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THE PITFALLS OF TIMIDITY: THE RAMIFICATIONS OF
LASSITER V. DEPARTMENT OF SOCIAL SERVICES

By Lowell F. Schechter*

PART I. INTRODUCTION

In Lassiter v. Department of Social Services, the United States Supreme Court was confronted with the question whether an indigent parent has a constitutional right to counsel when the state moves to terminate that parent's parental rights. The Court's answer was equivocal: it could not deny that due process might require the appointment of counsel in some cases, but it would not affirm that the Constitution requires the appointment of counsel in every termination proceeding. While the Court might set down a general standard for determining when due process required the appointment of counsel, it would not adopt any firm rules. Thus, the decision whether counsel is required was left to be made in the first instances by the trial court in each case. It is the contention of this article that the Supreme Court's equivocation threatens not only the rights of indigent parents, but also the welfare of their children and even the interests of the state.

Part II of this article describes the chain of events leading up to the Supreme Court decision: the initial state intervention removing William Lassiter from the care of his mother Abby Gail, the developments that occurred while William was in foster care, the filing of the petition to terminate parental rights, the testimony presented at the termination hearing, and the decisions rendered during the appeal process.

Part III critically examines the Supreme Court decision. Section A of Part III summarizes Justice Stewart's majority opinion. Section B analyzes the reasoning in refusing to recognize an absolute right to counsel and evaluates the merits of the case-by-case approach adopted in its stead. Section C offers an alternative approach that could have been used to resolve the right to counsel issue.

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2. 101 S. Ct. at 2162.
Part IV examines the ramifications of the Lassiter decision. It explores the likely impact of Lassiter on (A) the provision of counsel for indigent parents in termination proceedings, (B) the provision of counsel for indigent parents in "child in need of care and supervision" adjudications, (C) the provision of counsel for children in termination proceedings, and (D) other constitutional issues arising out of the termination of parental rights.

Part II the Facts

For several reasons, close attention must be paid to the facts of Lassiter. First, full knowledge of the facts is essential in assessing the impact of Lassiter on indigent parents' right to counsel in future termination cases. In Lassiter, the Supreme Court stated that the decision whether an indigent parent has a constitutional right to counsel must be made on a case-by-case basis, looking at the particular facts of each case. The Supreme Court then went on to determine whether, on the facts before it, Ms. Lassiter had such a constitutional right. A bitterly split Court decided that Ms. Lassiter's trial without counsel had not been fundamentally unfair and that she had not been denied due process. Distinguishing Lassiter on its facts, therefore, will be crucial in future cases when arguing for an indigent parents' right to counsel.

Second, close attention to the facts, combined with a careful reading of the majority opinion, can provide insight into why the Court reached the decision that it did. For, there is some evidence that the Court's decision on the procedural issue of right to counsel was influenced by facts relating to the substantive issue of the merits of the termination—the mother's imprisonment that prevented her caring for the child and the grandmother's questionable suitability as an alternative custodian.

Third, viewed from a different perspective, the facts of the case raise serious questions both about the merits of the termination decision and about the fairness of the procedures leading to it.

The events that culminated in the Supreme Court decision may be divided chronologically into five stages: (i) The spring of 1975—the time of the initial state intervention on behalf of William Lassiter which resulted in custody being transferred to the Durham County Department of Social Services, (ii) June, 1975 to April, 1978—the period between the transfer of custody and the filing by the Durham Department of Social Services of a petition to permanently terminate parental rights, (iii) April 10, 1978 to August 31, 1978—the interval between the filing of the petition
and the hearing on the merits, during which Ms. Lassiter failed to obtain the assistance of counsel, (iv) August 31, 1978—the date of the hearing during which Ms. Lassiter's parental rights to William were terminated, and (v) August 31, 1978 to June 1, 1981—the lapse of time taken up by the appeal process, from the termination hearing to the Supreme Court decision.

(i) Spring 1975: The Initial State Intervention

The facts relating to the initial state intervention, like many others in *Lassiter*, are the subject of controversy and confusion. While not mentioned by the Supreme Court, it appears that in May, 1975, when the Department of Social Services first became involved, William Lassiter, the youngest of Abby Gail Lassiter's four children, was staying with Ms. Lassiter's mother, Lucille. It is uncontested that the Department received a complaint from Duke Pediatrics stating that Duke Pediatrics was having difficulty in locating Ms. Lassiter and was concerned because William had not been brought back for treatment of medical problems. After the complaint, when a social worker brought William into the hospital for treatment, the doctors advised that he stay because of breathing difficulties, malnutrition and evidence of an untreated severe infection. The Department maintained that it also had received a complaint from Lucille Lassiter charging that her daughter, Abby Gail, was not taking adequate care of the children, and that she was leaving the children with Lucille for days without providing any money or food while she was gone. Lucille Lassiter, however, denied having made this complaint.

The Department of Social Services filed a neglect petition and a court hearing was held on May 14, 1975. Abby Gail Lassiter, who was in prison at that time, did not appear. The trial court judge, Judge Gantt, evidently was unaware of her imprisonment, since he ordered the sheriff to locate and arrest Abby Gail Lassiter, and

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4. Id. at 10-11.
5. Id. at 17.
6. Id. at 48-49.
7. According to Thomas Russell Odom, Assistant Durham County Attorney, “At the time of that hearing, Abby Gail Lassiter was in the Durham County jail, having been arrested on the preceding day for shoplifting. She was in fact served with the custody petition while in jail, but she was not released in time to attend the hearing.” Letter from Thomas Russell Odom to the author (October 1, 1981) [hereinafter cited as Odom letter of October 1st].
bring her to court. Judge Gantt ordered a continuance of the matter until May nineteenth. But, when the hearing resumed on May nineteenth, Abby Gail, who was now out of prison, did not appear. At the May nineteenth hearing, Judge Gantt found that a social worker for the Department of Social Services had contacted Abby Gail by telephone and that Abby Gail expressly had refused to appear.

The Supreme Court used Judge Gantt's finding of Abby Gail Lassiter's express refusal to attend the 1975 hearing as a justification for its holding that the failure to appoint counsel at the 1978 termination hearing was not a denial of due process:

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. Here, the trial court had previously found that Ms. Lassiter had expressly declined to appear at the 1975 child custody hearing. . . .

But, Judge Gantt's finding, on which the Supreme Court relied, that Abby Gail expressly declined to appear, may have been erroneous. The testimony at the 1978 hearing of Abby Gail Lassiter and of her mother, Lucille, indicated that it was Lucille, and not Abby Gail, who had told the social worker she would not attend the 1975 hearing.

In any event, on June 16, 1976, when the trial court found that William Lassiter was a neglected child, and decided to transfer custody to the Durham County Department of Social Services, the finding and decision were based solely on evidence presented by the state, without the presence of the parent, or counsel to represent the parent's interest.

(ii) June 1975 to April 1978: From the Transfer of Custody to

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8. Transcript at 27-29.
9. Id. at 31.
10. 101 S. Ct. at 2163. While there may be some question as to whether the Supreme Court is referring to a finding in the 1975 neglect hearing or the 1978 termination hearing, the use of the word previously suggests that the Court is referring to the 1975 rather than the 1978 proceedings.
11. See Abby Gail Lassiter's testimony, Transcript at 31, and Lucille Lassiter's testimony, id. at 47. In a petition for rehearing, submitted to the Supreme Court on June 26, 1981, counsel for petitioner submitted additional evidence to show that it was Lucille and not Abby Gail who had expressly refused to attend. Petitioner's Brief for Rehearing at 12, Lassiter v. Department of Social Servs., 101 S. Ct. 2153 (1981) [hereinafter cited as Petitioner's Brief for Rehearing]. Mr. Odom disagrees on this point. Referring to pages 32 and 33, he reads the transcript as indicating that both Lucille and Abby Gail had expressly declined to appear. Odom Letter of October 1st.
the Filing of A Petition to Terminate Parental Rights

This period is not without its own drama—and controversy. When the Department finally moved to terminate parental rights, it alleged two statutory grounds:

(1) The parent has without cause failed to establish or maintain concern or responsibility as to the child's welfare . . . .
(3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, to encourage the parent to strengthen the parental relationship, with constructive planning for the future of the child. 12

Much of the controversy stems from two factual questions, which are of great importance given these statutory grounds: First, to what extent did Ms. Lassister maintain interest in and contact with William? Second, if there were relatively little contact, was it solely the fault of Ms. Lassiter, or could it be attributed in part either to the Department of Social Services' failure to stimulate such contact or to other events beyond Ms. Lassiter's control?

At the termination hearing in August of 1978, Bonnie Cramer, the social worker representing the Department of Social Services, testified that the only contact between Abby Gail Lassiter and William during this entire period had been one prearranged visit and one meeting on the street. 13 Ms. Lassiter, in responding to

12. N.C. Gen. Stat. §§ 7A-289.32(1), (3) (Supp. 1979). If one of the conditions authorizing termination of parental rights is found to exist, the petition must still be dismissed if the court finds that the best interests of the child would not be met by termination. Id. § 7A-289.31(a).
13. It should be noted that Ms. Cramer had been assigned to the Lassiter case in August of 1977, over two years after William had been removed. Her testimony, therefore, was to a great extent based not on personal knowledge but on the Department of Social Services' case record:
Q. Ms. Cramer, does the record reflect or do you have any knowledge of how many times Ms. Lassiter has seen the child since he was removed from her home in May of 1975?
A. Yes.
Q. Would you tell us what that is please, how many times?
A. The record reflects that Ms. Lassiter saw William in December of '75 along with Mr. William Boykin on a prearranged visit and that there has been no other contact except Ms. Lassiter mentioned to me that during her trial in July of '76, she, by chance, saw William and his foster mother on the street downtown.
Q. Does the record reflect any contact by her with the Department regarding her
cross-examination, testified that she had contacted the Department to find where William had been placed, that she had talked to Ms. Cramer's predecessor about bringing William home, and that she had seen William more than five or six times during this period.\textsuperscript{14}

Concern for the child or the care of the child and how the child was growing and progressing?

A. Abby Gail Lassiter?

Q. Yes.

A. No.

Q. Do you have any knowledge of her mother?

A. Yes.

Q. And has her mother made any contact with the Department of Social Services regarding that child?

A. There has been a great deal of contact with Mrs. Lassiter concerning the other children who are placed with Mrs. Lassiter. The record does not reflect that there has been any contact concerning William that was initiated by Mrs. Lassiter.

Q. Does it reflect any contact initiated by the Department on behalf of the child with her?

A. Yes.

Q. Do you feel that it would be in the best interest of this child to be placed in the physical custody of his grandmother?

A. No.

Q. What would be your basis for feeling that it would not be in his best interest?

A. I think there are several things. William does not know his grandmother. Mrs. Lassiter has a great deal—

MRS. LASSITER: You don't know me.

THE COURT: Don't speak up while she's talking.

Transcript at 12-13 (emphasis added). The Department's record itself, however, was not introduced into evidence. See note 40 infra:

14. Q. How many times all together, count up for us, how many times all together you have seen that child since May of 1975.

A. I've seen him more than twice.

Q. Well, count them up for us.

A. I would say about—because I seen him then, me and my children and all of us in—

Q. Five, maybe six times?

A. Yes. More than that because I have seen him more than that. That's right, more than that.

Q. Including when you’d see him on the street.

A. Yeah, uh huh.

Q. But you haven't made any effort to really visit with him by calling the Department and setting it up, have you?

A. Did I make an effort?

Q. To call the Department and set up a visit or ask if you could see him?

A. Yes, I have, yes, I have. Because she wasn’t on the case working then, she wasn't on the case. It was another social worker on the case. She was saying the social worker was going to bring the child by the house and she was going to bring my baby home. She told me, she was a black lady, she said she was going to bring my baby home.
The trial court judge appears to have found Ms. Cramer’s account more reliable. But, even accepting Ms. Lassiter’s numbers, five to six visits over a three year period still might be found insufficient contact to meet the statutory standard. The answer to the question why there was not more contact, therefore, is crucial.

Certain other occurrences during this period shed light on the lack of contact. They also help explain why Abby Gail Lassiter was unsuccessful in preventing the termination of parental rights. Nineteen seventy-six was an eventful year for Ms. Lassiter: in February, she was charged with second degree murder; in April, she gave birth to a fifth child, a son; in June, she was convicted of

Q. Did you hear this lady testify that the record did not reflect any of that?
A. I don’t know anything about that, I don’t know where she come from, she wasn’t the social worker at that time.

Transcript at 38-39.

Since Ms. Lassiter was unable effectively to present her own case (see text accompanying notes 45-47), her side of the story is revealed, to the extent that it is, only on cross-examination.

Abby Gail’s mother, Lucille, seems to indicate that her daughter had made even more of an attempt to maintain contact with William, stating that Abby Gail, “was going back and forth to the people about her child because she didn’t even know where they had put her child.” Transcript at 51.

15. 101 S. Ct. at 2158.
16. The birth of Ms. Lassiter’s fifth child in April, 1976, raises further questions about the handling of the termination decision both by the Department of Social Services and by the courts. The Department sought to terminate Ms. Lassiter’s parental rights only in regard to William, not to any of the other four children, who, in fact, remained in Lucille’s care. The Department contended that Lucille Lassiter had said she was not capable of taking care of William and that, in fact, she would be unable to do so. The Department’s contention was a key element in the Supreme Court’s conclusion that failure to provide counsel was not a denial of due process because counsel would not have made any difference:

True, a lawyer might have done more with the argument that William should live with Ms. Lassiter’s mother—but that argument was quite explicitly made by both Lassiters, and the evidence that the elder Ms. Lassiter had said she could not handle another child, that the social worker’s investigation had led to a similar conclusion, and that the grandmother had displayed scant interest in the child once he had been removed from her daughter’s custody was, though controverted, sufficiently substantial that the absence of counsel’s guidance on this point did not render the proceedings fundamentally unfair.

101 S. Ct. at 2162-63.

In its statement of fact, however, the Supreme Court never recognized that Lucille has been taking care of a child, almost from birth, much younger and probably more demanding than William. It appears, in fact, that at least some members of the Court may have believed that William was the youngest child. Justice Blackmun, writing for three of the dissenters states in his opinion: “Petitioner, Abby Gail Lassiter, is the mother of five children. The State moved to remove the fifth child, William, from petitioner’s care . . . .” 101 S. Ct. 2172 (Blackmun, J., dissenting) (emphasis added). Skilled counsel might have used Lucille Lassiter’s care of this baby, first, as explanation of her “lack of interest” in William and, second, as strong evidence that she was competent to care for William. Counsel might have
second degree murder and sentenced to prison for twenty-five to forty years.

Ms. Lassiter’s murder conviction probably destroyed any chance of successfully appealing the termination of her parental rights. While it might be argued in her behalf that her imprisonment provided an explanation why there was not more contact with William, the conviction was nonetheless damaging. For one thing, her conviction for a crime of violence cast further doubt upon her suitability as a parent. It also meant that, absent a reversal of the conviction, she would not be acting as caretaker for William for the foreseeable future. Both her lack of suitability and availability as a caretaker for William could be used to substantiate the argument that termination of Abby Gail Lassiter’s parental rights was in William’s “best interests.” The impact of the murder conviction is evident in Justice Burger’s concurring opinion:

I join the Court’s opinion and add only a few words to emphasize a factor I believe is misconceived by the dissenter. The purpose of the termination proceeding at issue here was not “punitive”... On the contrary, its purpose was protective of the child’s best interest. 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.

There is a third reason the murder trial was damaging. Not only did it eliminate Abby Gail Lassiter as a potential caretaker, it also undermined Abby’s claim that, in her absence, her mother Lucille should be given care of the child. Lucille also had been implicated in the murder. While the case against Lucille was dismissed,

stressed that a Termination Order would not only sever William’s relationship with mother and grandmother, but, also with his four siblings.

17. The state bears the burden of proving that one of the statutory conditions authorizing termination has been met and that termination is in the child’s best interests. See note 12 supra.

18. 101 S. Ct. at 2163 (Burger, C.J., concurring) (emphasis added).

19. Both Abby Gail Lassiter and her mother, Lucille Lassiter, were indicted for the murder for which Abby Gail was subsequently convicted. Procedurally, the trial court ordered the prosecutor to turn over all statements made by the defendants to the investigators prior to the trial. At the trial, the prosecutor attempted to introduce into evidence, by testimony of a police officer, a statement made by Lucille Lassiter subsequent to the crime that she was the person responsible for the death of the decedent. Because this information had been withheld from defense counsel, the attorney for Lucille Lassiter asked for a dismissal of the charges as to her. Said motion was allowed. Thereafter, in her petition for post conviction relief, Abby Gail Lassiter’s attorney, Mr. Thomas Loflin, sought to have her conviction overturned on
Abby Gail later maintained that it was her mother who had struck the fatal blow. In delivering the majority opinion, Justice Stewart commented in a footnote: "Ms. Lassiter's argument here that her mother should have been given custody of William is hardly consistent with her argument in the collateral attack on her murder conviction that she was innocent because her mother was guilty." The fourth, somewhat more subtle, effect of the murder trial, relates directly to the issue whether, in the termination hearing, the trial court erred in refusing to appoint counsel or delay the proceedings until Ms. Lassiter could obtain counsel. If Ms. Lassiter, a poor black woman in North Carolina, had never been tried for murder, it might have been assumed that she did not know how the legal system worked, nor of the need for and importance of counsel, nor how to obtain counsel. But Ms. Lassiter had been through a murder trial and counsel was still being retained on her behalf by her mother to appeal the murder conviction. Given these circumstances, Ms. Lassiter's failure to obtain counsel for the termination hearing might seem inexcusable.

(iii) April 10 - August 31, 1978: From the Filing of the Petition to the Date of Trial

While it was not until April 10, 1978, that the Department of Social Services filed its petition with the court to terminate parental rights, and not until April 12, that Abby Gail Lassiter received formal notice, the decision to seek termination and the giving of actual notice to Ms. Lassiter both had occurred at least four months before the delivery of formal notice. Ms. Cramer, when she

the theory that because jeopardy had attached, that Lucille Lassiter could have confessed to the crime after the charges as to her were dismissed, removing any guilt from Abby Gail Lassiter. He charged that Abby Gail Lassiter's defense counsel at the trial was negligent for his failure to attempt to elicit such testimony from Lucille Lassiter. This information was provided to me by Mr. Tom Loftin, and confirmed by Mr. James Maxwell, a Durham attorney, who represented Lucille Lassiter in the criminal trial, and Mr. B. Frank Bullock, who represented Abby Gail Lassiter in the criminal trial.

Odom Letter of October 1st.
20. 101 S. Ct. at 2163 n.8.
21. The petition also requested termination of the parental rights of William's father. Justice Stewart stated:

The petition had also asked that the parental rights of the putative father, William Boykin, be terminated. Boykin was not married to Ms. Lassiter, he had never contributed to William's financial support, and indeed he denied that he was William's father. The court granted the petition to terminate his alleged parental status.

101 S. Ct. at 2168 n.2.
visited Abby Gail Lassiter in prison in December, 1977, had told Ms. Lassiter that the Department wanted to terminate her parental rights.\(^{22}\) Abby Gail Lassiter strenuously objected, maintaining that William should be placed with her mother, Lucille.\(^{23}\)

Yet, despite these strenuous objections, Abby Gail Lassiter never retained counsel: not in the period from December to April when she already knew informally of the Department's plan; not even in the period after April 12, 1978, when she had official confirmation that the Department was going to court to carry through with its plan to terminate her parental rights. The trial court, which refused either to appoint counsel or to delay the proceedings further until Ms. Lassiter obtained counsel, found her failure to obtain counsel was without just cause.\(^{24}\) The Supreme Court was to use her "failure" to seek the help of counsel as a ground for its finding that there was no denial of due process in the trial court's action.\(^{25}\)

Two questions arising out of the events of this period, therefore, need to be answered: what effort, if any, did Abby Gail Lassiter make to seek legal help and was she so remiss as to justify the trial judge in refusing either to grant a further delay for her to obtain counsel or to appoint counsel on her behalf?

It must be remembered that Abby Gail Lassiter was in prison during this entire period and her ability to obtain help was limited by her imprisonment. At the termination hearing, Abby Gail claimed that she had informed her prison guards of the pending legal action and the guards did not take any steps to help her obtain counsel.\(^{26}\) She admitted, however, that she had not informed

\(^{22}\) Transcript at 15.
\(^{23}\) Id.
\(^{24}\) Id. at 9.
\(^{25}\) 101 S. Ct. at 2163.
\(^{26}\) The testimony was as follows:

THE COURT: And she has had over four months to speak to an attorney and has spoken to an attorney but has not consulted anyone with reference to this child. Isn't that true?

MS. LASSITER: Say what now?

THE COURT: I said you were served with notice of—I mean, you were served with a summons in reference to the termination of your parental rights of William L. Lassiter on April 12.

MS. LASSITER: Yes, I got the papers.

THE COURT: And you have done nothing towards—

MS. LASSITER: Yes, I did.

THE COURT: What did you do?

MS. LASSITER: I reported to the Department of Corrections Center. I told someone about that. Didn't nobody get in touch with no one and I told them that I had a
the attorney, Thomas F. Loflin IV, who had been retained to appeal her murder conviction. Ms. Lassiter's failure to consult Attorney Loflin proved to be extremely damaging to her cause. Justice Stewart, writing for the majority, in justifying the trial court's refusal to appoint counsel, stressed that "Ms. Lassiter had not even bothered to speak to her retained lawyer after being notified of the termination hearing."

There is some dispute, however, about the nature and extent of the relationship between Abby Gail Lassiter and Attorney Loflin. It seems clear that Abby Gail had not herself retained Attorney Loflin; he had been hired by Lucille Lassiter to try to reverse her daughter's murder conviction. The judge at the termination hearing found that Abby Gail had met with the attorney once during the period between the filing of the petition and the hearing.

The judge's finding, however, was challenged in the petition for rehearing before the Supreme Court. Petitioner claimed that the trial court record showed that this finding was erroneous; that the only contact between Ms. Lassiter and Attorney Loflin during this period was a letter the attorney had mailed to her. In any event, Attorney Loflin submitted an affidavit stating that, even if Abby Gail Lassiter had approached him about representing her at the pending termination hearing, he would not have done so in view of her indigency.

If there is some dispute over the facts themselves, there is even

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paper when I got the first paper. I contacted someone and told them I had to go to court about this paper and didn't nobody contact no one and I told one of the ma-trons there.

Transcript at 3-4.
27. Transcript at 4-5.
28. 101 S. Ct. at 2163.
29. Id. at 2157.
30. The findings are cited in petitioner's brief:
On September 7, 1978, the court filed an order containing formal findings of fact. With respect to petitioner's non-representation by counsel, the court found specifically:
5. That subsequent to being served with a copy of the Summons and Petition, Abby Gail Lassiter communicated and conferred with her attorney regarding post-conviction proceedings, but did not seek counsel regarding this matter.
Brief for Petitioner at 4, Lassiter v. Department of Social Servs., 101 S. Ct. 2153 (1981) [hereinafter cited as Brief for Petitioner].
31. Petitioner's Brief for Rehearing at 13, citing Transcript at 4-6.
32. 101 S. Ct. at 2173 n.21 (Blackmun, J., dissenting).
33. It also seems clear that not all the facts relating to the issue of Ms. Lassiter's failure to obtain counsel were brought out at the termination hearing. Again, the author is indebted to Mr. Odom, the Assistant Durham County Attorney representing the Department of So-
greater room for argument about their interpretation. In Ms. Lassiter's defense, it may be argued that, given the almost complete lack of prior contact between her and the attorney, failure to consult him about the termination is neither shocking nor indicative of any lack of interest in maintaining parental rights in William. On the other hand, it may also be argued that, despite the very limited contact that existed, the reasonable, caring parent would have consulted the attorney. As already discussed, one factor that may have weighed against Ms. Lassiter was that, since she had been through a murder trial, in judging her actions, it might be assumed that she knew something about legal proceedings and the importance of legal representation. In light of her prior experience, her failure to consult the attorney might easily be interpreted as demonstrating a lack of interest in the termination proceeding.

