fundamental fairness" and "due process," we see the Court beginning to reach outside the confines of strict constructionalism.

Taking this premise (though somewhat nebulous) as a point of beginning, that insofar as the Constitution's right to counsel can be viewed as such a limitation on governmental power, it occurred to me that the notion of a constitutionally guaranteed right to counsel in all instances of governmental intrusion appears not so alien. "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' [*Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)], rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."[6] In fact, such a concept might reword Justice Hugo Black's dissent in *Betts v. Brady*[7] to read:

> A practice cannot be reconciled with "common and fundamental ideas of fairness and right," which subjects innocent [persons] to increased dangers of [wrongful deprivation] merely because of this poverty. Whether [an individual should be so deprived] cannot be determined from a trial which, as here, denial of counsel has made it irresponsible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented.

Discussion

In my attempt to better understand President Greco's call, I began with what might be the seminal case in the field, *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). In *Lassiter,* the court sought to address whether an indigent parent had a constitutionally granted right to counsel in a termination of parental rights context. The issue was rather clearly brought before the Supreme Court in a well-enunciated decision rendered by the North Carolina Court of Appeals:

> While this state action does invade a protected area of individual privacy, the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated.[8]

Lassiter begs the question as to whether and when an indigent individual has a constitutionally guaranteed right to counsel in a civil context.

Interestingly, the underlying assumption that an indigent parent would have a constitutionally mandated right to counsel in another factual scenario was uncontested. In fact, the Supreme Court implicitly acknowledged that assumption by asking whether "fundamental fairness" required such an appointment and stating that the answer was "an uncertain enterprise which…consists…in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake."[9]

The Court then explained that a litigant's right to appointed counsel is directly proportional to his or her interest in personal liberty,[10] as determined by the balancing test expressed in *Matthews v. Eldridge*.[11] Unfortunately, the term "personal liberty" as used in the right to counsel context prior to *Lassiter* was expressed in the more easily grasped incarceration terms.[12] As a result, the *Lassiter* Court was forced to look outside of the incarceration definition, as the issue at hand clearly dealt with another kind of "liberty interest."

Lassiter begins with the acknowledgement of the presumption against a constitutionally required right to counsel except in the criminal context. However, the Court then explains that this presumption can be overcome by the weight of the affected private interest as measured by the three factors of *Eldridge*.[13]

In addressing the first prong of the

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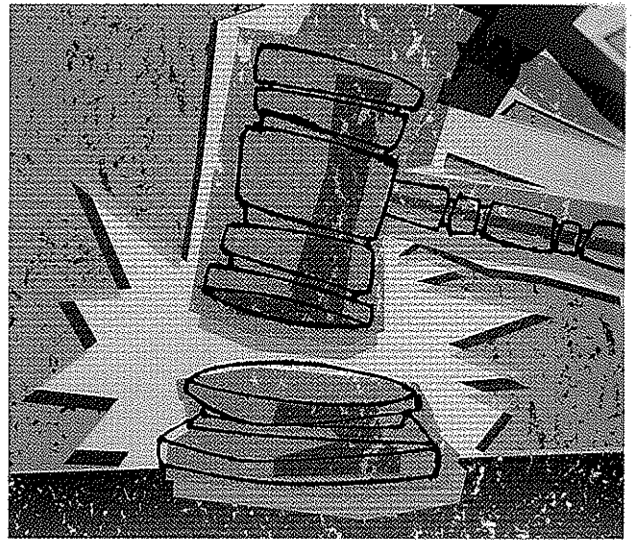
Eldridge test, the Court had to determine whether the interest at stake was one which "undeniably warrants deference and, absent a powerful countervailing interest, protection."[14] The Court determined that it did, finding that "a parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one."[15] While *Lassiter* was ultimately decided against the appellant, it implicitly acknowledged the existence of a constitutional right to counsel in the civil context, at least on a very limited basis.

Interestingly, the Court then momentarily stepped outside of the facts of the case and, *in dicta*, addressed other situations where appointed counsel may be constitutionally required.

> 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. 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, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases.[16]

Lassiter begs the question, then, as to whether, and when, an indigent individual has a constitutionally guaranteed right to counsel in a civil context. Despite recognizing that there might be some right to counsel and giving us a test which balances the presumption of no right to counsel in civil matters against the *Eldridge* factors, the *Lassiter* Court did not go much further in clarifying the issue. The Court even acknowledged this shortcoming, explaining that "[h]ere, as in [*Gagnon v.*] *Scarpelli*, [411 U.S., at 790] '[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements,' since here, as in that case, '[t]he facts and circumstances...are susceptible of almost infinite variation.'"[17]

There is a limited constitutional guarantee of counsel in non-criminal contexts.



Fortunately, the Connecticut Supreme Court stepped forward, offering some assistance in defining this fledgling right to counsel in *Lavertue v. Niman*, 196 Conn. 403, 407 (1985), explaining that:

> The test that governs the due process right to court-appointed counsel is whether the absence of counsel deprives an indigent defendant of "fundamental fairness." *Lassiter v. Department of Social Services*, 452 U.S. 18, 25, *reh. denied*, 453 U.S. 927 (1981). That test, in turn, involves an analysis of three separate factors: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Id.*, 27, citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Once we identify the analytic components of this test, we must then determine what weight to attach to each of its elements, and whether any supervening presumptions tilt the balance in favor of or against a right to counsel. *Lassiter v. Department of Social Services*, supra, 27.