Drawing conclusions from what an "ordinary" or "reasonable" person would have done in Ms. Lassiter's position, with prior exposure to the legal system, may be unfair to Ms. Lassiter. While not mentioned in either the trial court's findings or in any of the appellate opinions, there was evidence in one of the juvenile court reports presented to the trial court, that Ms. Lassiter has rather low intelligence and might well be mentally retarded. Ms. Lassiter's alleged mental retardation, of course, would not only help to explain why she did not actively seek legal counsel, but more important, raise grave doubts about her ability to defend her

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Odom Letter of October 1st.

The facts stated by Mr. Odom lend themselves to any number of interpretations. If Lucille's statements to Mr. Odom are to be believed, they demonstrate that Abby Gail was concerned about keeping her child. It seems possible, from the evidence of this encounter, that it was Lucille's failure to take appropriate action on behalf of her daughter that may have left Abby Gail bereft of counsel.

Certainly, these facts illustrate the danger of placing great weight, as Justice Stewart does (see note 89 below), on a trial court's findings as to defendant's actions when that defendant is almost inarticulate and not represented by counsel.

34. See text accompanying note 20 supra.
35. Petitioner's Brief for Rehearing at 9-10.
interests without benefit of counsel at the August thirty-first termi-
nation hearing.

(iv) August 31, 1978: The Termination Hearing

Two questions must be kept in mind while examining the record of the termination hearing. The first question was raised above: to what extent was Abby Gail Lassiter able to represent herself effectively without benefit of counsel? The second question is prompted by the Supreme Court majority’s eventual decision that, even if Ms. Lassiter did not effectively represent her own interests, effective counsel would have made no determinative difference: 36 how strong was the state’s evidence that the statutory grounds for termination had been met and that it was in William’s best interest that parental rights be terminated?

The termination hearing opened with a discussion of whether Ms. Lassiter had had adequate opportunity to obtain counsel. After consulting with Mr. Odom, counsel for the Department of Social Services, and Ms. Lassiter and her mother, Judge Gantt decided Ms. Lassiter’s opportunity to seek counsel had been ample and that the hearing should not be postponed. 37

Mr. Odom then presented the case for the Department of Social Services which, in fact, consisted of the testimony of only one witness, the social worker, Bonnie Cramer. Ms. Cramer’s testimony was used to establish three propositions: first, that William had been found to be a neglected child and had been placed in foster care; second, that, while William was in foster care, Ms. Lassiter and her mother had displayed little interest in William and had made little effort to stay in contact with him; and third, that, at this point, it was in William’s best interest to be put up for adoption rather than be placed in the home of Lucille Lassiter. 38

In any assessment of the weight to be given to Ms. Cramer’s tes-

36. Justice Stewart wrote:
   While hearsay evidence was no doubt admitted, and while Ms. Lassiter no doubt left incomplete her defense that the Department had not adequately assisted her in rekindling her interest in her son, the weight of the evidence that she had few sparks of such interest was sufficiently great that the presence of counsel for Ms. Lassiter could not have made a determinative difference.
101 S. Ct. at 2162.
37. William’s best interest plainly calls for a speedy resolution of the custody proceeding. See note 63 infra. It should be noted, however, that the termination hearing had already been delayed for two months because Judge Gantt was attending a Judge’s conference on the original hearing date. Transcript at 6.
38. Id. at 9-16.
timony, which, as stated above, was the only evidence presented by the Department, certain other facts should be taken into account. 39 First, regarding Ms. Cramer's testimony as to the lack of interest and contact, Ms. Cramer had had charge of William's case only since August, 1977. Much of her testimony on this matter, therefore, was not given on the basis of personal knowledge, but only on the basis of the department of Social Services' record. It must be emphasized, however, that this record was never introduced into evidence, nor were Abby Gail and Lucille Lassiter given any opportunity to examine and refute its contents. 40

Second, regarding the issue of the "best interests" of the child, the Department's attorney elicited the following testimony from Ms. Cramer:

Q. Do you feel that it would be in the best interest of this child to be placed in the physical custody of his grandmother?
A. No.
Q. What would be your basis for feeling that it would not be in his best interests?
A. I think there are several things. William does not know his grandmother. Mrs. Lassiter has a great deal—to do to care for the other children and she does a very fine job of that with a great deal of support from the Department of Social Services and supportive services. I have—I don't feel that the home is conducive for William. I have checked with people in the community and from Mrs. Lassiter's church who also feel that this additional responsibility would be more than she can handle. Mrs. Lassiter herself has indicated that to me on a number of occasions. 41

It must be noted that the state presented no other witness, either expert or lay, to buttress Ms. Cramer's opinion of what would be in William's best interest; that, while Ms. Cramer referred to "people in the community and from Mrs. Lassiter's church" who felt that William would be too much for her to handle, these individuals were never identified, much less brought into court to give their opinion first hand; and that, while she expressed the opinion that the home was not "conducive" for William, Ms. Cramer was never asked to give the opinion a factual basis.

Abby Gail Lassiter was given the opportunity and did attempt to

39. For the weight Justice Stewart attaches to the social worker's testimony, see text accompanying note 88 infra.
40. 101 S. Ct. at 2173 (Blackmun, J., dissenting). For the importance of the record as opposed to direct personal observation, see note 13 supra.
41. Transcript at 13-14.
cross-examine Ms. Cramer. The hearing transcript, however, reveals that Ms. Lassiter simply did not know how to cross-examine a witness. Justice Blackmun, in his dissenting opinion, cites one portion of the transcript to show that “she apparently did not understand that cross-examination required questioning rather than declarative statements.” Another portion of the transcript reveals that the cross-examination of Ms. Cramer by Ms. Lassiter eventually degenerated into a cross-examination of Ms. Lassiter by Judge Gantt.

42. Id. at 19-24.
43. The passage cited by Justice Blackmun read:
   THE COURT: All right. Do you want to ask her any questions?
   PETR: About what? About what she—
   THE COURT: About this child.
   PETR: Oh, yes.
   THE COURT: All right. Go ahead.
   PETR: The only thing I know is that when you say—
   THE COURT: I don't want you to testify.
   PETR: Okay.
   THE COURT: I want to know whether you want to cross-examine her or ask any questions.
   PETR: 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.
   PETR: About that?
   THE COURT: Yes. Do you understand the nature of this proceeding?
   PETR: Yes.
   THE COURT: And that is to terminate any rights you have to the child and place it for adoption, if necessary.
   PETR: Yes, I know.
   THE COURT: Are there any questions you want to ask her about what she has testified to?
   PETR: Yes.
   THE COURT: All right. Go ahead.
   PETR: 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?
   PETR: My son, William.

101 S. Ct. at 2173 n.22 (Blackmun, J., dissenting), accord, Transcript at 19-20.
44. The testimony reads:
   Q. Well, what I want to ask about, what I want to know is why you want to take the child and place it in adoption care?
   A. Because I feel that William needs to have a permanent home, some place where he can grow up and stay and because his family, you or his grandmother nor anybody else in the family has for over three and a half years shown any interest in him or asked about him and a four year old does not remember a family who does not stay in contact with him or see him. William is four years old and he has got his whole life
After attempting to cross-examine Ms. Cramer, Ms. Lassiter herself took the stand, first to be questioned by Judge Gantt and then to be cross-examined by Mr. Odom. To Judge Gantt's credit, he did begin by trying to elicit from Ms. Lassiter her view of her relationship with William.

Q. All right. Tell us about your relationship with your son William L. Lassiter. I understand he was born September 26, 1974?
A. Yes.
Q. Where was he born, Duke Hospital?
A. Yes.
Q. All right. Now tell us about your relationship with him and his development and so forth from that time until you were imprisoned.
A. When he was born, when I had him and everything?
Q. Yes, ma'am.  

Unfortunately, the attention of the judge was soon diverted to an inquiry into why Ms. Lassiter had not appeared at the neglect hearing, why her AFDC checks were mailed to her boyfriend's house and why some of William's hair had fallen out. The judge, in his interrogation, never addressed the key questions: what efforts had Ms. Lassiter made to contact William once he was put in foster care and he needs to be in a home.

Q. Well, he's been—I've been—what I'm saying, why you think—I don't thing you know what I said. I don't think because he's been—what I'm saying, that child's been with us, he was big while he was took, he was older. He wasn't that very young when they took him. He was kind of big.
A. He was eight months old.
Q. Yes, he was big, he wasn't that young. And he knows us and he knows my mother. And I feel why you should adopt him, he have a family, we are his family. Why you want to place him in adoption among strange people that not his family and they not got no relationship to him and his family is over here, my mother and I.
MR. ODOM: I think she has already answered that question. I think it's obvious, you know, I think the answer to that question is very obvious.

THE COURT: What she's driving at is it's apparently going to be a long time before you will be able to associate with this child. The child is in foster care and they want to put the child in a permanent home where he can grow up and live and reside with people that he knows and who will take care of him and treat him as a family member.
MS. LASSITER: We have treated him as a family.
THE COURT: Well, why did she file the complaint?
MS. LASSITER: Well, that is lies.
THE COURT: Huh?
MS. LASSITER: That is lies because when I went to the hospital, when I carried him to the clinic . . .

Transcript at 22-23.
45. Id. at 25.
ter care; what efforts had the Department of Social Services made to help her reestablish a relationship with William; what plans did she have for William if her parental rights were not terminated; and why, in her opinion, would William's interests be better served were parental rights not terminated?

Having failed to give Ms. Lassiter an opportunity to offer responses to any of these questions, the Judge delivered Ms. Lassiter to the Department's lawyer with the comment, "All right, Mr. Odom, see what you can do." Mr. Odom did reach the issues of the amount of contact between mother and child, and the mother's view of what should be done with her child, but only in

46. In addition, one may easily conclude from reading the transcript that Judge Gantt was not overly sympathetic to the witness. Justice Blackmun points out that Judge Gantt "expressed open disbelief at one of her answers," 101 S. Ct. at 2174 (Blackmun, J., dissenting), and cites the following passage: "THE COURT: Did you know your mother filed a complaint on the 8th day of May, 1975 . . . ?" "A. No. 'cause she said she didn't file no complaint.'" "THE COURT: That was some ghost who came up here and filed it I suppose." 101 S. Ct. at 2174 n.23 (Blackmun, J., dissenting), accord, Transcript at 30.

47. Transcript at 36.

48. Id. at 36-38. See note 14 supra.

49. The testimony reads as follows:

Q. If you could decide right now what you plan to do with that child what would you plan to do for that child right now? What would you have happen to it?
A. If I do what now?
Q. What would you want to happen to your child if you could plan for him right now, what would happen to him? I mean, you can't take him over there and keep him with you.
A. Well, I'd be a mother for him like I always done, be a mother for him.

THE COURT: Just answer his question. He said what would you like to have done with your child since you can't take him with you?
Q. Do you want him to stay where he is?
A. No.
Q. You want him to go live with your mother?
A. Yes, I do. Because that's his family. She is his grandmother.
Q. And you think he knows her?
A. Yes, he does. He knows all of us, my children.
Q. How does he know you? How do you even know that he knows you if you haven't seen him in a year?
A. Well, he knows us.
Q. Just because you are his family?
A. He knows us. Children know they family. I don't care which way it is, children know they family. They know they people, they know they family and that child knows us anywhere. He got brothers and sisters. I got four more other children. Three girls and a boy and they know they little brother when they see him.
Q. He hasn't seen any of them in a couple of years.
A. Yes, he have, he have seen them since then.
Q. How do you know?
A. Because I have been with them. They seen him because I had my children with me and when we met and run into him and see him, they see him too. All of us be
After Abby Gail Lassiter was excused, Lucille Lassiter, the last of the three witnesses who testified at the hearing, took the stand to be questioned by Judge Gantt and then cross-examined by Mr. Odom. Though Lucille Lassiter was testifying on behalf of her daughter, Abby Gail was never told that she had a right to question her mother. Much of the judge's questioning focused on whether Lucille Lassiter had, in fact, filed a neglect complaint against her daughter in 1975 and why Lucille had failed to appear at the neglect hearing. When, at one point, Lucille Lassiter attempted to relate the contacts she and her daughter had made with Ms. Cramer’s predecessor about returning William, testimony going to the issues of the parent’s concern about the child and the Department’s efforts to foster that concern, the Judge failed to pursue the matter.\textsuperscript{50} In fact, he yielded the questioning to Mr. Odom in evident frustration: “The Court: ‘I tell you what, let’s just stop all this. You question her, please. Just answer his questions. We’ll be here all day at this rate. I mean we are just wasting time, we’re skipping from one subject to another . . . .’”\textsuperscript{51}

Mr. Odom conducted a brief cross-examination. When Lucille Lassiter tried to return to the topic of the family’s contact with

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standing there. Because the last time when I ran into the store when that lady had him, that lady had him, she had him. And my other children were standing right there and she said there go our other brother and that child got out of that cart, he didn’t want to go with that lady. ‘Cause she’s not his mother, I’m his mother. I don’t care which way it is, I’m his mother and that’s his grandmother.

Q. And he has been in foster care for over three years of his four-year life, isn’t that right? He was eight months old when he went into foster care, isn’t that right?
A. Sir, how would you feel if somebody came and took your child and took it away like that?

Q. Just answer my question. He’s been in foster care since he was eight months old?
A. I don’t know how long he has been in there.
\end{flushleft}

\textit{Id.} at 39-41.

\textsuperscript{50} The testimony reads as follows:

So then they put this little black lady on the case. So she was coming in and she said she would take her, you know, and see about the child. When we would see the child he would knows all us because he was a big child. He knows us, he come right straight to us and all the stuff like that. But anyway, when she got—when this trouble happened, you know, with me and her, with the court on this trouble what she’s in now, this black lady and she was talking to her and she said, well, Abby Gail, she said, ya’ll go on to court and she said, and we’ll see, you know, what’s going to happen to ya’ll in court and I was found guilty and she would found not guilty in court and come out.

Q. Let’s not get into all of that.

\textit{Id.} at 51.

\textsuperscript{51} \textit{Id.} at 52.
Ms. Cramer's predecessor, "the onlyest anybody that seemed like cared or had any—or cooperated along with us," Mr. Odom terminated his cross-examination. There then occurred the following exchange, which sheds further light on Ms. Abby Gail Lassiter's comprehension of the nature of the proceeding and her ability to represent herself without the aid of counsel:

Mr. Odom: If your Honor please, that's all as far as we know unless she has some more witnesses she wants to testify.

The Court: Do you have any other witnesses? Ms. Lassiter, do you have any other witnesses?

Ms. Lassiter: That knows about this?

The Court: I said that to her, Abby Gail Lassiter. Do you have any more witnesses?

Ms. Lassiter: Nobody else don't know nothing about this but me and momma.

After Judge Gantt had once more questioned Ms. Lassiter about her AFDC check and Mr. Odom had presented his closing argument, Ms. Lassiter was asked if she had anything more she wanted to say. Ms. Lassiter responded, "Yes, I don't think it's right." Judge Gantt then announced that unless Ms. Lassiter thought there were some defect in the record, he was prepared to sign an order terminating her parental rights. Only upon Mr. Odom's intervention did the judge pause to inform Abby Gail that she had the right to appeal his decision and to suggest that if she wanted to appeal she should seek counsel.

52. The testimony reads as follows:

Q. Did you ask anybody where he was?
A. Yes, I called and I didn't know where he was, we had nobody to cooperate with us until this little black lady got on the case. And then she went right along with us and cooperated with us to try to get her child back. That's the onlyest anybody that seemed like cared or had any—or cooperated along with us. And this little black lady, I don't know what happened to her, she cooperated with us and went along with us in trying to get her child back.

MR. ODOM: Well, I don't have any other questions, Your Honor.

Id. at 56-57.

53. Id. at 57.

54. Id. at 61.

55. The transcript reads as follows:

MR. ODOM: I would like to, of course, there is no testimony to that effect, but there has been some indication that Ms. Lucille Lassiter is disturbed about this. She has been disturbed, apparently, I think that Ms. Smith can evidence some indication that she showed the first time and we would like for the Court to instruct her that there are appropriate means for her to object to what is happening this morning and to take it out directly against the social worker is an inappropriate way. If you understand what I mean.
August 31, 1978—June 1, 1981: From the Termination Hearing in Durham County to the Supreme Court Decision

After the termination hearing, Abby Gail Lassiter contacted the North Central Legal Assistance Program, whose attorneys brought an appeal to the North Carolina Court of Appeals. The basis of the appeal was that the indigent Ms. Lassiter had a fourteenth amendment due process right to representation by counsel, and therefore, that the trial court judge committed reversible error when he did not appoint counsel to represent her.56

The North Carolina Court of Appeals did not deliver its decision until November 6, 1979. It unanimously affirmed the trial court's decision. While it did accept that "there is no question but that there is a fundamental right to family integrity protected by the U.S. Constitution,"57 the court concluded that there was no violation of either procedural or substantive due process in the failure to provide appointed counsel for the parent.

The termination of parental rights by the State invokes no criminal sanction against the parent whose rights are to be terminated. 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.58

The North Carolina Court of Appeals went on to express its agreement "with the underlying rationale of In re Moore . . .59 that the legislature might have required and authorized the appointment and payment of counsel for indigents in these circumstances, but apparently did not choose to do so," adding that "[t]here is cer-

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56. It should be noted that "[a]t no time during the entire hearing did Ms. Lassiter ever inform the Court that she could not afford counsel, nor did she ever explicitly or implicitly ask that he appoint an attorney to represent her." Brief for Respondent at 2, Lassiter v. Department of Social Servs., 101 S. Ct. 2153 (1981) [hereinafter cited as Brief for Respondent].
58. Id.
tainly no bar to its making such a requirement in the future."\(^{60}\)

Petitioner's counsel next sought review of the court of appeals decision by the North Carolina Supreme Court. The North Carolina Supreme Court, without opinion, denied the petition for discretionary review on January 17, 1980.\(^{61}\) Counsel for Ms. Lassiter then petitioned the United States Supreme Court for a writ of certiorari to review the decision of the North Carolina Court of Appeals. The writ was granted on October 6, 1980, oral arguments were presented on February 23, 1981, and the Court rendered its decision on June 1, 1981.

These dates are significant in indicating the length of time William Lassiter's status had been left in limbo. At the time the Supreme Court was making its decision, William had been in foster care a total of five years and more than two and a half years had elapsed since Judge Gantt's decision to terminate Ms. Lassiter's parental rights.\(^{62}\) Given the lengthiness of the litigation and the Supreme Court majority's concern that "child-custody litigation must be concluded as rapidly as possible consistent with fairness,"\(^{63}\) the Court was under considerable pressure to reach a decision that would clarify William's status without further litigation or other delay.

Part III. The Supreme Court Decision

A. A Summary

Justice Stewart's majority opinion comprises four parts: Part I sets out the facts of the case and reviews the proceedings below;

\(^{60}\) See note 58 supra. See similar statement by the United States Supreme Court, expressing its opinion that legislation requiring appointed counsel might be desirable, note 90 infra.


\(^{62}\) Mr. Odom has advanced a strong argument that the petitioner was not without fault for allowing this long period of separation:

The statutory scheme in North Carolina, particularly G.S. § 7A-289.34, allows for temporary orders affecting the custody or placement of the child pending appeal. No such effort was made during the pendency of the appeals process in this case. Without addressing myself to the merits of whether such orders would or should have been allowed, an effort to obtain an order which would have preserved some relationship between Ms. Lassiter and her child pending appeal would have, at the least, buttressed her argument that she was genuinely concerned about her relationship with her child. The range of inferences that might be drawn from her failure to do so is virtually limitless.

Odom Letter of October 1st.

\(^{63}\) 101 S. Ct. at 2162.
Part II develops the argument for the propositions that due process requires the appointment of counsel for indigent parents in some, but not all, termination cases and that the decision whether counsel is constitutionally required should be made in the first instance by the trial court on a case-by-case basis; Part III explains why the trial court's failure to appoint counsel for Ms. Lassiter should not be considered a denial of due process; and Part IV, a rather curious coda, commends appointing counsel for indigent parents in termination and in neglect and dependency hearings, even when counsel is not constitutionally required. It is useful to summarize the key portions of this opinion, Parts II and III, before offering specific comments or criticisms.

Justice Stewart opens Part II by recognizing that due process can never be precisely defined, by equating the requirement of due process with that of "fundamental fairness," and by suggesting that to apply the Due Process Clause we must, "discover what fundamental fairness consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." 64

The analysis which follows is divided into three sections. In section A, Justice Stewart examines a number of Supreme Court decisions involving the rights of indigents to appointed counsel. He "concludes" that the "pre-eminent generalization that emerges from this Court's precedents . . . if [sic] that such a right has been recognized only where the litigant may lose his physical liberty if he loses the litigation." 65 Justice Stewart then uses this conclusion, drawn from past Supreme Court decisions, to justify establishing a barrier to future claims of indigents not threatened with a loss of physical liberty. The barrier is in the form of a presumption, which Stewart briefly describes at the end of section A:

In sum, the Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured. 66

There is no explanation in section A how this presumption is to be
employed or what weight will be attached to it and there is an immediate shift in focus in section B to the Mathews v. Eldridge three-pronged balancing test.

Mathews v. Eldridge, it may be recalled, involved a recipient of Social Security Disability Payments whose benefits had been terminated without a hearing. The question before the Court was whether the Social Security Administration’s procedures, which included the possibility of a post-termination hearing, were constitutionally sufficient or whether due process required that there be a hearing prior to termination of benefits.67 After reviewing prior decisions involving the question whether due process requires an evidentiary hearing prior to the deprivation of some type of property interest, the Court developed the following balancing test:

[R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected . . . More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.68

Justice Stewart, in Lassiter, after citing the three elements of

68. In Eldridge, the application of this balancing test led the Court to find that there was no due process violation. In reaching this decision, the Court stressed that the proceeding in question was an administrative, not a judicial, proceeding. “We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies ‘preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts.’” Id. at 348, accord, FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940).

The Court stated that in assessing what process is due in an administrative proceeding, “substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.”

The Court then found that “the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final.”

The administrative procedures in question, therefore, did not violate due process. Id. at 349.
the Eldridge test—the private interests at stake, the government's interests, and the risk of an erroneous decision—then explains how the Eldridge test will be utilized in conjunction with the presumption against the right to counsel just created in section A: "We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." 69

Justice Stewart, in effect, creates two balancing tests: two challenges the indigent parent must meet successfully. First, the indigent parent must show that, on balance, his or her interest in the child and the risk of error in proceeding without counsel outweigh the government's interest in not providing counsel. Even if the indigent parent survives this first ordeal, victory is not assured. For, the parent must still show that the balance under the Mathews v. Eldridge test weighs so far in his or her favor, that it overcomes the section A-created presumption against the provision of counsel.

The remainder of section B is devoted to an application of the three Eldridge elements to termination of parental rights proceedings. Investigating the private interest at stake, Justice Stewart acknowledges that the indigent parent's interest in his or her child deserves great weight.

This Court's decisions have by now made plain beyond the need for multiple citation 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 . . . ." Here the State has sought not simply to infringe upon that interest but to end it. If the State prevails, it will have worked a unique kind of deprivation . . . . A parent's interest in the accuracy and injustice 70 of the decision to terminate his or her parental status is, therefore a commanding one. 71

Inspecting the governmental interests, Justice Stewart points out the government does have interest in not appointing counsel to "avoid both the expense of appointed counsel and the cost of the lengthened proceedings." He admits, however, the state has a countervailing interest in appointing counsel: "Since the State has

69. 101 S. Ct. at 2159.
70. In the Supreme Court Reporter, the word is "injustice," but in United States Law Week it is "justice." 49 U.S.L.W. 4586, 4588 (1981). "Justice" seems to make more sense.
71. 101 S. Ct. at 2160 (footnote omitted).
an urgent interest in the welfare of the child, it shares the parent’s interest in an accurate and just decision. For this reason, the State may share the indigent parent’s interest in the availability of appointed counsel.”72 He concedes, moreover, that whatever pecuniary interest the state has militating against appointing counsel, “it is hardly significant enough to overcome private interests as important as those here.”73

Thus, after the first two confrontations in the Mathews v. Eldridge area, the indigent parents are clearly ahead. In the third and final encounter, when the issue of the likelihood of erroneous decisions comes into play, the state’s final defenses are swept away.

Justice Stewart commences his examination of the likelihood of erroneous decisions, if indigent parents are not seconded by counsel, with a lengthy review of the other procedural safeguards available in North Carolina termination proceedings. He then reiterates the respondent’s arguments, that “the subject of a termination hearing—the parent’s relationship with her child—far from being abstruse, technical, or unfamiliar is one as to which the parent must be uniquely well informed” and that “the termination hearing is not likely to produce difficult points of evidentiary law, or even of substantive law, since the evidentiary problems peculiar to criminal trials are not present and since the standards for termination are not complicated.”74 The tactic is a setup: Justice Stewart deploys these arguments the better to easily defeat them in the following strongly worded passage:

Yet the ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be. Expert medical and psychiatric testimony, which few people are equipped to understand and fewer still to refute, is sometimes presented. 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.75

Justice Stewart concludes section B by referring to the judgments

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72. *Id.*
73. Justice Stewart adds, “Particularly in light of the concession in the respondent’s brief that the ‘potential costs of appointed counsel in termination proceedings . . . is [sic] admittedly de minimis compared to the costs in all criminal actions.’” *Id.*
74. *Id.* at 2161.
75. *Id.*
of these courts in a manner suggesting that he too will award the decision to the parents:

Thus, courts have generally held that the State must appoint counsel for indigent parents at termination proceedings. . . . 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.76

Section C, however, opens by restating the theme that the indigent parent must not only survive the Mathews v. Eldridge balancing test, but that the Eldridge facts must also be weighed, “against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of liberty.”77 In summarizing his findings concerning each of the three Eldridge factors, Justice Stewart once again stresses the strength of the parent’s interests in having counsel and the weakness of the state’s interest in opposing providing counsel, but hedges on the risk of error, stating that “the incapacity of the 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.”78

Justice Stewart is still forced to admit that, “[i]f 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.”79

But he counters this admission with the claim that, “[s]ince the Eldridge factors will not always be so distributed, and since ‘due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed,’ . . . neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding.”80

Having decided that due process demands counsel in some, but not all cases, Justice Stewart concludes Part II of the opinion by citing the example of Gagnon v. Scarpelli,81 and holding that “the

76. Id.
77. Id.
78. Id. at 2162 (emphasis added).
79. Id.
81. 411 U.S. 778 (1973). Gagnon involved a decision to revoke Gerald Scarpelli’s proba-
decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings 'should be left,' to be answered in the first instance by the trial court, subject, of course, to appellate review. 82

Justice Stewart opens Part III of the opinion with two announcements. First, the Supreme Court will not issue any "precise and detailed" guidelines for trial courts to follow when faced with the problem of determining whether counsel is required under the constitutional standard set out in Part II. Second, while the Supreme Court generally will leave the due process decision to the trial court in the first instance, in Lassiter it will not remand, but will decide the issue itself. Justice Stewart justifies refusing to provide specific guidelines to trial courts by referring once more to Scarpelli and by stating, "[H]ere, as in that case, 'the facts and circumstances. . . . are susceptible of almost infinite variation." 83 He justifies the Court's readiness to decide the issue in Lassiter under the newly formulated standard by citing the need to conclude child-custody litigation "as rapidly as is consistent with fairness." 84

The remainder of Part III is devoted to the question whether Abby Gail Lassiter was denied due process under the Court's balancing or double-balancing test. The Supreme Court's refusal to make a general announcement of guidelines to be used by lower courts in applying this test, of course, enhances the importance of the criteria the Court itself uses to decide the question whether Abby Gail Lassiter was denied due process.

82. 101 S. Ct. at 2162.
83. Id., accord, Gagnon v. Scarpelli, 411 U.S. at 788. It should be noted that while the Court stated in Scarpelli that "it is not prudent to attempt to formulate a precise and detailed set of guidelines," the Court did proceed to set out certain general guidelines. It suggested that counsel should be provided when (i) the probationer or parolee denies committing the alleged violation of conditions which is the basis for sending him back to prison or (ii) even if he admits the violation, there are substantial reasons justifying or mitigating the violation, and these reasons are complex or difficult to present. The Court added that, "the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself." 411 U.S. at 790-91.
84. 101 S. Ct. at 2162. Justice Stewart adds in a footnote: "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." Id. at n.7.
Justice Stewart begins by pointing out that the petition to terminate Ms. Lassiter's parental rights contained no allegation of neglect or abuse upon which criminal charges might subsequently be brought. He notes that the Department of Social Services was represented by a lawyer, but he also notes that no expert witnesses testified. He also maintains that at trial the case presented no especially troublesome points of law.85

Justice Stewart then rather cursorily86 addresses the question whether the presence of counsel for Ms. Lassiter might have affected the outcome of the trial and appears to conclude87 that the presence of counsel would not have made a difference.

While hearsay evidence was no doubt admitted, and while Ms. Lassiter no doubt left incomplete her defense that the Department had not adequately assisted her in rekindling her interest in her son, the weight of the evidence that she had few sparks of such an interest was sufficiently great that the presence of counsel for Ms. Lassiter could not have made a determinative difference. True, a lawyer might have done more with the argument that William should live with Ms. Lassiter's mother—but that argument was quite explicit made by both Lassiters, and the evidence that the elder Ms. Lassiter had said she could not handle another child, that the social worker's investigation had led to a similar conclusion, and that the grandmother had displayed scant interest in the child once

85. Id. Cf. id. at 2174 (Blackmun, J., dissenting). Justice Blackmun points out that while "[t]he Department's own 'diligence' was never put in issue during the hearing, . . . it is surely significant in light of petitioner's incarceration and lack of access to her child." Id. See also the argument made in Petitioner's Brief for Rehearing, note 178, infra, that there was expert testimony at trial.

86. For issues that had the potential for being outcome-determinative, that might have been affected by the presence of counsel, but are not discussed by Justice Stewart, see text accompanying note 185 infra.

87. "Appears to conclude" is used because a close reading of the text of the opinion raises some doubt as to the firmness of Justice Stewart's conclusion. Clearly, he believes that counsel would have made no difference on the issue of the Department's assistance to Ms. Lassiter, since he states in a straightforward manner that the presence of counsel "could not have made a determinative difference." 101 S. Ct. at 2162 (emphasis added). His statement on the issue whether the child could have been placed with the grandmother is not as straightforward. Here he concludes that the evidence, though controverted, was "sufficiently substantial that the absence of counsel's guidance . . . did not render the proceedings fundamentally unfair." Id. at 2163. On one hand, it may be argued that Justice Stewart was using "did not render the proceedings fundamentally unfair" as the equivalent of "could not have made a determinative difference." On the other hand, it may be argued that the two terms are not synonymous; that "did not render the proceedings fundamentally unfair" could cover a finding that there was a possibility the presence of counsel might have made a determinative difference in the result, but, in the Justice's opinion, the possibility was not substantial enough to warrant a reversal.
he had been removed from her daughter’s custody was, though controverted, sufficiently substantial that the absence of counsel’s guidance on this point did not render the proceedings fundamentally unfair.88

Having made all these points—no potential for criminal charges, no expert testimony, no difficult issues of law, and little, if any, likelihood that presence of counsel would have affected the outcome—Justice Stewart concludes Part III citing one other factor: the mother’s lack of interest in contesting the proceedings.

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. Here, the trial court had previously found that Ms. Lassiter had expressly declined to appear at the 1975 child custody 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. In view of all these circumstances, we hold that the trial court did not err in failing to appoint counsel for Ms. Lassiter.89

B. A Critique

Many may be disturbed by the outcome in Lassiter: that, as a result of Justice Stewart’s opinion, there may continue to be cases in which indigent parents are permanently stripped of all rights to their children at hearings where the parents have no legal counsel. Justice Stewart himself seems to have been worried enough by this malady to order up a strong dose of dicta in Part IV of his opinion:

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 higher standards 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 . . . . 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.90

88. Id. at 2162-63.
89. Id. at 2163.
90. Id.
As Justice Rehnquist has emphasized, however, criticism of Supreme Court decisions by academic lawyers must be based on firmer ground than the critic's unhappiness with the outcome of the case.

To the extent that the criticism is what I would call "result-oriented"—that is, obviously determined by the fact that the critic is unhappy with the rule which the Court laid down, it will offer little help to the court subjected to the criticism in making future decisions unless it is backed with some sort of sound reasoning.91

In light of Justice Rehnquist's comments, it behooves the academic critic to consider whether Justice Stewart's reasoning was correct, before bemoaning the result of that reasoning.92 It is the contention of this article that Justice Stewart's opinion is open to attack on three broad fronts: first, in his employment of a presumption against the right to counsel; second, in his utilization of the *Mathews v. Eldridge* balancing test; and third, in his actual application of the presumption and of the *Mathews v. Eldridge* factors to the facts in *Lassiter*.

1. *The Presumption Against the Right to Counsel*

Justice Stewart's presumption that "an indigent litigant has a right to appointed counsel," "only when, if he loses, he may be deprived of his physical liberty" is a powerful, if somewhat mysterious Force. Unsheathed at the critical moment, when the right of the indigent parent to counsel appears to have survived the *Mathews v. Eldridge* balancing test, it is then used as the key weapon to deny the right to counsel to at least some indigent parents.93 Yet, the employment of this presumption is itself open to serious challenge: (i) on the ground that the creation of the presumption conflicts with the Court's own prior decisions; (ii) on the ground that even if the Court's prior decisions do not preclude the crea-

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   If its criticisms are made with caution, scholarship, and objectivity, they may be of great assistance to the Court, and quite properly taken into account by the Court in deciding later cases. But if criticism from legal academia is substantially founded on the Critic's personal philosophy of government, rather than the common legal training to which we have all been subjected, that attention that it may justly command from the Court will be quite different. At least the nine Justices of the Supreme Court have been appointed by the President and confirmed by the Senate, whereas law school faculties and students have received no official imprimatur whatever.

92. Bemoaning the result is reserved for Part IV infra.

93. See text accompanying note 77 supra.
tion of a presumption, they still do not require it and that the invocation of the presumption in a case involving the termination of parental rights is a very questionable choice of policy given prior legislation and judicial decision-making in this area; (iii) on the ground that the presumption is improperly applied.

(i) The Presumption Conflicts With the Court's Own Prior Decisions

According to Justice Stewart's own explanation, the presumption is based on his finding that in the past the Court has recognized a right to counsel only upon a showing that the physical liberty of the litigant was jeopardized. The first question the presumption raises, therefore, is whether Justice Stewart's description of past Supreme Court practice is accurate.

A review of the Court's past decisions reveals a record of expansion of the right to counsel from defendants in capital cases in 1932,⁹⁴ to defendants in federal criminal cases in 1938,⁹⁸ to defendants in state felony cases in 1963,⁹⁶ to juveniles facing delinquency proceedings which might lead to imprisonment in 1967,⁹⁷ to anyone imprisoned for a crime in 1972,⁹⁸ and to prisoners facing transfers to mental institutions in 1980.⁹⁹ Two of these decisions, In re Gault¹⁰⁰ dealing with juveniles and Vitek v. Jones¹⁰¹ dealing with prisoners facing transfer to mental institutions, extend the right beyond the confines of purely criminal proceedings.¹⁰² For Justice Stewart's thesis to be correct, both of these decisions must rest on the fact that their litigants, as those in the criminal cases, were being threatened with loss of physical liberty. Justice Stewart argues that they do.

That it is the defendant's interest in personal freedom,¹⁰³ and not

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99. Vitek v. Jones, 445 U.S. 480 (1980). Of five Justices reaching the merits in Vitek, four held that the prisoner was entitled to legal counsel; one Justice, Justice Powell, agreed that the prisoner was entitled to qualified and independent assistance, but this assistance need not always be supplied by a licensed attorney. For further discussion, see text accompanying notes 107-14 supra.
100. 387 U.S. 1 (1967).
102. In these non-criminal cases, the right to counsel must be based on the fourteenth amendment's Due Process Clause rather than the sixth amendment's.
103. 101 S. Ct. at 2159 (emphasis added). It may be worth noting that there is a subtle
simply the special Sixth and Fourteen Amendments' right to counsel in criminal cases, which triggers the right to counsel is demonstrated by the Court's announcement in In re Gault... that "the Due Process clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed," the juvenile has a right to appointed counsel even though those proceedings may be styled "civil" and not "criminal". Similarly, four of the five Justices who reached the merits in Vitek v. Jones... concluded that an indigent prisoner is entitled to appointed counsel before being involuntarily transferred for treatment to a state mental hospital.104

Is Justice Stewart's reading of these two cases correct? In re Gault certainly does offer support for Justice Stewart's thesis. Fifteen year old Gerald Gault faced a serious loss of physical liberty through confinement in the State Industrial School for a period of up to six years. The Court's opinion, moreover, stressed this potential loss of liberty.105

shift in Justice Stewart's terminology. When he first announces his "pre-eminent generalization," he employs the phrase "where the litigant may lose his physical liberty." Id. at 2158. When he subsequently refers to the decisions in In re Gault and Vitek v. Jones, he speaks of "the defendant's interest in personal freedom." Id. at 2159. An interest in personal freedom is potentially a much broader interest than an interest in physical liberty. Justice Stewart's shift from an interest in physical liberty to an interest in personal freedom may simply be a stylistic device to avoid repetitious use of the phrase "physical liberty," or it may be a tacit admission that, as argued below, the Vitek case is not a case involving the interest in physical liberty per se.

104. 101 S. Ct. at 2159 (emphasis added).
105. It should be noted that Justice Stewart did not support the Court's decision in In re Gault. He was the only Justice who did not concur at least in part with the extension of due process rights to juveniles facing delinquency proceedings, and he was the only Justice to vote against the extension of the right to counsel to these juveniles.

Justice Stewart opened his dissent by criticizing the Court for using "an obscure Arizona case as a vehicle to impose upon thousands of juvenile courts throughout the Nation restrictions that the Constitution made applicable to adversary criminal trials." 387 U.S. at 78 (Stewart, J., dissenting) (footnote omitted). He added, "I believe the Court's decision is wholly unsound as a matter of constitutional law, and sadly unwise as a matter of judicial policy." Id.

Justice Stewart maintained that juvenile proceedings were fundamentally different from criminal proceedings, that juvenile proceedings were "simply not adversary proceedings," and that their purpose was fundamentally different from the purpose of criminal proceedings: correction rather than punishment. While recognizing that the performance of juvenile agencies "has fallen disappointingly short of the hopes and dreams of the courageous pioneers who first conceived them," he stressed that court intervention would not provide an answer. Id. at 79.

Finally, he believed that there was no reason to deal with the due process issues in the instant case because "the Supreme Court of Arizona found that the parents of Gerald Gault
Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of little practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes a building with whitewashed walls, regimented routine and institutional hours. . . . "Instead of mothers and fathers and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and delinquents" confined with him for anything from waywardness to rape and homicide. In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase "due process." 104

The Court's decision in Vitek v. Jones, however, tends to contradict Justice Stewart's thesis. Larry D. Jones had already been deprived of his physical liberty, through conviction on a robbery charge and incarceration in a state prison, before he was subjected to a transfer without hearing to a state mental hospital. Thus, Jones' physical liberty per se was not at stake when the transfer decision was made and could not be used as a basis for imposing a right to counsel or other due process requirements. Nevertheless, the Court insisted that due process protections were mandated because of the state's interference with other liberty interests: "Here the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections." 105 The foregoing key passage from Vitek appears to directly contradict Justice Stewart's assertion in Lassiter that the right to counsel has only been extended when physical liberty itself has been at stake. An argument which minimizes the weight to be attached to Vitek, however, may be

105. 445 U.S. at 494 (emphasis added).
While five justices—a majority of the Court—held that the impact of the decision on Jones' liberty interest activated general due process protections, only four justices—a plurality—held that due process safeguards must include the right to legal counsel. The fifth justice, Justice Powell, specifically refused to find an absolute right to legal counsel. Thus, while Vitek is authority for a general requirement of due process protections, it may not be authority for a required right to counsel.

In response to this argument, it should be noted that, while Justice Powell did not find an absolute right to legal counsel, he did hold that the individual facing commitment to a mental institution had a right to "qualified and independent assistance." Justice Powell's reluctance to specify that a lawyer must provide such "independent assistance" seems to have stemmed at least in part from his belief that, given the medical issues involved in a commitment determination, a licensed psychiatrist or other mental health professional might provide better assistance than a lawyer. It should also be noted that, while four justices dissented, the dissents were not based on the merits. Justices Stewart, Burger and Rehnquist based their dissent on a finding that the case was moot. Justice Blackmun based his dissent on a finding that the case was not ripe for adjudication.

Thus, Vitek contains no reasoned opposition to the application

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108. In considering this argument, it should be remembered that Justice Stewart himself appears to give a good deal of weight to the Vitek decision. See text accompanying note 104 infra.


110. The Court had an alternative ground for imposing due process safeguards: that the state statute itself gave the prisoner a "reasonable" or "objective" expectation that he would not be transferred without a finding of mental illness or defect and, thus, created a liberty interest protected by the Due Process Clause. Id. at 490-91.

111. Id. at 500 (Powell, J., concurring).

112. Id. Justice Powell added, however, "I would not exclude . . . the possibility that the required assistance may be rendered by competent laymen in some cases." Id.

113. Id. (Stewart, J., dissenting).

114. Id. at 503 (Blackmun, J., dissenting). To explain these seemingly anomalous holdings, it is necessary to relate the case's peculiar facts. Vitek had been released on parole and then reimprisoned for a parole violation, but had not been returned to the mental institution. There was some question whether a threat of return to the mental institution still remained. Justice Stewart, joined by the Chief Justice and Justice Rehnquist made a finding of "mootness;" Justice Blackmun, who evidently placed greater weight on the threat of reincarceration in the mental institution, nevertheless found the issue "not yet ripe" for adjudication. Id. at 500, 503.
of due process safeguards. Of the five justices reaching the merits, all agreed that these safeguards should apply, all agreed that the individual was entitled to independent, effective aid, and four of the five agreed that such aid encompassed legal counsel. Further, *Vitek* does not stand alone. It is neither the first nor the only case involving the right to counsel in which the Supreme Court has made reference to the stigmatizing impact of a proceeding upon an individual. In *In re Gault*, the Court's determination that a person's being labeled a "juvenile delinquent" was almost as stigmatizing as being labeled a "criminal" was used to support its conclusion that due process protections should apply to alleged juvenile offenders. In *Middendorf v. Henry*, the Court's determination that there was no stigma attached to the military offense of "unauthorized absence" was used to support its conclusion that a defendant in a summary court-martial proceeding did not have a right to counsel.

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115. Further, we are told that one of the important benefits of the special juvenile court procedures is that they avoid classifying the juveniles as a "criminal." The juvenile offender is now classified as a "delinquent." There is, of course, no reason why this should not continue. It is disconcerting, however, that this term has come to involve only slightly less stigma than the term "criminal" applied to adults. 387 U.S. 22-24 (footnote omitted).

The Court responded to the claim that there is no stigma because juvenile court proceedings are kept secret by stating that this claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invariably apply only to the court records, and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers. Of more importance are police records. In most States the police keep a complete file of juvenile "police contacts" and have complete discretion as to disclosure of juvenile records. *Id.* at 24-25 (footnotes omitted).

116. 425 U.S. 25 (1976). In *Middendorf v. Henry*, the Court rejected both Middendorf's claim to a right to counsel under the sixth amendment's provision for counsel in "criminal proceedings," and his claim to a right to counsel under the fifth amendment's Due Process Clause. *Id.* at 48.

117. Here, for example, most of the plaintiffs were charged solely with "unauthorized absence," an offense which has no common-law counterpart and which carries little popular opprobrium. Conviction of such an offense would likely have no consequences for the accused beyond the immediate punishment meted out by the military, unlike conviction for such civilian misdemeanors as vagrancy or larceny which could carry a stamp of "bad character" with conviction. *Id.* at 39.

In a strongly worded dissent, Justice Marshall argued that it was, wholly unrealistic to suggest that the impact of a summary court-martial conviction lies exclusively in the immediate punishment that is meted out. Summary court-martial convictions carry with them a potential of stigma, injury to career, and increased
These earlier opinions\textsuperscript{118} reinforce Vitek. They show that the stigma attached to being committed to a mental institution is not \textit{sui generis}. They demonstrate, rather, that other decisions may have stigmatizing impact on individuals and that the Court has looked not only to the loss of physical liberty, but also to the loss of liberty through this stigmatization, in invoking due process requirements.

In conclusion, it may be argued that giving due weight to Vitek and reading it correctly shows Justice Stewart's initial premise to be faulty and, as a consequence, the whole structure of his argument for a presumption against the right to counsel, based on that premise, also to be irreparably flawed.

(ii) \textit{The Presumption is Not Required by the Court's Past Decisions and Should Not Have Been Invoked}

Assuming, for the sake of argument, that the reading of Vitek suggested above is incorrect and that all the cases cited by Justice Stewart in which the Court found a right to counsel did turn on the potential deprivation of physical liberty, there still remains a serious question about the next, crucial link in Justice Stewart's chain of reasoning: the link between the holdings of past cases and the presumption designed for future cases. The question may be phrased as follows: Even if in past cases the right to counsel has been dependent upon the presence of a threat to physical liberty, should it be presumed that there are no other interests sufficiently important to require the provision of counsel?

Here, two points need to be made. First, Justice Stewart's creation of the presumption is not a matter of \textit{precedential necessity},

\textit{punishment for future offenses in the same way as do convictions after civilian criminal trials and convictions after general and special courts-martial.}

\textit{Id.} at 59 (Marshall, J., dissenting).

\textit{118. See also Parham v. J.R., 99 S. Ct. 2493 (1979), which involved the question of what process is constitutionally due a minor whose parents or guardian seek state administered mental health care for the child, the Court recognized that, "commitment sometimes produces adverse social consequences for the child because of the reaction of some to the discovery that the child has received psychiatric care." Id. at 2503. The Court, however, questioned how much stigmatization there would be in this situation.}

This reaction, however, need not be equated with the community response resulting from being labeled by the state as delinquent, criminal, or mentally ill and possibly dangerous . . . . The state through its voluntary commitment procedures does not "label" the child; it provides a diagnosis and treatment that medical specialists conclude the child requires. In terms of public reaction, the child who exhibits abnormal behavior may be seriously injured by an erroneous decision not to commit.

\textit{Id.}
but of policy choice. Second, the invocation of the presumption in a case involving the termination of parental rights is a highly questionable choice of policy given prior legislation and judicial decision-making in this area.

As a matter of simple logic, six or seven—or for that matter six or seven hundred—cases holding that counsel is required because physical liberty is at stake do not establish the converse proposition that counsel is not required when deprivation of physical liberty is not threatened. To be able to ground his presumption on precedent, Justice Stewart would have to show that the Supreme Court continually and consistently has refused to recognize a right to counsel when liberty interests, other than the interest in being free from physical confinement, have been at issue.

Justice Stewart's opinion in Lassiter fails to meet this burden. He cites only three cases where the Court has refused to recognize an unconditional right to counsel:119 Morrissey v. Brewer,120 Gagnon v. Scarpelli121 and Scott v. Illinois.122

The first two cases cited, Morrissey and Scarpelli, provide scant support for the proposition that the Supreme Court has refused to recognize a right to counsel when loss of physical liberty is not risked. In Morrissey, which involved the issue of what due process protection was required before revocation of parole, the Supreme Court, rather than rejecting the right to counsel, reserved judgment.123 In Scarpelli, which, similarly, involved the question what due process protection was required before revocation of probation, the Court did refuse to require counsel for all indigent probationers. Justice Stewart argues in Lassiter that the Court in Scarpelli refused to extend the right to counsel unconditionally to all probationers because the probationers had only a conditional, rather than an absolute, right to physical liberty124 and that Scarpelli, therefore, demonstrates that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel."125

\[119. \text{See 101 S. Ct. at 2159, for Justice Stewart's discussion of these three cases.}\]
\[120. 408 U.S. 471 (1972).\]
\[121. 411 U.S. 448 (1973).\]
\[122. 440 U.S. 367 (1979).\]
\[123. 408 U.S. at 489.\]
\[124. 101 S. Ct. at 2159.\]
\[125. Id. In Scarpelli, the Court went on to detail the differences between regular criminal trials and probation and parole hearings. It is true that, in the course of this analysis, the Court seemed to suggest that probationers and parolees had more limited due process rights.}\]
A close reading of Scarpelli, however, reveals that the Court's refusal to recognize an absolute right to counsel did not spring so much from a general theory of degrees of deprivation of physical liberty, as from a specific examination of the special nature of probation hearings. The Court found that, in many probation revocations, there might be no need for counsel, since the probationer had already been convicted of committing another crime or had openly admitted the charges against him. The Court also found that probation hearings normally were informal proceedings, that the introduction of counsel might lead to a much more formal proceeding, and that, at least in some cases, this increased formality might operate to the disadvantage of the probationer.