Where the federal courts appeared to rely on the direct threat of incarceration to inform and trigger the right to counsel, the Connecticut Supreme Court in *Lavertue* went much farther and expounded that the deprivation need not even be direct. *Lavertue v. Niman*, 196 Conn. 403, 407–8 (1985) ("The putative father faces a possible loss of liberty if he is found "guilty" and subsequently fails to pay court ordered child support.")

Like the federal cases, in Connecticut, a parent who faces the termination of his or her parental rights is entitled to the assistance of counsel, however, that entitlement is statutorily mandated.[18] Unlike the federal cases, the Connecticut Supreme Court in *Lavertue* found a right to counsel which was based not only in the federal, but in the Connecticut constitution. *Lavertue v. Niman*, 196 Conn. 403, 408–409, 493 A.2d 213 (1985) (weighing *Eldridge* factors and concluding that indigent parent has federal due process and state constitutional right under article first, § 10, to appointed counsel in state supported paternity action). Also unlike the federal courts, the Connecticut Supreme Court has not limited this right to counsel in the civil context in the same manner, in fact the Court has extended the right beyond parental termination cases to include, *inter alia*, civil contempt and paternity matters.[19]

Although it might be impossible to distill the importance of the federal line of cases, which include *Gideon,* into a single kernel of thought, at least one proposition does tend to shine more brightly than others: The federal constitution "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."[20] This principal of "fundamental fairness" is echoed in *Lassiter*:

> [U]ltimate issues with which a termination hearing deals are not always simple, however commonplace they may be....The parents are likely to be people with little education, who have

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 uncounseled parent is evident from the findings some courts have made. Thus, courts have generally held that the State must appoint counsel for indigent parents at termination hearings.[21]

Conclusion

It is not my contention that *Gideon* or *Lassiter*, or any case for that matter, impose a duty upon the state to provide the assistance of counsel in all civil cases—clearly, they do not. I do contend, however, that these cases serve as recognition that the legal process is alien and impenetrable to all but the most skilled practitioners. Justice Black, though addressing this right in a criminal context, perhaps stated it most clearly: "That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious."[22]

Without a doubt, there is a limited constitutional guarantee of counsel in non-criminal contexts. But that guarantee extends only to those cases where governmental intrusion threatens the integrity of the family unit, in a termination of parental rights or a child-protective proceeding.

The question to be addressed in the coming years is whether that guarantee extends to those cases in which the government denies needed health benefits or seeks to terminate benefits for the elderly, or where the state seeks to evict families with children from shelter or fails to provide supportive housing for those who are not mentally able to fend for themselves.

Mr. Greco contends that certain serious legal problems "can imprison [the indigent] just as surely in poverty and despair." I believe that it is his contention that fairness and due process demand that those disenfranchised be provided with a fair opportunity and hearing—which requires the provision of counsel. In the end, he asks us all to consider whether the time has come for a defined right to counsel in certain serious civil matters. The answer, at least in Connecticut, is that, to some extent, it already has. **CL**

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Notes

1. Greco, Michael S., "Court Access Should Not Be Rationed," *ABA Journal*, December 2005.
2. *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981).
3. *Scott v. Illinois*, 440 U.S. 367.
4. Everett, Timothy H., "Post-Gideon Developments in Law and Lawyering," Conn. Pub. Int. L.J., Vol. 4, No. 1, 20, 27.
5. *Lassiter*, 452 U.S. at 25.
6. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).
7. *Gideon v. Wainwright*, 316 U.S. 335, 476 (1972).
8. *In re Lassiter*, 43 N.C. App. 525, 527, 259 S.E. 2d 336, 337.
9. *Lassiter*, 452 U.S. at 24-25.
10. *Lassiter*, 452 U.S. at 26.
11. *Matthews v. Eldridge*, 424 U.S. 319, 335.
12. *Gideon, supra*; *Betts, supra*; *Argersinger v. Hamlin*, 407 U.S. 25; *Gagnon v. Scarpelli*, 411 U.S. 778; *Morrissey v. Brewer*, 408 U.S. 471; *Scott v. Illinois*, 440 U.S. 367.
13. *Lassiter*, 452 U.S. at 32–33. (1) The private interests at stake; (2) the government's interest, and (3) the risk that the procedures used will lead to erroneous decisions. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).
14. *Lassiter*, 452 U.S. at 27, quoting *Stanley v. Illinois*, 405 U.S. 645, 651.
15. *Lassiter*, 452 U.S. at 27.
16. 452 U.S. 18, 34.
17. *Lassiter*, 452 U.S. at 32.
18. C.G.S. § 45a-717(b). See, *State v. Anonymous*, 179 Conn. 155, 160, 425 A.2d 939 (1979) (a parent in a termination of parental rights hearing has the right not only to counsel but to the effective assistance of counsel).
19. See, e.g., *Emerick v. Emerick*, 28 Conn. App. 794, 797 (1992) ("The due process clause of the fourteenth amendment to the United States constitution guarantees the right to appointed counsel to any indigent civil contemnor who might be incarcerated."); and *Lavertue v. Niman*, 196 Conn. 403 (1985) (finding that an indigent defendant in a state-initiated paternity suit has a constitutional right to court-appointed counsel); *State v. Anonymous*, 179 Conn. 155, 160, 425 A.2d 939 (1979) (a parent in a termination of parental rights hearing has the right not only to counsel *but to the effective assistance of counsel*).
20. *Johnson v. Zerbst*, 304 U.S. 458, 462-3 (1938).
21. [citations omitted] Lassiter, 452 U.S. at 31.
22. Johnson v. Zerbst, 304 U.S. at 463.

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