Furthermore, Justice Stewart's argument can be turned back on itself. For, even if probation hearings presented a situation where only a "conditional" physical liberty interest were at stake, the Supreme Court in Scarpelli nevertheless held that fundamental fairness required the appointment of counsel in those probation hearings which involve evidentiary disputes or difficult mitigation issues. On this basis, Scarpelli may be seen more as a breach than criminal defendants.

The differences between a criminal trial and a revocation hearing do not dispose altogether of the argument that under a case-by-case approach there may be cases in which a lawyer would be useful but in which none would be appointed because an arguable defense would be uncovered only by a lawyer. Without denying that there is some force in this argument we think it a sufficient answer that we deal here, not with the right of an accused in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime.

411 U.S. at 789.

It should be noted, however, that prior criminal convictions affect not only the degree of physical liberty but also the amount of stigma at stake in a parole or probation hearing.

In any case, the Court's emphasis on the informal nature of probation proceedings and the fact that often there are no evidentiary issues to be resolved demonstrates the vast difference, between these hearings and hearings concerning the termination of parental rights. These differences raise the questions whether one may make generalized presumptions of due process requirements or whether one must approach each type of hearing with an open mind.

126. Id. at 787. The Court concluded that, "[W]hile in some cases he may have a justifiable excuse for the violation or a convincing reason why revocation is the appropriate disposition, mitigating evidence of this kind is often not susceptible of proof or is so simple as not to require either investigation or exposition by counsel." Id.

127. "In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation." Id. at 788.

128. Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes
than a brick in the wall of presumption which Justice Stewart seeks to erect to contain the right to counsel.

The third case cited by Justice Stewart, Scott v. Illinois, does provide more substantial support for his position. The issue in Scott was whether petitioner, an indigent criminal defendant who was not being sentenced to prison, nevertheless had a right to the assistance of appointed counsel in his defense. In his brief, petitioner relied heavily on the stigmatizing effects of criminal conviction—both the general public disgrace and specific collateral consequences, such as job disqualifications, license revocations and enhanced punishment upon subsequent convictions—in arguing that, even though there was no deprivation of physical liberty, due process still required the appointment of counsel. Justice Rehnquist, writing for the majority and citing Argersinger v. Hamlin, refused to extend the right to counsel to a criminal defendant who had not been deprived of this physical liberty:

Although the intentions of the Argersinger Court are not unmistakably clear from its opinion, we conclude today that Argersinger did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. Even were the matter res nova, we believe that the central premise of Argersinger—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.

The Scott decision, however, is a weak cornerstone on which to erect a general presumption against the right to counsel where physical liberty is not at issue. For, Justice Rehnquist’s opinion, which found deprivation of liberty a necessary condition for the

such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

Id. at 790. The Court went on to cite another factor to be taken into account: “In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.” Id. As Justice Blackmun points out in his dissent in Lassiter, 101 S. Ct. at 2175, Justice Stewart simply ignores this portion of the Court’s holding in Scarpelli.

131. Id. at 44-45.
133. 440 U.S. at 373.
appointment of counsel in criminal cases, only had the support of four of the nine Supreme Court justices. Four justices, believing that Scott was entitled to counsel, dissented. The crucial tiebreaking vote to uphold the conviction came from Justice Powell. But, while Justice Powell refused to recognize that Scott had a due process right to counsel, he also disavowed Justice Rehnquist’s reliance on the deprivation of physical liberty as the one and only determinative factor: “Moreover, the drawing of a line based on whether there is imprisonment (even for overnight) can have the practical effect of precluding provision of counsel in other types of cases in which conviction can have more serious consequences.”

Further, in contradistinction to Scott, there have been Supreme Court decisions involving the right to counsel in non-criminal contexts where the Court has refrained from making the deprivation of physical liberty the determinative issue. For example, in Goss v. Lopez, the Court considered whether due process required the appointment of counsel for a public school student under threat of a temporary suspension from school. If deprivation of physical liberty were always a necessary condition for the appointment of counsel, the Court in Goss should have rejected the petitioner’s request out of hand. Instead, the Court carefully examined the nature of the proceedings in question and concluded that given the almost countless number of brief suspensions that occur, the provision of counsel would be exceedingly expensive and that, in “further formalizing the suspension process and escalating its formality and adversary nature . . . [would] destroy its effectiveness as part of the teaching process.”

Taken as a whole, the Supreme Court’s past decisions do not support, much less compel, Justice Stewart’s construction of a presumption against the right to counsel. Justice Stewart, moreover, is on especially weak ground when he chooses to build his presum-

134. Justice Brennan, with whom Justices Marshall and Stevens joined, would have counsel required in all criminal prosecutions. 440 U.S. at 375. Justice Blackmun would have held that counsel was required whenever a defendant is tried for a nonpetty criminal offense: one punishable by more than six months’ imprisonment. Id. at 389-90 (Blackmun, J., dissenting).
135. 440 U.S. at 374 (Powell, J., concurring) Justice Powell concluded: “I join the opinion of the Court. I do so, however, with the hope that in due time a majority will recognize that a more flexible rule is consistent with due process and will better serve the cause of justice.” Id. at 375.
136. See 101 S. Ct. at 2164 (Blackmun, J., dissenting).
137. 419 U.S. 565 (1975).
138. Id. at 583.
PITFALLS OF TIMIDITY

In the concluding portion of his opinion, Justice Stewart himself acknowledges that legislation in thirty-three states and the District of Columbia provides for the appointment of counsel in termination proceedings. Earlier in his opinion, Justice Stewart refers to the large number of state court opinions which have held that counsel is constitutionally required. The key question is what impact the state legislation and the state court judicial decisions should have on the Supreme Court's decision-making process.

Respondent argued in its brief that, while the trend toward recognition of a right to counsel at the state level was persuasive, it was in no way binding upon the Supreme Court:

The Respondent readily admits that there is a popular trend among the various states that have either by legislative enactment or judicial decree, provided that counsel be appointed. . . . Also Respondent is aware of the various model statutes and codes that are recommended as guidelines to follow in considering and drafting proposed legislation to regulate the family relationship at stake here . . . . While I would in no way try to minimize the collective wisdom reflected by these various legislatures, courts and organizations who have expressed their opinions on this subject, I must submit respectfully that this trend in opinion, though pervasive, should not be the basis on which a constitutional decision is made. The Court must look to the Constitution and ascertain whether the right claimed can be found or implied within its provisions.

The Respondent, without a doubt, is correct in arguing that the final decision is one the Court must make on its own, on the basis of its reading of the Constitution. It is submitted that the Respondent also is correct in suggesting that the overwhelming trend on the state level towards a right to counsel is entitled to some recognition. Whether or not the Court should have given this trend more weight in making its final determination may be an open question. But, what Justice Stewart may be strongly criticized for, is his failure to take this evidence into account when initially deciding whether there should be a presumption against the right to counsel.

139. 101 S. Ct. at 1263. For a list of these jurisdictions, see Brief for Petitioner, Appendix B, at 17a.
140. Id. at 2161. For a compilation of these decisions, see Annot., 80 A. L. R. 3d 1141 (1977).
142. Upon examination, it may be possible to discount the relevance of state statutes to
The manner in which Justice Stewart employs his newly created presumption against the right to counsel is also open to serious challenge. The word "presumption" has been used promiscuously by the courts.¹⁴³ Laughlin, in surveying the diverse uses of the word, demonstrates eight different senses in which the word has been employed, ranging from merely indicating a general disposition of a court or stating an initial assumption upon which the legal reasoning that follows is based, to setting forth a rule shifting the burden of producing evidence or possibly even the burden of the Court's constitutional inquiry. One third of state legislatures not yet required the presence of counsel for parents. Moreover, those state legislatures which have done so may have acted out of a belief that providing counsel was wise public policy rather than out of a belief that such representation was mandated by the federal constitution. Finally, "using a commonly followed practice among the states as evidence that a contrary practice violates due process has found favor primarily in dissenting opinions." Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 Yale L.J. 319, 331 (1957).

For a more recent case, rejecting state practice as indicative that a contrary practice violates the Constitution, see Patterson v. New York, 432 U.S. 197 (1977), accord, Leland v. Oregon, 343 U.S. 790, 797 (1952). Kadish does note an exception:

However, in In re Oliver, 333 U.S. 257, 266 (1948), holding a one-man grand jury summary contempt conviction in camera a violation of due process, Justice Black, for the majority, stated: "Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." And at 267-68: "Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public."

Kadish, supra, at 331.

Again, it must be noted that Kadish is concerned with the impact of state practice on the Court's final determination as to whether there has been a violation of due process; the issue here is the impact state practice should have on the Court's initial decisions on the creation of a presumption against the right to counsel in termination proceedings.

However, creating the presumption against the right to counsel in the face of a large group of state court decisions, which almost unanimously have found a federal constitutional right to counsel, is much more difficult to defend. It should be noted here that the Supreme Court, in the seminal right to counsel case, Powell v. Alabama, 287 U.S. 45 (1932), did take state court decisions into account in determining that Powell had a due process right to counsel: "The state decisions which refer to the matter, invariably recognize the right to the aid of counsel as fundamental in character." Id. at 70.

¹⁴³. Laughlin, In Support of the Thayer Theory of Presumptions, 52 Mich. L.R. 195 (1953);

The language of the law is permeated by "magic words," such as the word res gestae, which are used as substitutes for analysis. The word "presumption" is rapidly becoming such a word. It has been used to indicate numerous and unrelated rules of substantive and procedural law. In most instances its use could be entirely eliminated without affecting the thought. Courts have too frequently behaved like law students when pushed to solve a particular problem. Instead of analyzing they glibly seize upon such a presumption.

Id. at 195-96.
persuasion.\textsuperscript{144} In what sense, then, is Justice Stewart using the word presumption? Is he simply saying that the Supreme Court is generally disposed not to recognize the right to counsel when physical liberty is not at stake? Or that the Court starts with the assumption that there is no right to counsel? Or that the petitioner has the burden of producing evidence that fundamental fairness cannot be ensured in the absence of counsel? Or that the petitioner, in fact, has the burden of persuading the Court that this is the case?

It seems, at first, that Justice Stewart is employing his presumption in this last sense: as a device to shift the burden of persuasion onto the petitioner, requiring her to meet the \textit{Eldridge} balancing test in order to demonstrate that her interest in the matter and the risk of error outweigh the state's interest in not providing counsel. And if Justice Stewart were employing the presumption \textit{only} for this purpose, solely to shift the burden of persuasion, his use of the presumption might be defensible.

Closer examination, however, reveals that Justice Stewart is also using the presumption in a second, more radical manner: in effect, transmuting the presumption into a substantive factor in the crucial balancing process and giving it a very substantial weight of its own. For, as described above,\textsuperscript{145} he insists that the three \textit{Mathews v. Eldridge} factors not only must be balanced against each other, but also must be weighed against this presumption.\textsuperscript{146}

Justice Stewart's double-balancing test certainly places a very heavy burden on the proponents of the parent's right to counsel.\textsuperscript{147} First, they must persuade the Court that the parent's interest in the proceedings and the risk of error outweigh the state's interest in not providing counsel. Then, they must go on to prove to the

\textsuperscript{144} \textit{Id.} at 196-209. Laughlin finds other senses in which the word is used to include: as a conclusive presumption, as a rule of substantive law, as a permissible inference, as a statutory prima facie case and as a proposition of judicial notice. \textit{Id.}

\textsuperscript{145} See text accompanying note 73 supra.

\textsuperscript{146} That the presumption is not used merely as a device to shift the burden of persuasion, but also as a major substantive bar to the parent's first claim becomes apparent in Justice Stewart's statement that "It is against this presumption that all the other elements in the due process decision must be measured." 101 S. Ct. at 2159. This is not language normally used merely to shift the burden.

\textsuperscript{147} The weight that Justice Stewart attaches to this presumption in balancing it against the \textit{Eldridge} factors can be seen in his statement that, "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 \textit{Eldridge} factors did not overcome the presumption . . . ."
Court that the parents’ overall performance on the Eldridge test outweighs this presumption against the right to counsel. It may be no accident the proponents failed this test; the “presumption” may be designed for just that end. Or, to refer back to Laughlin’s terminology,148 it may be argued that Justice Stewart’s presumption is in reality all along a “conclusive” presumption against a general right to counsel.149

2. The Mathews v. Eldridge Balancing Test150

The adoption of the Mathews v. Eldridge balancing test is as suspect as the propagation of the presumption against the right to counsel.151 As discussed above,152 the question before the Court in

148. See note 143 supra.

149. The damage done does not stop with the denial of a general right to counsel. Justice Stewart, of course, goes on to leave the decision as to whether counsel is required to the trial court on a case-by-case basis. But Justice Stewart’s use of the presumption as a substantive factor in the balancing process—a factor, moreover, whose weight cannot be measured by the facts of the individual case but is totally within the discretion of the judge—leaves it open to the judge in each case to find that, even though the parent has fundamental interests at stake, even though there is some risk of error, and even though the state’s interest in not providing counsel is minimal, all the Eldridge factors are still outweighed by the presumption against the right to counsel. The trial court judge may, in fact, always buttress this judgment by referring to Justice Stewart’s own balancing of these factors in regard to Abby Gail Lassiter. See Part IV, section C infra. This whole weighing process, therefore, is not really credible as an objective method of making a due process determination.


151. Given that the majority uses the Eldridge test to deny Ms. Lassiter’s due process claim, it is truly ironic to note that use of the Eldridge test was originally proposed by counsel for Ms. Lassiter and vigorously opposed by the counsel for the Department of Social Services.

Petitioner’s entire brief was organized around the three prongs of Eldridge: Part II dealt with the private interests at stake, Part III with the risk of erroneous termination and Part IV with the issues of expense and administrative inconvenience. Counsel for Ms. Lassiter has indicated that he advocated use of the Eldridge test because he felt that there was a need for some sort of test or standard by which to measure whether an indigent parent had a due process right to counsel and because he believed that the application of the Eldridge test inevitably would result in a finding that counsel was required. Telephone conversation with Leowen Evans, North Carolina Legal Assistance Program (July 15, 1981).

Respondent, in opposing the use of Eldridge, made the following argument:

At the outset of this discussion Respondent would suggest that the Mathews principle as a rule of law, is inapposite to this action . . . . The cases cited by the Court in Mathews involve the determination of when and in what manner, individuals would be afforded a hearing relative to some claimed right or interest . . . . Clearly, however, the actions challenged in those cases as denying due process were either administrative, or ex parte quasi-judicial actions negatively affecting the right or interest without giving the individual notice and opportunity to be heard prior to the action.
Eldridge was whether the Social Security Administration's disability benefits termination procedures, which included the possibility of a post-termination hearing, were constitutionally sufficient or whether due process required that there be a hearing prior to termination of benefits.

The three-pronged balancing test, therefore, was created to measure the constitutional validity of an administrative proceeding terminating, perhaps only temporarily, the statutorily created property interest of a recipient of government-sponsored social security disability payments. In Lassiter, however, Justice Stewart uses this device to measure the sufficiency of a formal judicial proceeding permanently terminating the fundamental liberty interest of a parent in maintaining rights to her child.

In designing the balancing test as a tool for reviewing the constitutional validity of administrative proceedings, the Eldridge court stressed that there were fundamental differences between the methods to be used in reviewing the adequacy of administrative proceedings and the means to be employed in reviewing the adequacy of judicial proceedings.

But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude whole transplantation of the rules of procedure, trial and review which have evolved from the history and experience

In fact, the very question in Mathews was whether the Social Security Administration could terminate disability payments before affording the recipient an evidentiary hearing, ultimately, before a Social Security Administration law judge. The balancing of the individual interest against that of the government was required to ensure that the methods the government had adopted to regulate Social Security disability did not deprive the recipient of his benefits erroneously. Implicit in this reasoning is that the government was acting in its own interest through its own devices to regulate benefits. Clearly the government has an advantage under these circumstances. The advantage is reduced when, as here, the Department is asking the Court to terminate parental rights in full evidentiary hearings.

Brief for Respondent at 30. The author reaches the same conclusion as Respondent's counsel, but for very different reasons. See text accompanying notes 156-66 infra.

152. See text accompanying note 64 infra.

153. The recipient whose disability payments are terminated has a right not only to a post-termination hearing, but also a right to retroactive compensation if that hearing results in a finding that he was still disabled beyond the date of termination. 424 U.S. at 339.
Justice Stewart totally ignores this strong admonition. He uproots the balancing test from its initial setting, review of an administrative termination of a property interest, and transplants it in a new field, review of a judicial proceeding terminating a fundamental liberty interest, without considering whether the balancing test is suited to this radically different environment. If due consideration be given the special nature of termination proceedings, powerful arguments emerge against the relocation of Eldridge balancing to such a region.

The first argument is that Eldridge balancing, involving a weighing of the cost of additional procedural safeguards against the benefit of increased accuracy of decision-making, is inappropriate given the interest at stake. Justice Stevens presents this argument in a brief, but impassioned dissent in Lassiter. Justice Stevens agrees that Eldridge balancing is appropriate when reviewing the adequacy of procedures which may result in the deprivation of a property interest. With property interests, courts may weigh the "costs and benefits of different procedural mechanisms for allocating a finite quantity of material resources among competing claimants." He reminds the majority, however, that the termination of parental rights involves not only the deprivation of a property interest by cutting off statutory rights of inheritance, but also the destruction of a much more fundamental liberty interest by severing the parents' relationship with the child. When such a fundamental liberty interest is at stake, the test of the adequacy of procedural safeguards should be "one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits." In terms of fundamental fairness, Justice Stevens maintains 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."

154. Id. at 348.
155. As described above, see text following note 63 infra, the Eldridge balancing test appears on the scene rather unexpectedly, at the very beginning of Part II, Section B, of Justice Stewart's opinion: "The case of Mathews v. Eldridge ... propounds three elements to be evaluated in deciding what due process requires," 101 S. Ct. at 2159. The circumstances surrounding the origin of this test are never explained.
156. 101 S. Ct. at 2176 (Stevens, J., dissenting).
157. Id.
158. Id. Justice Stevens, unfortunately, speaks in conclusory terms, rather than fully de-
The second argument against the *Lassiter* majority’s adoption of *Eldridge* balancing is the senselessness of using a test which makes “the increased accuracy of decision-making” a vital factor in the balancing process in determining the ultimate “best interests of the child,” when it is usually impossible to tell for years, if ever, whether a decision was “accurate” or “right.” In fact, given the difficulty of gauging the correctness of a judge’s decision and that termination proceedings may rouse strong passions among both family members and the community at large, it could appear vitally important, that ‘justice’ not only be done, but that “justice be seen to be done.” In other words, even if the presence of counsel for the parent would not result in preventing any ‘wrong’ decisions to terminate, counsel might play a vital role in helping the parent to understand what is happening and to accept it. Moreover, in some parts of the community, state child protection agencies have a reputation as “child snatchers,” which may hinder community members’ cooperation in reporting cases of abuse and neglect. It is in the state’s own interest, therefore, that counsel be appointed, in order that termination proceedings be seen as scrupulously fair.

The author develops his argument. While he does refer to the arguments made in Justice Blackmun’s dissenting opinion, he does not himself explain why the potential deprivation of liberty here is to be so great that the criminal “fundamental fairness” test should be applied to the procedures used, nor does he explain why the application of this “fundamental fairness” test would result in a finding that appointed counsel is required. These questions are addressed in Section C below, which describes how the Court might have proceeded to decide the *Lassiter* case.

159. For a cogent discussion of the limits on the ability of any decision-maker, including psychiatrists, to predict what is the “right” child placement decision, see A. Freud, J. Goldstein & A. Solnit’s groundbreaking work, *Beyond the Best Interests of the Child* 50-52, 63-64 (1979). For a survey of studies demonstrating the extent to which there is no “right” answer, because judges making child placement decisions are ultimately relying on personal value systems, see Amicus Curiae Brief of the American Bar Association at 8-9, *Lassiter v. Department of Social Servs.*, 101 S. Ct. 1253 (1981) [hereinafter cited as Amicus Brief of the American Bar Association].

160. An abusive or neglectful parent may have a special need for such counsel. Many such parents have few supportive relationships with other individuals. It is possible, moreover, that the social worker, who has “befriended” the parent in trying to improve the parent-child situation, at the termination hearing, may take the stand as an adverse witness testifying to the parent’s shortcomings. See text accompanying note 221 infra. With few other friends, and the social worker now seen as a villain, the lawyer may be the parent’s only source of counsel. For a description of the dynamics of the parent’s relationship with social workers and others, see Davoren, *The Role of the Social Worker*, in *The Battered Child* 135 (2d ed. 1974).

161. Four years of service on a multidisciplinary child protection team provided the opportunity for the author to discover that members of the community at large, as well as fellow professionals, often harbor deep-rooted suspicions concerning the activities of child
As Professor Mashaw has pointed out in criticizing the use of Eldridge balancing in reviewing administrative proceedings affecting property interest, in “limiting its calculus to the benefits of costs that flow from correct or incorrect decision” it tends, as cost-benefit analyses typically do, to “dwarf soft variables” and “to ignore complexities and ambiguities.” In termination proceedings, this criticism is even more telling, both because the direct costs and benefits are so difficult to measure and the side effects of such decisions are so important.

The third and most important argument against the use of Eldridge balancing in Lassiter is that the Eldridge test is designed to weigh the competing interests of two parties: the state and the individual litigant. Termination proceedings, however, also affect the fundamental rights of a third party: the child. If the state succeeds in its action, the child’s relationship with his biological family will be severed. The child may be moved to a different physical environment and a new family may be imposed upon him. When protective service workers. For example, at a 1979 seminar in Vermont, bringing together social workers and lawyers from throughout the state, supposedly to improve communications and cooperation between these groups, one public defender commented in his prepared remarks:

I approach allegations regarding actions of family members with a certain amount of skepticism. I think that’s somehow inherent in the job. I want to be shown, I want it proven to me, and I want it ultimately to be proven to the court one way or the other. Basically I guess the reason why I take that approach is first of all, I don’t believe that the State should go meddling in the affairs of families unnecessarily. Second is that I am suspicious of middle class bias that I think a lot of case workers bring to problems like this.


163. The case for treating the child’s interests not merely as a factor, but the paramount factor, in placement decisions has been made with great force by Freud, Solnit and Goldstein:

[W]e take the view that the law must make the child’s needs paramount. This preference reflects more than our professional commitment. It is in society’s best interests. Each time the cycle of grossly inadequate parent-child relationships is broken, society stands to gain a person capable of becoming an adequate parent for children of the future.

A. FREUD, A. SOLNIT and J. GOLDSTEIN, supra note 159, at 5. For an example of how this view of the paramount needs of the child has been translated into constitutional claims on behalf of the child, see text accompanying note 245 infra.
the adequacy of the procedures is judged, the child’s fundamental interest in the best hearing possible should be taken into account. But, in adopting Eldridge, the Court is choosing a test which was not designed to give independent weight to the interests of this vital third party.

The Court is forced, therefore, when applying the Eldridge test, to consider the interests of the child only indirectly, as a subsidiary interest of the state. Justice Stewart refers to the state’s “urgent interest in the welfare of the child” and he concedes that “the State’s interest in the child’s welfare may perhaps be served by a hearing in which both the parent and the State acting for the child are represented by counsel,” but he never directly inquires what would be in the child’s own best interest.

It is an error to assume that the state’s interest and the child’s interest necessarily coincide. The state department of social services, for institutional reasons, may be committed to a termination proceeding which an independent guardian for the child may feel on balance is unwise. As Justice Stewart himself points out, North Carolina itself had recognized the possible divergence of interest between state and child, by requiring that, when a parent filed a written answer to a termination proceeding denying a material allegation of the petition, the state supply independent counsel to represent the interest of the child.

Given the child’s own vital interests in the proceedings, the Eldridge test should have been rejected out of hand as too narrow in scope. Unfortunately, the majority in Lassiter not only adopts the Eldridge test, but seriously compounds the resultant injury by ruling that the test will be applied on a case-by-case basis. The Court’s decision, not to decide generally whether Eldridge balancing favors indigent parents, but instead to let trial courts apply the test ad hoc, is strongly criticized by Justice Blackmun in his dissent. Justice Blackmun’s arguments may be summarized as follows:

(i) The majority’s own balancing, finding “the private interest weighty, the procedures devised by the State fraught with risks of error, and the countervailing environmental interest insubstantial,” so strongly establishes the need for counsel that there is no reason to require that counsel be doled out on a case-by-case basis, only

164. 101 S. Ct. at 2160.
165. Id.
166. Id.
167. See note 82 supra.
after a showing of need.\textsuperscript{168}  
(ii) Applying "balancing on a case-by-case basis is itself a sharp departure from prior due process practice."\textsuperscript{169}  
(iii) The case-by-case approach will undermine the desirable goals of predictability and uniformity "that underlie our society's commitment to the rule of law."\textsuperscript{170}  
(iv) It will be difficult, if not impossible, for an appeals court adequately to review whether a trial court's denial of counsel has unfairly disadvantaged a defendant simply on the basis of the trial court record.\textsuperscript{171}  In fact, the very absence of counsel may undermine the value of this record, because the unskilled parent acting \textit{pro se} "is even more likely to be unaware of controlling legal standards... and unskilled in garnering relevant facts."\textsuperscript{172}  
(v) Even if such a review were fair, it is likely to be both cumbersome and costly.\textsuperscript{173}  

Justice Blackmun's list of criticisms, while long, is by no means exhaustive. Again, if proper attention be given the interests of the child in the proceedings, the majority's decision to apply the balancing test on an ad hoc basis is indefensible. Justice Stewart's majority opinion stresses the importance of reaching a final decision in child custody cases "as rapidly as is consistent with fairness."\textsuperscript{174}  In fact, the majority refuses to remand the \textit{Lassiter} case and, instead, insists on deciding itself whether the trial judge's failure to appoint counsel resulted in a denial of due process to Ms. Lassiter, based on the need for a speedy determination. Yet, at the same time, the majority is establishing a system which, if it works according to plan, must result in substantially lengthened proceedings in some cases. To see that extended proceedings are inevitable, one only need consider the following points: 

(i) On the one hand, given the Court's consignment of the due process issue to trial court judges' ad hoc determination, it may be expected that, in some cases, trial judges will decide fundamental fairness does not require the appointment of counsel.\textsuperscript{175}  
(ii) On the other hand, given the Court's emphasis on the parent's

\textsuperscript{168} 101 S. Ct. at 2171.  
\textsuperscript{169} \textit{Id.}  
\textsuperscript{170} \textit{Id.}  
\textsuperscript{171} \textit{Id.} at 2172.  
\textsuperscript{172} \textit{Id.}  
\textsuperscript{173} \textit{Id.}  
\textsuperscript{174} See note 84 \textit{supra}.  
\textsuperscript{175} It may be argued that at least in some jurisdictions denials of counsel will be relatively rare. See text following note 225.
strong interest at stake and the possibility of error without counsel, any parent who is denied counsel has ready-made grounds for appealing a termination decision. These appeals will naturally lengthen the proceedings.

(iii) If we assume that there are conscientious appeals judges, some denials of counsel will be reversed, requiring new termination hearings and drawing out the proceedings even further. 176

(iv) Exacerbating this process is the Supreme Court’s refusal to lay out general guidelines as to when counsel should be required. In the absence of such guidelines, there is likely to be a considerable period of perplexity during which appeals will be fought upward through the state court systems and attempts will be made to secure further clarifications from the Supreme Court.

If the Court had deliberately set out to design a system that would maximize uncertainty and delay for the child, it could not have achieved much more. Nor is the damage this approach may wreak limited to the child; it may extend to the judicial process as well. Here, two points need to be made.

First, while the Court refused to set out guidelines deciding whether counsel is required, its own decision that Ms. Lassiter’s trial was not fundamentally unfair does give some hints as to its thinking. What is particularly disturbing is its justification for refusing to require counsel on the grounds that no expert witnesses testified. 177 This holding seems to reward the social services department for not doing its job. Thus, while the social services department that plans to present only the testimony of one of its social workers may avoid having to face opposing counsel, the social services department which plans to bolster its case with expert testimony forces the trial court judge to appoint opposing counsel. In other words, the Court’s holding tempts both state agencies and possibly the trial court itself to “keep things simple”: to avoid delving too deeply into “expert testimony” or “troublesome points of law.” 178

176. Newly appointed counsel for the parent will need time to prepare his or her case. The state may have to revise its case to take into account developments affecting the child in the interval between the first and second hearing. More disturbing, there is no guarantee the process will conclude with the trial court judge’s determination at the new hearing. With counsel now present, there may be other grounds on which to base an appeal of a second termination decision.

177. See note 85 supra.

178. It should be remembered that in North Carolina, as in a number of other jurisdictions, even if a statutory ground for termination exists, the court is empowered to order termination only after a determination that such action would be in the best interests of the
Second, the Supreme Court's approach may well thrust unfair burdens on appeals courts. Justice Blackmun has pointed out how difficult it is to judge, on the basis of the trial court record, whether a parent received a fair trial, even without counsel. But, the appeals court judge may be faced with a tougher dilemma when it appears from the record that, while the parent would not be adequately defended without counsel, even if counsel were provided in a new hearing, the result would likely be the same. The judge is faced with choosing between the parent's interest in having a new trial and the child's interest in bringing the proceedings to a conclusion within a reasonable time. In such a situation, the judge might well succumb to the temptation, as it may be argued the Supreme Court does in Lassiter, to put the child's interest first and to condone a blatantly unfair proceeding.

3. The Decision That Ms. Lassiter Had Not Been Denied Due Process

Even though the Supreme Court's condonation of the absence of counsel in the Lassiter termination hearing may stem from the best of motives, a sincere concern for the welfare of the child, its justifications for granting an indulgence to the trial court are specious.

The first question that must be raised is whether the Supreme Court itself violates the rules of fundamental fairness when it refuses to remand the case and insists instead on rendering an immediate decision under its newly formulated case-by-case double-balancing test. For, in doing so, the Court denies the petitioner a meaningful opportunity to be heard, an opportunity to develop facts and arguments as to why, under this new case-by-case ap-child. See note 12 supra. While the testimony of the social worker might be sufficient in and of itself on a ground of the termination such as lack of contact, one social worker's testimony does not seem an adequate basis on which to decide an issue of such difficulty and of such momentous import for parent and child as "best interest." For a discussion of the aid that may be provided the decision-maker by the testimony of an expert in the mental health field, see A. Freud, A. Solnit & J. Goldstein, supra note 159.

Having suggested that the social worker is not really an expert, at least not on the issue of the best interests of the child, the author also wishes to note that the petitioner in Lassiter, in seeking a rehearing, took the exact opposite position. Citing Paris v. Carolina Portable Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131 (1967), petitioner argued that social workers qualify as expert witnesses under North Carolina law, that Bonnie Cramer's opinion at the termination hearing on the child's best interest should be considered expert testimony, and that, therefore, under the Court's own standards, Ms. Lassiter was entitled to counsel to rebut this expert testimony. Petition for Rehearing at 10.

179. See text accompanying note 171 supra.
proach, counsel should have been appointed at the termination hearing.\textsuperscript{180}

The unfairness of the Court's summary disposition of the case without allowing petitioner to argue it under the new standard can best be illustrated by an example. In applying its new test, the Supreme Court concludes, on the basis of review of what is admittedly inadequate record,\textsuperscript{181} that while a lawyer at trial "might have done more with the argument that William should live with Ms. Lassiter's mother," this argument had been made by Ms. Lassiter and the "absence of counsel's guidance on this point did not render the proceedings fundamentally unfair."\textsuperscript{182} But how could the Court know what evidence competent counsel might have produced to substantiate this alternative? At the very least, the Court should have permitted petitioner, now that she finally had counsel on appeal, to offer proof that counsel at trial could have produced substantial evidence favoring Lucille Lassiter or controverting the negative testimony and opinion evidence of the Department's social worker.\textsuperscript{183}

The second question to be raised is whether the Court's approach to analyzing the facts of the Lassiter case is a proper one. Justice Stewart surveys the facts to see whether the presence of

\textsuperscript{180} It is true, of course, that petitioner and the American Bar Association as amici had presented briefs and arguments to the Court espousing Ms. Lassiter's right to counsel. Quite naturally, however, they had concentrated their attention on the question of why indigent parents, in general, should be held to have a right to counsel at termination proceedings and not on the issue of whether, under a case-by-case 'balancing approach,' the facts of this case would compel the appointment of counsel. Compare the cursory discussion of these facts, Petitioners Brief at 8, with the much more thorough discussion, Petitioners Brief for Rehearing at 8-13, in which counsel, now cognizant of the Court's new case-by-case balancing approach, seeks to demonstrate why Ms. Lassiter in particular was in need of counsel at the time of trial.

\textsuperscript{181} See text accompanying note 88 \textit{supra}.

\textsuperscript{182} Id.

\textsuperscript{183} The Court may be charged with unfairness on another ground. While not letting the petitioner produce further evidence, the Court, itself, as Justice Blackmun points out, goes beyond the record before it to bolster its finding that the trial court was not in error in determining that Abby Gail and Lucille Lassiter were unfit custodians for William:

Unfortunately, the Court does not confine itself to the issue at hand. By going outside the official record of this case to unearth and recite details of petitioner's second-degree murder conviction set forth in an unpublished state appellate opinion, the Court apparently believes it has contributed evidence relevant to petitioner's fitness as a parent, and perhaps to the fitness of petitioner's mother as well. Reliance on such evidence is likely to encourage the kind of subjective value judgments that an adversarial judicial proceeding is meant to avoid.

101 S. Ct. at 2175 n.26 (citations omitted).
counsel would have made a difference to the outcome of the termination hearing. For the reasons stated above, Justice Stewart concludes that, even with the presence of counsel, the outcome would have been the same and that, therefore, there was no denial of due process. Justice Blackmun, evaluating the same factual record, concludes that counsel might have made a difference in the outcome by establishing that Lucille Lassiter was a suitable custodian, or that the Department of Social Services had not fulfilled its responsibility to promote family integrity, or even that petitioner had not shown a willful lack of concern for her child.

It is not at all surprising that the two justices differ so markedly in their answers, when one considers the nature of the question posed by Justice Stewart. For, the question whether the presence of counsel would have changed the outcome forces the reviewing judge to make a highly subjective guess on the basis of limited information. In retrospect, how can it be ascertained what evidence competent counsel might have unearthed, how well counsel might have attacked the state and how persuasively counsel might have argued his or her own case? In short, Justice Stewart’s question, rarely, if ever, may be answered with a definite yes or no. It may be an ideal one to spark a classroom discussion, but it is an exceedingly poor one on which to ground a judicial decision.

It is submitted that the Court should have adopted a different approach. It should have considered the functions that are normally performed by counsel and then looked to see how well petitioner performed these functions in the absence of counsel. If Ms. Lassiter had performed these functions adequately on her own, the Court could conclude that there was no violation of fundamental fairness. If Ms. Lassiter had not been able to perform these func-

184. See text accompanying notes 88-89 supra.
185. 101 S. Ct. at 2174.
186. In his dissent Justice Blackmun emphasizes the difficulty of making a retrospective determination of the issue of whether counsel would have made a difference: The Court assumes that a review of the record will establish whether a defendant, proceeding without counsel, has suffered an unfair disadvantage. But in the ordinary case, this simply is not so. The pleadings and transcript of an uncounseled termination proceeding at most will show the obvious blunders and omissions of the defendant parent. Determining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case. Even if the reviewing court can embark on such an enterprise in each case, it might be hard-pressed to discern the significance of failures to challenge the State’s evidence or to develop a satisfactory defense.
101 S. Ct. at 2172.
tions effectively, however, the Court would have to conclude that there had not been a full, effective adversarial contest, that, therefore, it could not rule out the possibility of error on this very serious issue of terminating parental rights, and that the judgment would have to be reversed on due process grounds.

The American Bar Association's amicus brief in *Lassiter* in fact provided the Court with a ready-made list of basic advocacy functions of counsel in termination proceedings:

(i) delineating the issues;
(ii) investigating and conducting discovery;
(iii) presenting factual contentions in an orderly manner;
(iv) cross-examining witnesses;
(v) making objections and preserving a record for appeal.  

If the Supreme Court had adopted this alternative approach and evaluated Ms. Lassiter's performance on the basis of the amicus brief's list of functions, it would have reached a much less speculative, and a much more soundly based conclusion. The transcript clearly reveals that Ms. Lassiter did not and could not perform any of these functions on her own. She did not appear able even to understand the issues, much less to delineate them; being imprisoned, she was not free to investigate and conduct discovery and, in any case, she did not realize the other witnesses might be helpful; she did not present her case in any sort of logical manner; she was totally unable to cross-examine the Department's one witness; and she did not know anything at all about how objections are made or how to preserve a record for appeal. Using this approach, the Court would have to conclude that Ms. Lassiter did not have the ability meaningfully to present her side of the case without counsel, that there was not an effective ad-

188. See, in particular, the excerpt from hearing record reproduced in note 44, in which petitioner repeatedly manifests her basic lack of understanding of why this action was brought against her in the first place.
189. See Ms. Lassiter's response to the trial court judges' question whether she had any more witnesses: "Nobody else don't know nothing about this but me and momma" in excerpt reproduced in text accompanying note 53.
190. See description of, Ms. Lassiter's rambling testimony in notes 45-49 and accompanying text; note also her total lack of participation in the questioning of the one friendly witness, Lucille Lassiter, in notes 50-52 and accompanying text.
191. See in particular, excerpts from the hearing record in notes 43-44.
192. To see how defendant was first informed of her right to appeal, see excerpt from the hearing record reproduced in note 55.
193. *But see* the Amicus Curiae Brief of the State of North Carolina, joined by the Attor-
versarial proceeding, that there was, therefore, an unacceptable chance of error and that the trial court judgment should be reversed. 194

To sum up this critique of the Supreme Court's decision, the Court's resort to the presumption against the right to counsel and the *Eldridge* balancing test, for the purpose of restricting the extension of the right to counsel, is disquieting. Its decision to apply the *Eldridge* balancing test on a case-by-case basis, even though such an approach runs contra to the best interest of the child in having a speedy end to litigation, is even more disturbing. What is most distressing, however, is the Court's finding, on the basis of the record before it, that Ms. Lassiter's hearing was "fundamentally fair," a finding that Justice Blackmun can only describe as "virtually incredible." 195 For, in making this finding, ignoring the weakness of the state's case, the questionable role played by the trial judge, and above all, "the defendant's obvious inability to speak effectively for herself," the Court sets an abysmally low standard of fundamental fairness by which to judge future cases.

3. An Alternative Approach

The previous section criticized Justice Stewart for his convoluted approach to the right to counsel issue—for conjuring up


Petitioner understood the purpose of the hearing and attempted to rebut this evidence. She denied medically neglecting her son, and said she carried him to the doctors for treatment. She and her mother denied that her mother filed the neglect petition. She testified that her efforts to see her son were thwarted by social services' inattention. She cross-examined the social services' witness concerning the witness' opinion that termination was in the child's best interest, and she offered her countervailing theory that children naturally know and belong with their family. In short, Petitioner presented the evidence she needed, either on her own or in response to pertinent questions by Respondent's counsel, but was not believed.

*Id.* at 15 (footnotes omitted).

194. One might conclude that the *Lassiter* hearing violated due process on a quite separate ground. As described in Part I infra, Ms. Lassiter's lack of counsel, combined with her inability to speak for herself, led Judge Gantt to take a very active role in the proceeding. On appeal, petitioner raised the question whether the Judge had been prompted to take too active a role, and to abandon his position as a neutral and detached magistrate. Again, as described above, the trial court transcript does present evidence that the Judge became frustrated in attempting to question Ms. Lassiter and her mother and that he lapsed into "cross-examining" them rather than eliciting their side of the story. Justice Stewart, in placing his stamp of approval on the proceedings below, neither exonerates Judge Gantt nor justifies his conduct, but simply ignores the issue.

195. 101 S. Ct. at 2175.
doubtful presumptions and invoking dubious balancing tests. This section presents a simpler, more direct and much more soundly based three step process on which the Court could have relief.

The first step is a truly dispassionate survey of past decisions involving the right to counsel. A survey of the Supreme Court’s decisions reveals:

(i) that, while there has been a gradual expansion of the right to counsel,196 this movement has not been inexorable;197
(ii) that, while the Court had found the right to counsel to exist in some non-criminal cases,198 most of its decisions recognizing the right to counsel have been in the criminal area;
(iii) that, as part of its decision-making process in non-criminal cases, the Court has compared these cases with its criminal decisions;199 and
(iv) that, in comparing non-criminal and criminal cases, the Court has focused on the questions

(a) whether individual liberty interests of the same magnitude were at stake200 and
(b) whether the proceedings were of the same nature, that is, pitting an individual against the resources of the state in a formal, adversarial hearing.201

A survey of state court decisions on the specific issue of parents’ federal constitutional right to counsel in termination proceedings demonstrates that the state courts have often used this comparative approach.202 For example, the Maine Supreme Court has held that

[A]s an action more nearly approximates a criminal prosecution, the demand for procedural safeguards increases. In any given action, the necessity of a particular safeguard is to be evaluated in light of the nature of the proceeding and by the nature of the interest upon

196. See text accompanying notes 94-99 supra.
197. See cases referred to in notes 116, 120, 121, 122 and 137 supra.
198. See notes 97 and 99 supra.
199. See generally, Part III, B 1., The Presumption Against the Right to Counsel. For more detailed reference to specific cases, see notes 200 and 201 infra.
which the government seeks to infringe.\textsuperscript{203}

In sum, a dispassionate survey of all the right to counsel cases shows it was unnecessary to import a new approach from the administrative law area and that the Court could have applied a well-established, relatively simple two-pronged test, consistent not only with its own precedents, but also with most state court decisions.

The second step, then, is a comparison of the liberty interests at stake in a termination of parental rights with those at risk in a criminal trial. The most obvious liberty interest at stake in a termination proceeding is the parent’s interest in preserving a relationship with the child. Granted, there is widespread agreement that this is an important interest. Still, how can the Court determine whether the interest in not being deprived of a child is of the same magnitude as the interest in not being deprived of physical liberty?

There are several complementary approaches the Court might take in trying to resolve this issue. First, the Court could itself compare the detrimental impact each of these losses—the loss of the child and the loss of physical liberty—might have on an individual.\textsuperscript{204} Second, the Court could look to the opinions of those


\textsuperscript{204} Justice Stevens, in his dissent in \textit{Lassiter}, seems to adopt this approach:
A woman's misconduct may cause the State to take formal steps to deprive her of her liberty. The State may incarcerate her for a fixed term and also may permanently deprive her of her freedom to associate with her child. The former is a pure deprivation of liberty; the latter is a deprivation of both liberty and property, because statutory rights of inheritance as well as the natural relationship may be destroyed. Although both deprivations are serious, often the deprivation of parental rights will be the more grievous of the two.

101 S. Ct. at 2176 (Stevens, J., dissenting).

The weakness in Justice Stevens' opinion is that he speaks in conclusory terms; he does not really explain why deprivation of parental rights should be considered more grievous. One reason may be that a criminal conviction often results in only a short period of confinement; a termination of parental rights results in the parent being deprived of the relationship with the child for life.

On the other hand, it may be argued that, while to the average person the loss of the child might be as, or more, grievous than the loss of physical liberty, the class of parents facing termination is not average. Parents such as Ms. Lassiter, who face termination of their rights, generally have shown a lack of interest or concern in the relationship over a considerable period of time. It should not be assumed, therefore, that they would make the same value choice as the “average” parent. A somewhat related argument was made by Respondent in the \textit{Lassiter} case. Respondent argued that, when the child was still in home with the parent and there was an ongoing psychological parent-child relationship, state intervention in removing the child would cause grievous injury to a fundamental interest of the parent. But, when the child had already been removed from the home and the parent had not kept
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state courts that have made such a comparison. Third, the Court could turn to the opinions of other authoritative bodies and of experts in the field. Fourth, the Court could review its own decisions on the rights of parents to see how much weight it had attached to this interest in the past.

up the relationship, the interest of the parent no longer should be classified as a fundamental one.

If the parent allows his continued interests in the child to atrophy while he is in the care of, and in daily association with other individuals, then by the definition of the familial relationship set out in *Smith v. Organization of Foster Families* . . . the parent's interest devolves more and more to a mere blood relationship and becomes less and less fundamental.

Brief for Respondent at 33 (Emphasis added).

205. Those state courts that have made this comparison almost unanimously have concluded that loss of a child is as important an interest as loss of physical liberty. See cases listed in Amicus Brief of the American Bar Association at 7 n.3 and 101 S. Ct. at 2166 (Blackmun, J., dissenting).

206. For example, the House Committee on Interior and Insular Affairs, in reporting on the Indian Child Welfare Act of 1978, stated its belief that "the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty." H.R. REP. No. 95-1386, 95th Cong., 2d Sess. 22, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 7530, 7545.

207. The meaning to be derived from the Court's past decisions is subject to dispute. Thus, in *Lassiter*, Justice Stewart found that these decisions established the parent's interest was an "important" one.

This Court's decisions have by now made plain beyond the need for multiple citation 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." *Stanley v. Illinois*, 405 U.S. 645, 651. Here the State has sought not simple to infringe upon that interest but to end it. If the State prevails, it will have worked a unique kind of deprivation. Cf. *May v. Anderson*, 345 U.S. 528, *Armstrong v. Manzo*, 380 U.S. 545. A parent's interest in the accuracy and injustice [sic] of the decision to terminate his or her parental status is, therefore a commanding one.

101 S. Ct. at 2160.

Justice Blackmun read these same decisions to mean that the parent's interest was indeed a "fundamental" one.

At stake here is "the interest of a parent in the companionship of, care, custody, and management of his or her children." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. "[F]ar more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953), parental rights have been deemed to be among those "essential to the orderly pursuit of happiness by free men," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and to be more significant and priceless than "the libelstances which derive merely from shifting economic arrangements." *Stanley v. Illinois*, 405 U.S. at 651, quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring). Accordingly, although the Constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life long has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment. *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (plurality
There is also a second liberty interest of the parent at stake in a termination proceeding, the interest in not being stigmatized as a "bad parent" by an adverse decision. The Court, in examining this interest, must consider both the general impact on the individual's reputation in the community and the specific consequences that may flow from an adverse decision.

In terms of the general impact on reputation, being labeled a "bad parent" in a termination proceeding may be as damaging as being labeled a "bad person" in a criminal trial. In terms of specific consequences, the "bad parent" usually does not face as many civil disabilities, such as job and license disqualifications, as does the "bad person." The "bad person," however, does face two other possible consequences which are, in fact, more serious. First, the evidence obtained at a termination hearing may be used in subsequent criminal proceedings against the parent. Thus the termination hearing may result not only in an immediate loss of the child, but an eventual loss of physical liberty as well. Justice Stewart's opinion in Lassiter, which expressly recognizes the significance of this factor, concludes that Ms. Lassiter was not entitled to counsel only after mentioning that no criminal charges could stem from the findings of the trial court in her case. Justice Stewart, how-

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208. In his dissent from the denial of certiorari in Kaufman, Justice Black drew this comparison between a neglect proceeding and a criminal proceeding: "The defendant is charged with conduct—failure to care properly for her children—which may be criminal and which in any event is viewed as reprehensible and morally wrong by a majority of society." Id. On the other hand, by leaving the community, a person probably may escape from an adverse termination decision more easily than from a criminal conviction.

209. "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 legal counsel to guide them in understanding the problems such petitions may create." 101 S. Ct. at 2160 n.3.

210. "The respondent respresents that the petition to terminate Ms. Lassiter's parental rights contained no allegations of neglect or abuse upon which criminal charges could be
ever, ignores a second equally important consequence that was applicable to the circumstances of the *Lassiter* case. The termination of a parent’s rights in one of her children may have a negative effect on her efforts to keep her other children. Once one child has been permanently removed, once the “integrity of the family” has been breached, it becomes more likely that state officials will consider removing other children and easier for them to do so. Moreover, the evidence produced at the termination hearing, of the parent’s failings in regard to one child, may be used at a later hearing in regard to other children.211

The parent’s interests in not being deprived of the child and not being stigmatized as a “bad parent” are not the only interests militating for the appointment of counsel. For, as discussed above,212 the child has a direct, substantial interest in the proceeding as well. Even when the child has been appointed counsel of his or her own,213 it is still in the child’s interest for the parent to have counsel so as to ensure a full adversarial hearing. When, as in *Lassiter*, the child has no counsel of his own, the child’s interest is placed in even more severe jeopardy by the denial of counsel to the parent.

Finally, an enlightened court might recognize that the other chil-

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211. For an example of a case where a parent’s conduct in regard to one child was used to intervene in the case of another, see *Custody of Minor*, 389 N.E.2d 68 (Mass. 1979), where the court, in upholding the removal of a newborn child, stated:

> The mother here has failed to formulate any realistic plan by which she could care for her two children already in the department’s custody. Thus, in these circumstances, court intervention is appropriate in order to protect a child who, although not yet maltreated, is a probable victim of parental neglect.

*Id.* at 74.

It should be noted that, in *Lassiter*, Justice Gantt found Ms. Lassiter had not expressed concern for her son William’s welfare nor made any effort to plan for his future. Judge Gantt went on to find that the failure to establish or maintain concern or responsibility was without just cause. Trial Court Findings 11 & 12, Joint Appendix at 6. If the Durham County Department of Social Services decided to intervene and seek custody, and possibly eventually residual parental rights, with regard to Ms. Lassiter’s other children, it could use an argument analogous to that made in *Custody of a Minor*.

212. See note 163 *supra* text accompanying it.

213. In some jurisdictions, the child may have a guardian *ad litem* who is not a lawyer and who cannot ensure a full adversarial testing of the issues in court.
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Dren in the family also have an interest in preserving a relationship with the sibling. The interests of the other children, who almost certainly will not have counsel of their own, can be fully protected only by provision of counsel for the parent.\(^{214}\)

To sum up this comparison of the interests affected by termination hearings and criminal proceedings, it is possible that a court only examining the direct impact upon the parent might not be fully persuaded that the loss of a child is as grievous as physical confinement. If, however, the court takes into account the stigmatizing effects of such a decision on the parent, as well as the effects of such a decision on the interests of other family members, the case for providing counsel appears overwhelming.

The third and final step of this alternative approach is a comparison of the proceedings in termination cases with those in criminal cases. The purpose of this comparison is to determine whether the presence of counsel is as essential to protect the interests of the parent as it is to protect the interests of the criminal defendant.

Certain similarities between termination and criminal proceedings are beyond dispute. Both involve formal, adversarial hearings. Further, in both, the individual is pitted against the almost overwhelming power and resources of the state. This imbalance has been described well by the Maine Supreme Court:

\[\text{\textsuperscript{214}}\] Some commentators view the family as a unit and insist that this unit has rights and interests of its own, especially the right to "family integrity." See, e.g., Martz, Indiana's Approach to Child Abuse and Neglect: A Frustration of Family Integrity, 14 VAL. U.L. REV. 69 (1979). The family is the most important and fundamental social institution . . . serving as a microcosm for the development of socially satisfying and productive human relations. Due to its fundamentality as a social unit, the family must be protected from governmental intervention in all but the most compelling of circumstances. Often the best interests of the child seem to dictate government intrusion since a child is ill-equipped to protect itself from abuse and neglect. On the other hand, every family has a basic right to an opportunity to provide adequate care for its children without governmental intervention. . . . Family integrity means simply a wholeness or completeness of the family in an unbroken condition; living together as a family. Although no court has defined the term, courts have begun to use it in cases involving the protection of families and individuals from arbitrary coercive state intervention. Id. at 75-76 (citation omitted).

For a more traditional view of the interests involved, see Areen, Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases, 63 GEO. L.J. 887 (1975): "Three primary interests must be addressed in any neglect proceeding: those of the family, those of the child, and those of the state. The first, the interests of the family best can be analyzed if broken down further into the separate interests of each parent, of siblings and of the extended family." Id. at 890-91 (emphasis added).

As can be seen from the organization of the text of this article, the author favors the traditional approach of analyzing each family member's interests separately.
In a neglect proceeding the full panoply of the traditional weapons of the state are marshalled against the defendant parents. The Department is designated to represent the State at the hearing but may, at its option, request that the County Attorney represent the State as he would in criminal prosecutions. The Department has access to public records concerning the family, the services of professional social workers to investigate the family situation and to give testimony at the hearing and the Department's representative at the hearing has knowledge and experience in legal proceedings, subpoena powers, familiarity with the law of evidence, and the ability to examine witnesses.215

Admitting the similarities between the two proceedings, are there still such significant differences that there is less, or possibly more, of a need for counsel at termination hearings? This issue was joined in the briefs presented by the two amici curiae in Lassiter.

The State of North Carolina argued that termination hearings did not present legal issues as difficult as those present in criminal trials and that parents in termination hearings were better able to defend themselves given the nature of the charges:

The procedure in termination cases does not include the technicalities which are present in criminal law, such as, for example, sufficiency of a warrant, questions of double jeopardy, or motions to suppress evidence. This reduces the need for counsel . . . . While it is true that an unrepresented parent will not know the rules of evidence, he is singularly able to speak to the facts which allegedly constitute grounds for termination, and he does not have the added problem of speaking to a jury.216

The American Bar Association took the diametrically opposite position, arguing that the uncounseled parent is at a comparative disadvantage to the pro se criminal defendant, because the decisive issues in termination cases are much more complex than those in most criminal trials.

Unlike most criminal or personal injury actions, which look to the guilt or innocence, or liability or non-liability of the defendant arising from a single incident, termination actions examine conduct over the long term and then attempt to predict future behavior. Accordingly, parents must often secure and present expert testimony from physicians, psychiatrists, psychologists and clinical social workers. Their very ability to obtain these experts is suspect; they may be

215. 303 A.2d at 799.
unaware of diagnostic evaluation services, often secured by court order . . . , or that they can subpoena experts who have personal knowledge of the case. 217

The American Bar Association stressed another factor militating for the appointment of counsel in termination proceedings. Not only do the parents face more difficult issues, but because of educational, emotional and mental difficulties, these parents are "even less able to represent themselves than most lay citizens." 218

In deciding who was right—North Carolina or the American Bar Association—the Supreme Court might well have taken note of the state court decisions addressing these questions. State courts generally have found that counsel is, at the least, as essential in termination hearings as in criminal trials. 219 The Supreme Court also might have taken into account an additional factor which, while not discussed in either brief, is one that puts parents in many ter-

217. Amicus Brief of the American Bar Association at 12.
218. Id. at 9. The Amicus Brief of the American Bar Association cited a recent study, Schetky, Morrison & Sack, Parents Who Fail: A Study of 51 Cases of Termination of Parental Rights, 18 J. AM. ACAD. CHILD PSYCH. 366 (1979), showing that these parents usually have minimal education. The ABA brief also pointed out that a frequent ground for state intervention is the parent's mental incapacity. Amicus Brief of the American Bar Association at 10 n.6.
219. For example, in Danforth, the Maine Supreme Court found:
The crucial issues in a neglect proceeding may be difficult to grasp and consequently difficult to refute for an uneducated and unsophisticated layman. The expert testimony presented by the Department may include that of psychologists whose jargon is usually beyond the understanding of the ordinary person. The statement in Powell v. Alabama, 287 U.S. 45, (1932), that "even the intelligent and educated layman has small and sometimes no skill in the science of law" would apply to neglect proceedings in the same manner as it applies to criminal prosecutions. The average parent would be at a loss when faced with problems of procedure, evidence, or cross-examination.
303 A.2d at 799.
The Supreme Court of West Virginia made a similar determination in Lemaster v. Oakley, 203 S.E.2d 140 (W.Va. 1974):
Anytime parents are confronted with judicial proceedings involving the potential termination of their right to the custody of their children, the presented issues and the available defenses are most often exceedingly complex and susceptible of interpretations which may confound the most stable legal counsel. Precise concepts involving the determination of (1) destitution, homelessness or abandonment of the child by the parent; (2) lack of parental care; (3) whether the child begs; and (4) whether the child is subjected to an improper environment by reason of neglect, cruelty or dispute—all several grounds warranting termination expressed in Chapter 49 of the Code—suggest distinctions of subtle and uncommon variety to the semanticist and legal scholar. To laymen parents, in fear of losing children of their body, the words employed in these vague charges are bewildering and paralyzing.
Id. at 143 (emphasis added). See also Annot., 80 A.L.R.3d 1141 (1977).
mination hearings at a much greater disadvantage vis-a-vis the state than defendants in criminal trials.

In rare instances, the parent may so badly abuse the child or be so utterly incapable of providing care that, upon discovery of the problem, the state will move immediately to terminate parental rights. But, in the vast majority of cases, the state only moves to terminate parental rights after a considerable period of time, during which social workers from the state-mandated social service agency attempt to remedy the situation within the family. In these cases, the parent will be forced to cooperate with these social workers—to talk to them, to let them into the home, to take actions on the basis of their advice—under the implicit threat of removal of the child from the home or, if the child has already been removed as a result of a custody hearing, under the threat of the child's not being returned. The problem arises when the state agency decides to seek a termination order, because the social worker has acted not only as a helper, but also as an investigator. At the termination hearing, therefore, the parent may be confronted by the testimony of witnesses for the state, who have obtained a substantial amount of information that may be used against the parent, through contacts forced upon the parent. In other words, there is a strong possibility in a termination proceeding that a parent will have been compelled to incriminate him or herself in a manner not

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221. Parents may not even be aware that what they say or do in front of the social worker eventually may be used as evidence against them. The propriety of the social worker acting as both a helper and an investigator was questioned at a recent series of conferences sponsored by the Young Lawyers Division, Children's Rights Committee, Vermont Bar Association and the Vermont Department of Social and Rehabilitation Services, where, not surprisingly, the social workers generally defended the practice and lawyers generally attacked it:

It was generally agreed in the follow-up sessions that the role of the social worker as investigator and caseworker (helper) was a difficult one for social workers and families. However, the overwhelming majority thought that the conflict could be minimized and that in fact it was the best of possible alternatives. What is interesting to note is that in all the sessions except one, social workers themselves thought this was an appropriate role and one they could handle, albeit difficult. Social workers in only one group session advocated that the investigative role be separated from the rehabilitative function within SRS. But attorneys in the sessions; state's attorneys, public defenders and private attorneys thought differently. They thought (in the majority of sessions) that this dual role was detrimental to the relationship with the families, especially parents, since social workers were usually advocating of [sic] the child. A specific suggestion was made at one session to deal with both points of view on this issue: If the social worker testified in court, then the parents should have the option of having a new worker assigned.

CONFERENCE PROCEEDINGS BOOKLET, supra note 161, at 57.
permissible in any criminal proceeding. For this reason alone, the state may have a tremendous advantage over the parent and counsel may be necessary to equalize this imbalance.

If indeed the parent is in as much need of counsel as the criminal defendant, and if the interests at stake in a termination hearing are as important as those at issue in a criminal trial, then the court using this comparative approach must conclude that fundamental fairness does require the appointment of counsel for the indigent parent.

IV. THE RAMIFICATIONS OF THE LASSITER DECISION

No matter how strong a case can be made for the right to counsel, the fact remains that the Supreme Court, by a five to four vote, chose not to recognize a general right to appointed counsel for indigent parents in termination proceedings. The final question that must be addressed, therefore, is what the impact of its decision is likely to be. In analyzing the potential impact, it may be useful to divide the discussion into four parts: (A) the provision of counsel for indigent parents in termination proceedings, (B) the provision of counsel for indigent parents in “child in need of care and supervision” adjudications, (C) the provision of counsel for children in termination proceedings, and (D) other constitutional issues arising out of the termination.222

A. The Provision of Counsel for Indigent Parents in Termination Proceedings

The Lassiter decision may have both positive and negative effects on the provision of counsel for indigent parents in termination cases. On the positive side, Lassiter may, in fact, turn out to be a significant step forward toward the unconditional provision of counsel for all indigent parents in termination cases. True, the majority in Lassiter concludes that due process does not require the provision of counsel for all such parents. At the same time, however, the majority holds that the Constitution requires counsel be provided for some indigent parents and suggests that wise public policy dictates counsel be appointed in all cases. Given that two thirds of the states already automatically provide counsel for all such parents, the Supreme Court’s opinion in Lassiter may help

222. For a discussion of the impact of the Lassiter decision on the Supreme Court’s methodology in the due process cases, see Jackson, supra note 150.
persuade legislatures in the remaining states to follow suit.\textsuperscript{223}

Two other factors also may come into play. First, as suggested above,\textsuperscript{224} the Supreme Court's case-by-case approach will be difficult to implement and cumbersome and costly to maintain. If the Supreme Court's case-by-case approach proves to be seriously flawed when put into practice, then the states which have tried to use the case-by-case approach and seen it fail are likely to adopt the across-the-board provision of counsel as the lesser of two evils. Further, the Supreme Court itself may recognize that the case-by-case approach to the appointment of counsel is as infeasible in parental termination cases as in criminal cases and, following the precedent of \textit{Gideon v. Wainright},\textsuperscript{225} extend the right to counsel to all indigent parents.

Second, the Supreme Court's balancing test, when put into practice, may result, in some jurisdictions, in the appointment of counsel for most parents. It can be argued that \textit{Lassiter} presents an unusual combination of facts, militating against the parent: a mother who had not appeared at a prior hearing, who did not ask for counsel, who was facing a long prison sentence and who, therefore, would be unable to maintain contact with the child during the foreseeable future, and who was demanding that her child be

\textsuperscript{223} Support for this proposition may be found in the fact that the North Carolina Legislature has recently amended its laws to provide that all indigent parents in termination proceedings shall have appointed counsel. An Act to Require that Counsel Be Appointed For Indigent Parents In Termination of Parental Rights Actions, Ch. 966, 1981 N.C. Sess. Laws.

Subsequently, in \textit{In re Clark}, 281 S.E.2d 47 (1981), the Supreme Court of North Carolina went out of its way to make clear that this legislation only would be given prospective effect.

While not necessary for a decision in this case, but in the interest of judicial economy, we state for the guidance of the judges of our trial and intermediate appellate court that we would follow \textit{Lassiter} and hold that in proceedings brought prior to August 9, 1981, where other circumstances do not dictate to the contrary, an indigent parent is not entitled to appointment of counsel as a matter of law. In such proceedings, begun prior to August 9, 1981, the right to appointed counsel must be determined on a case-by-case basis.

\textit{Id.} at 54.

\textsuperscript{224} See text accompanying notes 167-179.

\textsuperscript{225} 372 U.S. 335 (1963). See note 97 \textit{supra}. Indeed, the Court could use the language of \textit{Gideon} with but one change: substituting \textit{Lassiter v. Department of Social Services} for \textit{Betts v. Brady}:

The fact is that in deciding as it did—that "appointment of counsel is not a fundamental right, essential to a fair trial"—the Court in \textit{Betts v. Brady} made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice.

372 U.S. at 343-44.
placed with her own mother while, at the same time, insisting that her mother was guilty of murder. Thus, in most cases, it should be fairly easy to distinguish *Lassiter* on its facts and to argue that, under the balancing test, counsel is required. In a state where the judiciary is sensitive to the rights of parents and where the judiciary does not give too much weight to the presumption against the right to counsel, application of the balancing test may eventually produce a de facto rule that counsel be provided to all parents.

While there are grounds, therefore, for optimism about the long range effects of *Lassiter*, there are also grounds for pessimism, especially concerning its short term effects. First, *Lassiter* certainly will put a halt to the hertofore almost uninterrupted march of state supreme court decisions holding that counsel is required under the due process clause of the federal Constitution. Second, *Lassiter* may also put a brake on, rather than accelerate, the movement of state legislatures toward statutorily requiring the provision of counsel. In an era of increasing strain on state finances and decreasing support for social services to the poor, legislatures may pay more attention to the Court’s holding that there is no legal obligation to provide counsel in all cases, than to the Court’s pronouncement, in dicta, that there is a moral obligation to do so. Third, *Lassiter’s* case-by-case approach does not foreclose the greatest of abuses. The truly ignorant indigent parent, the one least likely to be able to represent him or herself in a court of law without counsel, is also the parent most likely to lack the wit both to ask for the appointment of counsel at the hearing and to appeal a trial court judge’s failure to spontaneously appoint counsel. In such cases, the case-by-case approach may provide an illusory, rather than an effective, check on the trial court judge’s discretion. Fourth, the actual decision denying Ms. Lassiter due process creates an especially ominous precedent. While often *Lassiter* may be distinguished on its peculiar facts, the problem described above remains: in condoning the trial court’s failure to appoint counsel in a situation where the record clearly shows that the parent had absolutely no ability to defend herself, the Supreme Court

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226. While North Carolina has adopted a statutory provision requiring counsel, it is important to note that a number of other states, including Delaware, Mississippi, Florida, Nevada and Arkansas, joined North Carolina as amici curiae in *Lassiter* to argue against the parent’s right to counsel.

227. See text accompanying note 225.

228. See text accompanying notes 188-195.
has set a very low standard of fundamental fairness by which to review future trial court refusals to appoint counsel.

B. The Provision of Counsel for Indigent Parents in "Child in Need of Care and Supervision" Adjudications

The appointment of counsel for indigent parents in "neglect" or "dependency"—or, to use more modern terminology, "child in need of care and supervision"—hearing is not directly at issue in *Lassiter*. To the extent that these hearings do not involve permanently severing the parent's relationship with the child, it might be assumed that, if the right to counsel were in issue, it would be given shorter shrift by the Court. It may be argued,

229. Hearings to determine whether a child has been or risks suffering harm have been given a variety of labels in different states. For example, in addition to Children in Need of Care & Supervision (CINS) proceedings, another term which has gained currency is Persons in Need of Care & Supervision (PINS). Moreover, even when two states use the same label, such as neglect, they may have very different definitions of what neglect encompasses. It is possible, in theory at least, to distinguish between neglect and dependency. Neglect connotes that the parent is somehow at fault for the child's condition, while dependency does not necessarily carry this connotation. Children in Need of Care and Supervision is a broader term, which can include children such as those "beyond the control of their parents," who are neither neglected nor dependent. Persons in Need of Care and Supervision is broader still, possibly encompassing incompetent adults. For a survey of the terminology and scope of "neglect" laws, see Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 Fam. L.Q. 1 (1975).

230. The great majority of states have different statutory standards for determining when the child is neglected or in need of care and supervision, and for deciding when parental rights should be terminated. Normally, termination hearings occur long after a neglect hearing has removed the child from the home, and only when it has become abundantly clear that the underlying family problems cannot be remedied. In a few states, no statutory distinction is made and the court has authority, in theory at least, to consider termination as an alternative at the initial hearing. See, e.g., VT. STAT. ANN. tit. 33, § 656(3) (Supp. 1981), under which judges can simply transfer legal custody or can transfer residual parental rights as well. In practice, however, courts are very reluctant to do the latter. See *In re D.R.*, 136 VT. 478, 392 A.2d 95 (1978) (reversing a district court decision to immediately terminate parental rights as a result of a child in need of care and supervision hearing).

231. There is a countervailing factor, however, whose importance is likely to increase with the passage of time. Traditionally, it was relatively easy for the state to remove a child from the home on the basis of neglect or dependency, but very difficult to permanently terminate parental rights. FREUD, SOLNIT & GOLDBERG, supra note 159; Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 7 Stan. L. Rev. 985 (1975), and others have argued for much more restrictive standards for removing children from the home on the basis of abuse or neglect; but a much more liberal standard for terminating parental rights once children have been removed. This approach has been adopted in the Juvenile Justice Standards of the Institute of Judicial Administration and American Bar Association, reprinted in 4 [1978] Fam. L. Rep. (BNA) 3105.

If a state legislature adopts this approach, it could be argued that, in that state, the initial removal hearing was in practice a crucial, if not the crucial, hearing in determining whether parental rights would eventually be severed. Consequently, the appointment of counsel
however, that *Lassiter* bodes well for some parents in the “child in need of care and supervision” cases. *Lassiter* contains indications that the majority would apply the same sort of balancing test to determine whether counsel should be appointed in these cases. First, Justice Stewart seems to go out of his way to note that “[a] number of courts have held that indigent parents have a right to appointed counsel in child dependency or neglect hearings as well.”

Second, and more important, Justice Stewart, in setting out the criteria to determine whether counsel is required, places great stress on the possibility of criminal charges arising out of the civil proceedings, where uncounseled parents may have unwittingly incarcerated themselves. While, in practice, criminal charges are rarely brought against parents after adverse determinations in “children in need of care and supervision” proceedings, in theory, such charges are possible in a majority of cases. Given the majority in *Lassiter*’s concern about potential criminal liability, the court might well decide, if confronted with the issue, that counsel is required at least in some “children in need of care and supervision” hearings and that the determination should be made on a case-by-case basis using the same balancing process established for termination cases.

C. The Provision of Counsel for Children in Termination Proceedings

Again, the right to counsel for children in termination proceedings is not directly at issue in *Lassiter*. The decision, however, does not portend the establishment of such a right. Even Justice Blackmun’s dissenting opinion, which raises the question of the child’s right to counsel, responds in a most equivocal fashion. “The possibility of providing counsel for the child at the termination proceeding has not been raised by the parties. That prospect requires consideration of interests different from those presented here, and again might yield to a different result with respect to the right to counsel.”

would be required just as much, if not more, at this initial hearing.

232. 101 S. Ct. at 2161 n.6.

233. *Id.* at 2162. See text accompanying note 85 *supra*, and note 209 *supra* and text accompanying it.

234. AMERICAN HUMANE SOCIETY AND NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL ANALYSIS OF OFFICIAL CHILD ABUSE AND NEGLECT REPORTING (1979).

235. 101 S. Ct. at 2168 n.10 (Blackmun, J., dissenting).
While Justice Stewart's majority opinion does not explicitly address the child's right to counsel, two facets of it tend to undermine the prospects for establishment of such a right. First, as discussed above, Justice Stewart seems to assume that the state will be acting on behalf of the child's interest; he never recognizes that the state's interests and the child's interests may in fact diverge. If the proposition is accepted that the state always acts for and in the best interests of the child, then the appointment of separate counsel for the child may be regarded as a luxury, rather than a necessity. Second, Justice Stewart seems to suggest that, if a fully contested hearing is useful for avoiding errors, appointment of counsel for either the parent or the child achieves this goal. If this is a correct interpretation of Justice Stewart's remarks, then the child's right to counsel, if it exists at all, would only emerge in those cases in which the parent did not have counsel.

If one were charged with the task of using Lassiter to support an argument for the right of the child to counsel in a termination

236. See text accompanying notes 163-67 supra.
237. Counsel for the parent and counsel for the child seem to be treated as fungible in the following passage:

Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision. For this reason, the State may share the indigent parent's interests in the availability of appointed counsel. If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal. North Carolina itself acknowledges as much by providing that where a parent files a written answer to a termination petition, the State must supply a lawyer to represent the child.

101 S. Ct. at 2160 (emphasis added).

While this passage is somewhat ambiguous and, by itself, does not establish that Justice Stewart regards counsel for the child as an alternative to counsel for the parent or vice-versa, Justice Stewart does return to the theme of counsel for the child as an alternative method of ensuring accurate decision-making.

Finally, consideration must be given to the risk that a parent will be erroneously deprived of his or her child because the parent is not represented by counsel. North Carolina law now seeks to assure accurate decisions by establishing the following procedures: . . . the court must, as has been noted, appoint a lawyer as the child's guardian ad litem.

Id.

If Justice Stewart is indeed taking the position that either counsel for the child or counsel for the parent is sufficient to contest the issues with state's counsel, then one might question whether this is inconsistent with the other position he seems to take: that the child's interests are being fully represented by counsel for the state. If the latter is true, what issues would there be for the state's and the child's counsel to contest?
hearing, the best course of action might be to rely on Justice Bur-
ger's concurring opinion, which stresses that the purpose of termi-
nation proceedings is not "punitive" but "protective of the child's best interests." One could at least argue that if the purpose is to be "protective of the child's best interests," the child should have counsel to ensure that this purpose is in fact accomplished.

D. Other Constitutional Issues Arising Out of the Termination of Parental Rights

Several factors have combined to increase the resort to involun-
tary termination proceedings. First, the 1960's and 1970's were marked by expanding public awareness of the magnitude of the problems of child abuse and neglect. With the passage of new juve-
nile court acts defining these concepts and providing remedies, with the establishment of state-mandated agencies to provide "protective services" and with the implementation of child abuse reporting laws, the general incidence of state intervention on behalf of maltreated children rose dramatically.

Second, while reductions in government spending on social ser-
vices, growing doubts about the efficacy of state intervention, and a resurgence of concern with freedom from government control may combine to restrain state intervention in the future, a major in-
crease in the number of termination proceedings is still likely. Concerns about the detrimental effect of long-term foster care on children have led to state and federal attempts to reform foster-
care systems, limiting the amount of time children spend in foster care by seeking speedier decisions either to return the children to their families or to pursue involuntary terminations while children are still young enough for adoption. Given the larger number of children now in foster care because of increased state intervention in the 1970's, the number of terminations is also bound to in-

238. Id. at 2163 (Burger, C.J. concurring).
239. For a discussion of the growth of state intervention on behalf of abused children, see Schechter, The Violent Family and The Ambivalent State: Developing A Coherent Policy For State Aid to Victims of Family Violence, 20 J. OF FAMILY LAW 1, 3-17 (1981).
240. Id. at 33-35. See also Dickens, Parental Rights and Their Modern Functions and Limits, [1981] 7 FAM. L. REP. (BNA) 4039.
242. "The rise in the number of children in 'temporary' foster placements from 287,000 in
crease if these reforms are implemented.

Third, during the 1960's and 1970's, increased stress on the rights of the child, as opposed to the traditional emphasis placed on the rights of the parent, led to a "liberalization" or broadening of the grounds for termination in many states, making termination actions feasible in many more cases.

In recent years, involuntary termination proceedings have given rise to a host of constitutional issues, going far beyond the question of the parent's right to counsel. In fact, a number of these issues were before the Supreme Court last term in Doe v. Delaware. Petitioners, a father and mother whose parental rights in five children had been terminated under a Delaware statute allowing such termination when the parents were "not fitted to continue to exercise parental rights," raised three constitutional claims on their own behalf:

(i) that a statute allowing termination without requiring specific findings of existing or threatened harm to the child violates substantive due process;
(ii) that a statute allowing termination based on the sole criterion that an individual is "not fitted" to be a parent is unconstitutionally vague; and
(iii) that allowing termination upon a "preponderance of the evidence" standard also violates due process.

The National Association of Counsel for Children and the Guardian Ad Litem Program of the District of Columbia, appearing as amici curiae in Doe, raised additional, somewhat conflicting constitutional claims on behalf of the children:

(i) that the children had a liberty interest in the proceedings that required their being given party status and independent counsel;

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1965 to an estimated 364,000 in 1975 reflects increased protective service activity resulting in the removal of children from the parental home." Derdeyn, Rogoff, & Williams, Alternatives to Absolute Termination of Parental Rights After Long-Term Foster Care, 31 VANDERBILT L. REV. 1165, 1166 (1978).

243. Cf. Katz, Howe & McGrath, Child Neglect Laws in America, 9 FAM. L.Q. 1, 67 (1975). For an extreme example of change, see that in Nebraska’s statutory standards described in Linn v. Linn, 205 Neb. 218, 286 N.W.2d 765, (1980) (new statutory standards so broad as to be unconstitutionally vague). See also note 250 infra.


and
(ii) that, even if the Court were to hold the termination statute unconstitutional, the children, who had been in foster care from four to seven years, might have sufficient interest in not being returned to the parents to require the court to make its determination of unconstitutionality purely prospective.\(^\text{247}\)

In a six to three decision handed down just two-and-one-half months before its decision in \textit{Lassiter}, the Court managed to avoid resolving any of these issues by dismissing the appeal for want of a properly presented federal question.\(^\text{248}\) The issues themselves, however, remain very much alive. Two weeks after \textit{Doe}, the Supreme Court granted certiorari in \textit{Santosky v. Kramer},\(^\text{249}\) a case involving a challenge to New York's use of the preponderance of the evidence standard in its termination law. In recent years, there have been quite a number of challenges to termination statutes on the grounds of vagueness,\(^\text{250}\) so the Court may be confronted with this


\(^\text{248}\) Justice Brennan, in a dissenting opinion joined by Justice White, found the dismissal unwarranted, but would have remanded for reconsideration in light of supervening changes in the actual circumstances and the applicable law. 101 S. Ct. at 1496 (Brennan, J., dissenting). Justice Stevens, in his separate dissent, noted that the preponderance of the evidence standard remained unchanged under the new Delaware statute and argued, therefore, that there was at least one federal question ripe for decision. Id. at 1503 (Stevens, J., dissenting).

\(^\text{249}\) 101 S. Ct. 1694 (1981). Santosky was argued before the Supreme Court on November 11, 1981. An editorial summary of the argument appearing in [1981] FAM. L. REP. (BNA) 2038, includes the following exchanges between Martin Guggenheim, attorney for the petitioners, and the Justices on the relevance of \textit{Lassiter} to Santosky:

Justice Blackmun noted the Court's recent holding in \textit{Lassiter v. Department of Social Services}, that appointed counsel for indigent parents is not required in all parental rights termination cases.

Guggenheim distinguished \textit{Lassiter} as being based on the Sixth Amendment right to counsel. Right-to-counsel cases come to this Court with a presumption against them, he noted, but that is not so with standard-of-proof cases. \textit{Lassiter} makes a clear and convincing evidence requirement even more important in those states where counsel is not provided in parental rights termination cases, he said.

Justice O'Connor: Isn't it ultimately more important to look at the overall scheme to determine whether it is a fundamentally fair scheme for handling the problem, rather than looking at an artificial evidentiary standard?

Guggenheim: That is the approach taken in \textit{Lassiter}, which said the need for appointed counsel must be decided on a case-by-case basis, but that simply cannot be in this case. If the Court were to rule that there is no constitutional requirement for the clear and convincing evidence standard, we couldn't bring this case on certiorari. The parties must know before the trial takes place what evidentiary standard applies.

\(^\text{250}\) Recent cases included: \textit{In re Brooks}, 228 Kan. 541, 618 P.2d 814 (1980), where the
issue again in the near future. Further challenges to termination statutes on the grounds that the standards violate substantive due process or the fundamental rights of the parent are also quite likely.251

Can Lassiter be used to forecast how the Supreme Court will resolve other constitutional issues arising out of the termination of parental rights? First, the Court's rush to uphold the North Carolina District Court's termination order in Lassiter should be considered alongside the Court's reluctance to consider upsetting the Delaware Superior Court's termination order in Doe. Both cases involved children who not only had been out of the home, but also out of contact with their parents for very lengthy periods of time.252 In both cases, the Court's decision may have been moti-

use of their term "unfit" was upheld; In re V.A.E.Y.H.D., 605 P.2d 916 (Colo. 1980), where the use of the term "whose environment is injurious to [her] welfare" was upheld; Linn v. Linn, 205 Neb. 218, 286 N.W.2d 765 (1980), where the use of "best interests and welfare of children" as the sole standard for termination was struck down as impermissibly vague. Most state court decisions have upheld statutes challenged on vagueness grounds. But see the federal district court's decision in Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (D.D. Iowa 1975), aff'd, 545 F.2d 1137 (9th Cir. 1976). For a discussion of the ramifications of Alsager, see Day, Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Doctrine, 16 J. OF FAM. L. 213 (1977).

251. So far, there have not been nearly as many challenges on this ground as on vagueness and on the evidentiary standard to be applied. A number of commentators, however, have been putting forward proposals that once a child has been removed from the home, termination should be the norm if the child cannot be returned to the home within a specified period of time. See Musewicz note 241 supra, at 739, 741 n.n.438 & 444 and accompanying text for a summary of some of these proposals. The Juvenile Justice Standards of the Institute of Judicial Administration and American Bar Association, reprinted in 4 [1978] FAM. L. REP. (BNA) 3105, provide that, for the child who has been placed outside the home, termination orders should be issued, with only very limited exceptions, after six months when the child is under three and after a year when the child is over three, if the child cannot be returned home.

If such standards, which focus on time out of the home rather than parental misconduct or inadequacies per se, are implemented, there is likely to be a substantial increase in claims based on the fundamental rights of parents or substantive due process.

252. In Lassiter, Ms. Lassiter had not exercised a statutory remedy which might have allowed her to maintain contact with her child. See note 62 supra; in Doe, the parents argued on appeal that they had not seen their children because the Division of Social Services had not permitted them to visit, but the record did not indicate when or how often they had attempted to see the children. 101 S. Ct. at 1498 n.12 (Brennan, J., dissenting).

It may be noted as well that, if Ms. Lassiter's conduct did not rouse the sympathy of the Justices, Doe's conduct was even less likely to do so. Doe and Roe were not merely unmarried, they were half-brother and sister living in an incestuous relationship. Doe previously had been charged with sexually assaulting his two year old child and had been convicted of the misdemeanor of offensive touching. Doe also had a severe alcohol problem, could not hold a job, and had threatened to kill Roe. The family's life had been chaotic and, at trial,
vated by its observation that Humpty Dumpty had indeed fallen off the wall; that even if the Court, to uphold the constitutional rights of the parents, set aside the state court termination order, these parents and children could never be put back together again. For counsel who represent parents in future cases, the most important practical lessons to be learned from *Lassiter* and *Doe* may be the necessity of getting the challenge to the termination order before the Supreme Court as quickly as possible and, in the meantime, of maintaining some contact between parents and children.

Second, the majority opinion in *Lassiter* is rather equivocal in its treatment of the rights of the parent. The majority not only refuses to classify these rights as "fundamental," but also does not weigh them all that heavily in applying the *Mathews v. Eldridge* balancing test. This equivocation does not augur well for future parental claims.

Third, however, a forecaster's disclaimer is in order. The decision in *Lassiter* was, after all, a five to four one. Justice Stewart, who wrote the majority opinion and who seems to have been especially reluctant to intervene in state social service activities, has now retired and been replaced by Justice O'Connor. It is quite possible, therefore, that Justice O'Connor's views on these issues may have a decisive impact on the cases involving the competing rights of family members and the state.  

V. CONCLUSION: THE PERILS OF TIMIDITY

In *Lassiter v. Department of Social Services*, the United States Supreme Court had to decide whether indigent parents had a constitutional right to counsel in termination hearings. An affirmative decision would not have required a bold step forward into the un-

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the Division of Social Services had produced one psychiatrist who labelled Doe a "sociopath" and another who maintained that Doe and Roe lacked the capability of functioning as nurturing parents. Brief for Appellee at 5-6, *Doe v. Delaware*, 101 S. Ct. 1495 (1981).

253. See notes 71 and 207 supra.

254. In spite of the admittedly strong parental interests and the admittedly weak countervailing state interests, the Court refused to come down on the side of an unconditional right to counsel. See Justice Blackmun's comment in dissent, text accompanying note 168 supra.

255. See note 105 supra.

256. These issues may create an exceedingly difficult dilemma for a "conservative" justice, because they present a conflict between two basic "conservative" principles respect for the autonomy of the states, especially in family law matters, on the one hand, and concern for the preservation of the traditional family unit, on the other.
known. All of the state courts which had recently considered the issue had determined that due process required the appointment of counsel. Two-thirds of the states already provided counsel for all indigent parents. The cost to the remaining states to do likewise was admitted to be relatively small.\(^{257}\)

A negative decision holding that there was no due process right to counsel would have required a giant step backwards. The Court would have had to make a sharp break with its own recent decisions stressing the importance of the parent’s interests in his or her child. It would have had to take a position diametrically opposed to that of the overwhelming majority of state courts which had considered the issue. Finally, the Court would have left itself open for very harsh ridicule if, on the same day that it decided in *Little v. Streater*\(^ {258}\) that indigent putative fathers had a due process right to blood tests to aid in disproving paternity, it had decided that parents had absolutely no due process right to counsel to aid in proving that parental ties with their children should not be severed.

Viewed in this light, the majority’s decision to adopt a case-by-case balancing approach appears to be a timid, grudging, small step forward. It leaves in peril both parents, especially those who do not know enough to demand counsel, and children, who may remain in limbo while the battle over counsel drags on. The greatest virtue of this case-by-case balancing approach may be its impracticability. The majority in *Lassiter* was not convinced that the automatic appointment of counsel for indigent parents was necessary to protect the best interests of parents, children and the state. When the case-by-case approach is given an opportunity to demonstrate its costs and impracticality, the Supreme Court may be forced to accept the provision of counsel for all indigent parents as the least detrimental alternative.

\(^{257}\) 101 S. Ct. at 2160.

LASSITER V. DEPARTMENT OF SOCIAL SERVICES: THE DUE PROCESS RIGHT TO APPOINTED COUNSEL LEFT HANGING UNEASILY IN THE MATHEWS V. ELDREDGE BALANCE.

By Jane E. Jackson*

In *Lassiter v. Department of Social Services*, The Supreme Court ruled that an indigent mother was not constitutionally entitled to appointed counsel in a case brought against her by a county social service agency seeking to terminate her parental relationship with one of her children, although others facing termination of parental rights might be entitled to counsel on a case-by-case basis. On its way to this result, the Court announced a new presumption against finding a right to counsel in cases not involving deprivation of physical liberty. It then attempted to apply the *Mathews v. Eldridge* balancing test to that presumption. The holding of the case will probably mean a net expansion of the right to counsel for numbers of termination defendants. The Court’s crabbed rationale, however, demonstrates the fulfillment of scholarly predictions that the utility-oriented *Eldridge* approach would lead to an unacceptable impoverishment of the concept of due process of law.

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3. The *Mathews v. Eldridge* test states that the question whether due process of law requires any particular procedure is answered by balancing the private interests at stake, the governmental interest, and the risk of error in the event the disputed procedure is not undertaken. *Id.* at 334-35.
4. At the time *Lassiter* was argued to the Supreme Court, thirty-four states provided counsel by statute in cases involving termination of parental rights. Since that time, the number has risen to thirty-five because, ironically, North Carolina has amended its termination statutes to provide for appointed counsel. Some persons in the remaining fifteen states, presumably, now will be supplied with counsel on a case-by-case basis. At the same time, it is at least possible that states which have been supplying counsel in all cases only because required to do so by Court decisions based on the Federal Constitution may turn back to the case-by-case approach approved by the Supreme Court in *Lassiter*. 101 S. Ct. at 2163.
5. Interest balancing, and particularly interest balancing with the heavy utilitarian slant mandated by the *Eldridge* codification of the balancing test, has been criticized as insensitive to important values served by the Due Process Clause. See, e.g., Mashaw, The Supreme Court’s Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge*: Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28 (1976). For a pre-*Eldridge* critique of the uses of interest balancing, see Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 Harv. L. Rev. 1510 (1975).
After a brief summary of the facts of Lassiter, this article will critique the Court's reasoning on its own terms, arguing that the adoption of a presumption against the right to counsel was both unwarranted and unwise, and that the Eldridge test was misapplied; it will then argue that the test was inappropriate for resolving the issue in Lassiter, and that the Court should have followed the "fundamental rights" approach taken by the several state courts that have found an unequivocal right to counsel in termination cases.

Summary of the Facts

In May, 1975, the District Court of Durham County, North Carolina, declared Abby Gail Lassiter's son William a neglected child and transferred him to the custody of the county Department of Social Services [hereinafter Department]. The next year, Ms. Lassiter was convicted of second degree murder and sent to state prison to serve a twenty-five to forty year sentence. In 1978, the Department petitioned the district court to terminate the parental rights of Ms. Lassiter and of the child's putative father. The grounds for termination asserted by the Department were

That [she] ha[d] without cause, failed to establish or maintain concern or responsibility as to the child's welfare, [and] [t]hat [she] ha[d] willfully left the child in foster care for more than two consecutive years without showing that substantial progress has been made in correcting the conditions which led to the removal of the child, or without showing a positive response to the diligent efforts of the Department of Social Services to strengthen her relationship to the child, or to make and follow through with constructive planning for the future of the child.

While in prison, Ms. Lassiter received a copy of the petition and

8. The circumstances of the murder were apparently unrelated to the allegations of neglect of William, which focused on the Department's concern with whether William was receiving proper medical care. 101 S. Ct. at 2157.
9. William's putative father had never supported the child and had denied paternity; his status as William's father was terminated without contest at the same time that Ms. Lassiter's rights were terminated. Id. at 2158 n.2.
10. Id. at 2169 (Blackmun, J., dissenting).
later a notice that a hearing would be held August 31, 1978. She did not file an answer to the petition nor consult an attorney about it, but she was brought from prison to attend the hearing. The trial judge discussed with Ms. Lassiter her lack of representation but, concluding that she had had ample time to retain counsel, did not postpone the hearing; the hearing proceeded with the Department being represented by an attorney and Ms. Lassiter attempting to represent herself.

Three witnesses testified: the social worker who had been assigned to William's case in August 1977, Ms. Lassiter, and Ms. Lassiter's mother. The social worker recounted the history of William's contact with the Department, stating that neither Ms. Lassiter nor her mother had maintained contact with William and that the mother had expressed inability to take William into her own care. Ms. Lassiter made a notably unsuccessful attempt to cross-examine the social worker. In her own testimony, Ms. Lassiter stated that she wanted William to stay with her mother; her mother later denied having said she could not care for William; both Lassiters denied that they had failed to visit William while he was in the custody of the Department. Ms. Lassiter was cross-examined by the judge, while her mother was questioned by both the judge and the Department's attorney. The judge sustained the petition. Ms. Lassiter filed an appeal, alleging that the court's failure to appoint counsel to represent her violated the due process clause of the fourteenth amendment. The North Carolina Court of Appeals affirmed the judgment of the trial court and the Su-

11. Id. at 2157. While in prison, Ms. Lassiter did meet with an attorney to discuss her criminal conviction, but did not take up with him the matter of the termination proceeding. Id. That attorney later filed an affidavit stating that he would not have been interested in representing her in the termination proceeding due to her indigency. Brief for Petitioner at 4, Lassiter v. Department of Social Serv., 101 S. Ct. 2153 (1981) [hereinafter cited as Brief for Petitioner].

12. The social worker who testified had been on William's case since August, 1977; her description of events before that time was based on Department records. 101 S. Ct. at 2173 (Blackmun, J., dissenting).

13. Ms. Lassiter had trouble confining her examination to questions; she tended to lapse into arguing with the witness. See, e.g., excerpt from the Hearing Transcript quoted in Justice Blackmun's dissent. Id. at 2173 n.22 (Blackmun, J., dissenting).

14. See Schecter, supra note 6, text accompanying notes 36-63.

15. After the hearing, the trial judge advised Ms. Lassiter that she had a right to appeal and suggested that she seek assistance from a legal aid office, which she did. Brief for Petitioner at 42 n.40.

Supreme Court of North Carolina declined to review the case.\textsuperscript{17}

Resolution of Abby Gail Lassiter's claim that she was entitled to appointed counsel required the Court to locate an intersection between two largely separate strands of doctrine. On the one hand was the tripartite balancing test\textsuperscript{18} articulated in Eldridge for measurement of the sufficiency of administrative process. Although the Eldridge approach has been used to test various procedures in a wide variety of contexts,\textsuperscript{19} only once before, in Vitek \textit{v.} Jones,\textsuperscript{20} has the Court had occasion to apply the balancing test in its fully developed form\textsuperscript{21} to an asserted right to appointed counsel.\textsuperscript{22} On the other hand was a long line of sixth amendment and due process right to counsel cases.\textsuperscript{23} Of the latter, Vitek alone was decided

\begin{itemize}
\item \textsuperscript{17} Matter of Lassiter, 262 S.E.2d 6 (N.C. 1980)(memorandum opinion).
\item \textsuperscript{18} See note 3 \textit{supra} and text accompanying notes 60-73 \textit{infra}.
\item \textsuperscript{19} E.g., Dixon \textit{v.} Love, 431 U.S. 105 (1977)(holding that a hearing was not required prior to revoking a driver's license on the basis of accumulated traffic violation points); Memphis Light, Gas and Water Division \textit{v.} Craft, 436 U.S. 1 (1978)(setting minimal procedural requirements which must be met before a public utility could terminate customer services); Addington \textit{v.} Texas, 441 U.S. 418 (1979)(holding that due process requires "clear and convincing" standard of proof for involuntary commitment of adults to mental institutions).
\item \textsuperscript{20} 445 U.S. 480 (1980).
\item \textsuperscript{21} See note 25 \textit{infra}.
\item \textsuperscript{22} Justice Blackmun's dissent also identifies Parham \textit{v.} J.R., 442 U.S. 584 (1979), as a right to counsel case. 101 S. Ct. at 2164. In \textit{Parham}, the Court was presented with the question whether due process required a hearing before a minor could be placed in a mental hospital. Applying the \textit{Eldridge} test, the Court determined that all that was necessary was that a "neutral fact finder" with authority to deny admission look into the facts of each child's case prior to admission and that there be some mechanism for periodic review of the child's commitment. 442 U.S. at 606. Since no hearing right was found, the possibility of a right to counsel at such a hearing was never addressed, except that the Court noted in passing that the hearing which the lower court had thought necessary "presumably would [have called] for some other person to be designated as guardian \textit{ad litem} to act for the child." \textit{Id.} at 610-11 n.18.
\item \textsuperscript{23} The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. By judicial interpretation, a right to appointed counsel developed, first as a due process requirement for a fair trial in a capital case, Powell \textit{v.} Alabama, 287 U.S. 45 (1932), then as a sixth amendment requirement in federal felony cases, Johnson \textit{v.} Zerbst, 304 U.S. 458 (1938). Betta \textit{v.} Brady, 316 U.S. 455 (1942) applied the due process counsel right to state felony proceedings on a case-by-case basis. Gideon \textit{v.} Wainwright, 372 U.S. 335 (1963) rejected the case-by-case approach and found a sixth amendment right to counsel in all state felony cases. That sixth amendment right was extended to misdemeanor cases involving actual imprisonment in Argersinger \textit{v.} Hamlin, 407 U.S. 25 (1972).
\item Where no criminal prosecution is involved, the sixth amendment does not operate but the due process right to counsel first recognized in Powell \textit{v.} Alabama may still apply. Thus, in In re Gault, 387 U.S. 1 (1967), the right to counsel was extended under the Due Process Clause to juveniles facing possible commitment to institutions in juvenile proceedings, and in Gagnon \textit{v.} Scarpelli, 411 U.S. 776 (1973), the right was extended to some persons facing
\end{itemize}
with explicit reference to the *Eldridge* test.\textsuperscript{24}

The *Right to Counsel Cases*

The Court\textsuperscript{25} approached this analytical problem by turning first to the right to counsel cases. The Court pointed out that the landmark case of *Gideon v. Wainwright*,\textsuperscript{26} which finally established that all felony defendants had a sixth amendment right to counsel,\textsuperscript{27} had involved a defendant who had been sentenced to prison, and that *Argersinger v. Hamlin*\textsuperscript{28} had extended that right to misdemeanants facing imprisonment. The Court then went on to say that the extension in *In re Gault*\textsuperscript{29} of a due process right to counsel to juvenile defendants facing possible confinement was evidence that the right to counsel was triggered by the interest in personal freedom. “Similarly,” the court continued, “*Vitek v. Jones*\textsuperscript{30} concluded that an indigent prisoner is entitled to appointed counsel before being involuntarily transferred for treatment to a state...

\footnotesize{24. In taking the right to counsel cases out of the mainstream of procedural due process analysis and relating them to their sixth amendment antecedents (see note 24 supra), I am not, of course, contending that interest balancing has not been utilized in counsel-right cases. Gagnon v. Scarpelli, 411 U.S. 778 (1973), for instance, not only considered the balance between state interests in informal procedure and the private interest in having counsel, but ultimately struck that balance in a way which shifted the weight between the government and the individual according to the need for counsel in particular cases. Cf. Note, supra note 5, at 1516 n.33.
25. Justice Stewart delivered the opinion of the Court, joined by Chief Justice Burger and Justices White, Powell, and Rehnquist. The Chief Justice also submitted a concurring opinion emphasizing that, in his view, the termination of rights was not punitive but protective of the child’s best interests. He also stated that “[g]iven 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.” 101 S. Ct. at 2163. There were two dissents, one by Justice Blackmun, joined by Justices Brennan and Marshall, id. at 2163, and the other by Justice Stevens, id. at 2176.
27. See note 23 supra.
30. 445 U.S. 480 (1980).}
mental hospital." The diminished nature of a probationer's interest in his physical liberty was said to account for the decision in Gagnon v. Scarpelli to apply the right to counsel in probation revocation proceedings on a case by case basis rather than across the board. Finally, the Court pointed to Scott v. Illinois, in which the Court had declined to extend Argersinger to misdemeanor defendants not suffering actual imprisonment. The Court drew from these precedents "the preeminent generalization," which four paragraphs later became a "presumption," that an indigent litigant has a right to appointed counsel only when, were he to lose, he might be deprived of physical liberty.

The Court's characterization of its sixth amendment precedents as establishing a bright line between misdemeanants who are ultimately imprisoned and all other misdemeanor defendants is, of course, unexceptionable. Exception may be taken, however, to the appropriateness of using those cases in the creation of a presumption for use in the non-criminal context. In the misdemeanor cases, the Court was looking at deprivations of liberty and property interests which occupied opposite ends of a hypothetical scale of severity. The defendant in Scott v. Illinois, for example, was charged with a crime carrying a possible sentence of a year in jail, was found guilty, and was fined fifty dollars. That the Court found him not entitled to counsel because his actual punishment was a fine rather than jail says little about whether due process demands counsel when a deprivation, different from imprisonment

31. 101 S. Ct. at 2159.
32. The Court considers the liberty possessed by persons on parole or probation to be a lesser version of the liberty enjoyed by other persons, because such persons may be imprisoned if they fail to comply with the conditions of their parole or probation. Morrissey v. Brewer, 408 U.S. 471, 480 (1972); 101 S. Ct. at 2159.
35. 101 S. Ct. at 2158.
36. Id. at 2159.
37. Cf. Justice Powell's concurring opinion in Scott v. Illinois, in which he points out that the Court's bright line approach precludes provision of counsel where the collateral consequences of conviction of crime might be more damaging to the defendant than a brief period of imprisonment and states his preference for a more flexible test. 440 U.S. at 374-75. Powell nevertheless joined the five-person majority necessary to support the Court's refusal to extend the sixth amendment right beyond Argersinger. For a comprehensive criticism of Scott v. Illinois, see Herman & Thompson, Scott v. Illinois and the Right to Counsel: A Decision in Search of a Doctrine? 17 AM. CRIM. L. REV. 71 (1979).
38. 440 U.S. at 388.
but clearly more severe than a monetary fine, is imposed.\textsuperscript{39} It says virtually nothing about whether counsel should be provided when the state seeks to inflict a deprivation—permanent severance of a parent’s relationship with her child—which many would consider more severe than imprisonment itself.\textsuperscript{40}

The Court purported to fill the above-mentioned analytical gap by reference to its non-sixth amendment counsel right cases. Its invocation of \textit{In re Gault}\textsuperscript{41} was essentially a non sequitur.\textsuperscript{42} A more serious objection, going to the substance rather than the craftsmanship of the Court’s reasoning, is that in justifying its new presumption the Court blatantly misread \textit{Vitek v. Jones} and conveniently twisted the rationale behind \textit{Gagnon v. Scarpelli}.

The facts, holding and language of \textit{Vitek} simply do not support the Court’s contention that it has never conferred the right to counsel except to protect the interest in physical liberty. \textit{Vitek} involved a convicted prisoner who was involuntarily transferred to a state mental hospital pursuant to a statute allowing the state’s director of correctional services to make such transfers upon being advised by a physician or psychologist that the prisoner had a mental illness which could not be treated in the prison.\textsuperscript{43}

The Court opened its consideration of the prisoner’s claim that

\begin{itemize}
  \item \textsuperscript{39} Although Justice Powell raised the issue of collateral consequences of conviction in his \textit{Scott} concurrence, see note 37 supra, the opinion of the Court, authored by Justice Rehnquist, treated the matter as though the only thing Scott lost as a result of his conviction was fifty dollars. Similarly, the \textit{Argersinger} Court had explicitly declined to address the question whether the sixth amendment might require counsel to protect against the civil disabilities attendant upon a criminal conviction. \textit{Compare} 407 U.S. at 37 (opinion of the Court) with 407 U.S. at 48-49 (Powell, J., concurring).
  \item \textsuperscript{40} See, e.g., \textit{Department of Public Welfare v. JKB}, 393 N.E.2d 406 (Mass. 1979), which noted that “loss of a child may be as onerous a penalty as the deprivation of the parent’s freedom.” \textit{Id.} at 407, accord, \textit{Custody of a Minor}, 389 N.E.2d 68, 74 (Mass. 1979). Even the \textit{Lassiter} Majority recognized that deprivation of one child is “unique.” 101 S. Ct. at 2160.
  \item \textsuperscript{41} 387 U.S. 1 (1966).
  \item \textsuperscript{42} The juvenile defendant in \textit{Gault} had been committed to a state school for up to six years for making lewd phone calls and for being a “delinquent child.” \textit{Id.} at 10, 28-29. An adult convicted of making a lewd phone call would have faced the possibility of up to a fifty dollar fine or two month’s imprisonment. \textit{Id.} at 29. The court found that “[a] proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution . . . . The child ‘requires the guiding hand of counsel at every step in the proceeding against him.’” \textit{Id.} at 36 (citation omitted). That the due process right to counsel has been expanded to non-sixth amendment contexts where physical liberty is at stake shows only that physical liberty is a fundamental interest; it is inapposite to determining whether proceedings to deprive a person of a different fundamental interest are also comparable in seriousness to a felony prosecution.
  \item \textsuperscript{43} 445 U.S. at 483.
\end{itemize}
he could not be transferred without notice, a hearing, and the as-
sistance of appointed counsel with the question whether the trans-
fer of a prisoner to a mental hospital implicates any liberty interest
protected by the due process clause. The statute stating the condi-
tions under which he could be transferred was found to have cre-
ated a liberty interest consisting in the reasonable expectation that
he would not be transferred unless those conditions were present. 44
The convicted prisoner was also found to retain, wholly apart from
any statutory right, a residuum of liberty which could be infringed
by transfer to a mental hospital, even though his conviction and
sentencing had extinguished his right to freedom from confine-
ment. 45 That residuum of liberty was said to consist, not in an in-
terest in avoiding transfer to a more physically restrictive environ-
ment, 46 but in two qualitatively different liberty interests:

Many of the restrictions on the prisoner's freedom of action at the
[mental hospital] by themselves might not constitute the depriva-
tion of a liberty interest retained by a prisoner, . . . But here, the
stigmatizing consequences of a transfer to a mental hospital for in-
voluntary psychiatric treatment, coupled with the subjection of the
prisoner to mandatory behavior modification as a treatment for
mental illness, constitute the kind of deprivations of liberty that re-
quires procedural protections. 47

Turning to the question of what process was required to protect
these interests, the Court held that the prisoner was entitled to
notice, to a hearing before an independent decision-maker at which the
prisoner could testify, to have witnesses present and to con-
front adverse witnesses, to a written statement of evidence relied
on and the reasons for the transfer, and to timely notice of all
these rights. Four members of the Court also said he had a right to
appointed counsel, while the fifth member of the majority, 48 Jus-
tice Powell, said that he had a right to competent representation
but that the representative need not in all cases be a licensed

44. Id. at 488.
45. Id. at 493.
46. The court had previously held that a sentenced prisoner had no protected interest in
not being transferred from one prison to another, Meachum v. Fano, 427 U.S. 215, 224
(1976), and that adverse changes in conditions of confinement within the bounds of the
sentence imposed did not alone trigger the protections of the due process clause, Montanye
47. 445 U.S. at 494.
48. Vitek was a 5-4 decision with no dissents on the merits of the case. Three justices
dissenting on the ground that the case was moot. Id. at 500. One justice thought it was not
ripe. Id. at 501.
attorney. An accurate reading of Vitek, then, shows that the Court has not always reserved the right to counsel to situations in which physical liberty is at stake, but has recognized that, where the state is in a position to affect important liberty interests such as the interest in not being labelled mentally ill and the interest in the integrity of one's mental processes, those interests may require the protection of an appointed representative.

The Court’s distortion of the reasoning of Gagnon v. Scarpelli is more subtle but, in light of its later reliance on Gagnon as justification for case-by-case application of the counsel right, more insidious than its attempt to gloss over the Vitek precedent. Gagnon concerned the due process rights of persons facing revocation of probation. Following its earlier decision in Morrissey v. Brewer, the Gagnon Court found that the conditional liberty possessed by persons on probation could not be taken away without a hearing. It then took up the question, not addressed in Morrissey, whether due process required appointment of counsel for an indigent probationer. Observing that "the effectiveness of the rights guaranteed in Morrissey may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess," the Court recognized that the uneducated might have difficulty representing themselves in cases where cross-examination of witnesses or examination of documents was necessary. At the same time, the Court expressed concern that the presence of counsel would significantly alter the nature of a probation revocation proceeding by formalizing and prolonging it. It therefore decided to require appointed counsel only where the probationer denied violating the conditions of probation; where mitigating reasons for violation required complex proof; or where the probationer was not capable of effectively speaking for himself.

The reason given by the Court for adopting the case by case approach, in spite of the ultimate failure of that approach in the felony context, was that, while criminal defendants generally need counsel to cope with the complexities of criminal procedure, proba-

49. Id. at 497.
50. See note 47 supra.
51. 408 U.S. 471 (1972).
52. 411 U.S. at 786.
53. Id. at 790.
54. See note 23 supra.
tioners need counsel only when their cases are complicated by special circumstances. Only as a secondary justification for its holding, and solely to cover the hypothetical situation in which the circumstances requiring appointment of counsel would not be discovered except by counsel, did the Court invoke the notion that probationers have but a limited interest in freedom from confinement. 55

The result of Gagnon did not turn, as the Lassiter opinion implied, on an assessment of the value of the private interest at stake in probation revocation, but on the strength of the state’s interest in quick, simple procedures and on the perception that probation revocation is a procedure which only sometimes entails a high risk of erroneous imprisonment of an uncounseled defendant. Properly read, Gagnon offers little support for the creation of a presumption based upon a rigid categorization of private liberty interests. It does suggest, as more fully developed below, that the relative complexity and formality of the procedures whereby the state forces a person to defend her liberty interests should weigh heavily in the determination whether due process requires appointment of counsel.

Even if the Court’s interpretation of its own cases were accurate, the necessity and usefulness of hardening two evolving lines of cases into a presumption would be questionable. A presumption against any aspect of procedural due process is, at the very least, somewhat inconsistent with the Court’s frequently expressed view that due process is a flexible concept. 56 It is also superfluous, given the Court’s commitment to the interest-balancing method of evaluating procedure. If the right to counsel in termination cases is to be determined by the balance among the parental interest at stake, the state’s interest, and the risk of error in not providing counsel, then there is ample opportunity to consider all arguments bearing on the weight and value of the parental interest-including arguments drawn from the results reached in other counsel right cases-within the balancing process.

Application of the Mathews v. Eldridge Test

In Mathews v. Eldridge, 57 the Supreme Court took stock of the

55. 411 U.S. at 787.
57. The issue in Eldridge was whether a recipient of Social Security disability benefits was entitled to an oral hearing prior to the termination of benefits. The Social Security Administration’s elaborate procedures for the adjudication of disputed eligibility claims pro-
plethora of due process cases which it had decided in the sixties and early seventies and distilled from those cases the balancing test which has served ever since as its formula for the analysis of due process claims:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally 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 additional or substitute procedural requirement would entail.

vided for a hearing after termination of benefits, with payment of back benefits if the initial determination of ineligibility were reversed. The situation was in many ways analogous to that in the landmark case of Goldberg v. Kelly, 397 U.S. 254 (1970), in which the Court had held that due process required an oral hearing before welfare benefits could be cut off. In Eldridge, however, the Court found that a pretermination hearing was not necessary. It distinguished Goldberg on two grounds: that welfare recipients whose benefits have been terminated are generally in more desperate straits than disability beneficiaries, 424 U.S. 319, 340-41; that there is less need for a prior hearing in disability cases because the eligibility determinations are based on unbiased medical assessments, while in welfare cases there are often involve disputed facts which raise issues of witness credibility, 424 U.S. at 324, 325.

For a more detailed description of the facts and circumstances of Eldridge, see Mashaw, supra note 5, at 31-36.


59. 424 U.S. at 334-35.

60. The notion that the requirements of due process can be determined by the balancing of private and governmental interests goes back at least as far as the Supreme Court's 1961 opinion in Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961). That case involved a cook whose security clearance was revoked by the Navy and who, consequently, lost her job with a private food concessionaire operating on Navy premises. The Court stated that consideration of whether she should have been accorded notice and a hearing "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected." Id. at 895. However, nowhere in its opinion did the Court make clear whether it was balancing interests to determine whether the Due Process Clause applied or to determine whether she had received the process that was due to her. In Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) the Court established that the question of applicability of due process did not depend upon the relative weight of the interests at stake, but on the nature of the private interest. Thus a teacher on a one year contract had no protected interest in having that contract renewed, no matter how weighty his interest in his job might be as compared with the university's interest in not giving him a hearing. Id. at 571. Interest-balancing remained the rule, however, for determining what process was due, and the three factors which are now known as the Eldridge test emerged. Prior to Eldridge, however, the "risk of error" factor was at times not addressed, e.g., Morrissey v. Brewer, 408 U.S. 471 (1972), or
Identification of the Factors

The Lassiter Court's evaluation of the private interest at stake was quite straightforward. It said that a parent's right to the care and custody of her children was "an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection;'" that termination of that right would be a "unique kind of deprivation;" and that, therefore, "a parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one." The Court also noted that a parent might have additional interests to protect if the termination petition alleged criminal activity.

The State was credited with two conflicting interests. First, be-
because of the state's interest in the welfare of the child, the state was said to share the parent's interest in an accurate and just decision. Second, the state's pecuniary interest is not bearing the cost of appointed counsel was recognized as "legitimate [but] hardly significant enough to overcome private interests as important as these." 66

The Court followed its relatively crisp identification of the parties' interests with a singularly equivocal assessment of the risk that an uncounseled parent might be erroneously deprived of her child. The statutory procedures applicable to termination cases in North Carolina were reviewed in some detail, after which the Court summarized the state's argument that the risk of error in terminations carried out under such procedures was low because of the familiarity of defendants with the subject matter, the absence of substantively complex standards for termination, and the unlikelihood that a termination hearing would raise difficult evidentiary problems. The Court then stated its own view that "the ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be." 68 It cited expert medical and psychiatric testimony as potential complications which might be beyond the parent's ability to handle, and recognized that parents who are defendants in termination proceedings

65. Id. at 2160.
66. Id.
67. North Carolina law now seeks to assure accurate decisions by establishing the following procedures: A petition to terminate parental rights may be filed only by a parent seeking the termination of the other parent's rights, by a county department of social services or licensed child-placing agency with custody of the child, or by a person with whom the child has lived continuously for the two years preceding the petition. N.C.G.S. § 7A-289.24. A petition must describe facts sufficient to warrant a finding that one of the grounds for termination exists, N.S.G.S. § 7A-289.25(6), and the parent must be notified of the petition and given 30 days in which to file a written answer to it, N.S.G.S. § 7A-289.27. If that answer denied a material allegation, the court must, as has been noted, appoint a lawyer as the child's guardian ad litem and must conduct a special hearing to resolve the issues raised by the petition and the answer. N.C.G.S. § 7A-289.29. If the parent files no answer, "the court shall order an order terminating all parental and custodial rights . . . ; provided the court shall order a hearing on the petition and may examine the petitioner or others on the facts alleged in the petition." N.C.G.S. § 7A-289.28. Findings of fact are made by a court sitting without a jury and must "be based on clear, cogent, and convincing evidence." N.C.G.S. § 7A-289.30. Any party may appeal who gives notice of appeal within 10 days after the hearing. N.C.G.S. § 7A-289.34.

101 S. Ct. at 2160-61. The Court noted that the "clear, cogent, and convincing" evidence standard was not in effect at the time of Ms. Lassiter's trial. Id. at 2161 n.4.
68. Id. at 2161.
are likely to be people who would find a hearing "distressing and disorienting." Finally, it acknowledged that other courts had generally held that appointed counsel was required at termination proceedings and that no presently authoritative case other than the state court decision in Lassiter had held that there was no due process right to counsel in termination cases.

**Weighing the Interests**

Both in substance and in tone, the analysis described in the last three paragraphs would have been an admirable preface to a decision maximizing the protections which must be accorded indigent parents. However, the Court had yet to consider what it deemed the "dispositive question:" whether the three Eldridge factors were sufficient to rebut the presumption against the right to counsel in cases not placing physical liberty in jeopardy. The Court's answer to that question soon followed:

If in a given case, the parent's interests were at their strongest, the State's interest 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. But since the Eldridge factors will not always be so distributed, and since "due process is not so rigid as to require that the significant interests informality, flexibility and economy must always be sacrificed," [citing Gagnon], neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in Gagnon v. Scarpelli, and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.

Applying its chosen standard to Ms. Lassiter's case, the Court found that she had not been accused of any conduct which could

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69. Id.
70. Id. at 2161.
71. Cf. id. at 2171 (Blackmun, J., dissenting): "The Court's analysis is markedly similar to mine; it, too, . . . finds the private interest weighty, the procedure devised by the State fraught with risks of error, and the countervailing governmental interest insubstantial."
72. Id. at 2161.
73. Id. at 2162.
74. The Court indicated it was deciding Ms. Lassiter's case rather than remanding it to the state courts out of concern for William, whom it noted could not be legally adopted until the end of the litigation. Id. at 2162 n.7.
be the grounds for criminal charges, that no expert witnesses had testified at the hearing, and that the case had presented "no troublesome points of law, procedural or substantive." It acknowledged that hearsay had probably been admitted, that a better defense could have been made, and that the argument that William should be placed with Ms. Lassiter's mother could have been better developed, but concluded that the evidence against Ms. Lassiter had been such that the presence of counsel "would not have made a determinative difference." "Finally," it observed,

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. Here, the trial court had previously found that Ms. Lassiter had expressly declined to appear at the 1975 child custody hearing, [that she] had not even bothered to speak to her retained lawyer after being notified of the termination hearing and . . . that [her] failure to make an effort to contest the termination hearing was without cause.

As aptly pointed out in Justice Blackmun's dissent, allowing trial judges to decide whether appointment of counsel is constitutionally required by weighing the Eldridge factors as they appear in each individual case "marks a sharp departure from the due process analysis consistently applied heretofore." With the single exception of Gagnon, the Court's due process cases prior to Lassiter have reflected a belief that the flexible mandate of the due process clause is best satisfied by applying to all persons facing

75. Id. at 2162. But see Justice Blackmun's discussion on this issue, id. at 2168-69, in which he points out that the statutory grounds on which termination of Ms. Lassiter's rights was based, (see text accompanying note 10 supra), are imprecise and raise numerous potential legal issues.

76. In a rather snide aside, the Court commented that this argument was "hardly consistent with her argument in the collateral attack on her murder conviction that she was innocent because her mother was guilty." 101 S. Ct. at 2163 n.8. As noted in Blackmun's dissent, the details of Ms. Lassiter's criminal case were not part of the record of the termination proceedings. Criminal conviction is not a ground for termination of parental rights in North Carolina. Id. at 2175 n.26.

77. Id. at 2162.

78. Id. at 2163.

79. It is not totally clear whether the Court expects trial judges and state appellate judges to weigh all three factors in each case, or merely to decide whether the risk of error factor in any particular case is great enough to justify appointment of counsel. However, the passage quoted in the text accompanying note 75 supra, seems to indicate that the Court envisions the private and state interests as well as the risk of error as variables in each case. But see text accompanying note 86 and 87 infra.

80. 101 S. Ct. at 2171.
a given deprivation of liberty or property, procedures adequate to protect the interests of a typical person in the same situation.\footnote{See, e.g., Mathews v. Eldridge, 424 U.S. at 344. "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions."}  

Thus, all adult prisoners were held to be entitled to hearings and the aid of a competent representative prior to transfer to mental hospitals because persons alleged to be mentally ill were considered "probably" unable to understand and exercise their rights.\footnote{Vitek v. Jones, 445 U.S. 480, 496-97 (1980).} On the other hand, no children facing commitment to mental hospitals were found entitled to precommitment hearings because parents and doctors in general were deemed to have the best interests of children at heart.\footnote{Parham v. J.R., 442 U.S. 584, 602, 611 (1979). In \textit{Parham}, the Court refused to require mental hospitals to use preadmission procedures which would protect a child from being improperly committed through collusion between the child's parents and the doctor ordering admission. The Court thought that in most instances a parental attempt to "dump" a child in a hospital would be detected and resisted by doctors. \textit{Id.} at 611.}

The procedural rules which emerge from this generic form of due process balancing can be applied with a degree of assurance by administrators and trial judges. Class-by-class balancing also enhances the appearance of fairness and governmental regularity by promoting uniform treatment of persons in similar circumstances. The \textit{ad hoc} approach taken in \textit{Lassiter} is objectionable, not because it is novel, but because it sacrifices these important advantages without clear justification or counterbalancing gain.

The \textit{Lassiter} opinions demonstrate how difficult it is to determine after a trial whether counsel would have made a difference.\footnote{Compare 101 S. Ct. 2162 (opinion of the Court) with 101 S. Ct. 2167-70 (Blackmun, J., dissenting).} In the end, the majority fell back on its impression of the merits of the case, concluding that Ms. Lassiter would have lost anyway. A judge trying to decide before trial whether circumstances call for appointment of counsel cannot, of course, base his decision on his view of how the merits of the case will develop. He may be able to ascertain whether the state is planning to use expert testimony and whether the complaint includes allegations of criminal activity, but he will not be able to predict with any certainty whether difficult points of substantive or procedural law will emerge during the trial. Perhaps most trial judges will resolve the uncertainties inherent in case-by-case balancing by simply appointing counsel for all
indigent parents who wish to contest termination of parental rights, since to do otherwise would be to invite an appeal of each case in which counsel is withheld. A series of such appeals ultimately may persuade the Court to abandon Lassiter as it abandoned Betts v. Brady. In the meantime, however, many innocent children will be left in legal limbo during prolonged litigation over a procedural issue which the Court had an opportunity to resolve in a single case.

Case-by-case balancing does not make sense unless at least one of the three elements of the balancing test differs significantly on a case-by-case basis. The governmental interest in not appointing counsel assumedly is constant; the fundamental parental interest in the parent-child relationship also ought to have the same weight in all instances, notwithstanding the Court's rather ugly implications to the contrary. Is the risk of error factor sufficiently varia-

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85. It would not be unusual for a person denied appointment of counsel at the trial level to file an appeal. Ms. Lassiter, for example, learned of the availability of free legal counsel only after her hearing. In other cases, appointment of counsel has been sought by persons represented at trial by legal aid lawyers who argued that their organizations lacked the necessary resources to represent all termination defendants. Department of Pub. Welfare v. JKB, 393 N.E.2d 406, 407 (Mass. 1979); Crist v. Division of Youth and Family Servs., 320 A.2d 203, 204 (N.J. Sup. Ct. 1974).

86. Although the Court seemed to say that the state's interest could vary, see note 81 supra, it gave no indication what could cause such variations. There is no apparent reason the strength of a state's interest in economy and expedited procedure should fluctuate.

87. In its brief, the State of North Carolina argued that Ms. Lassiter's interest in her child had "devolved" from a fundamental right down to a purely legal relationship due to her lack of interest in the child after his removal from her custody, and that this diminished interest did not require any more due process protections than were provided by the state. Brief for Respondent at 34-36, Lassiter v. Department of Social Serv., 101 S. Ct. 2153 (1981) [hereinafter cited as Brief for Respondent]. While the Court did not express itself so baldly, it seemed to allude to this argument when it said that a court need not ignore a parent's demonstrated lack of interest in attending a custody hearing. See text accompanying note 78 supra. The Respondent saw its theory of variable parental interest as analogous to the theory that probationers and parolees possess only a conditional liberty:

When the child is with the parent . . . the parent's interest in family integrity is unqualified. Efforts to intervene will require the most due process the Fourteenth Amendment will allow. However, after the state intervenes in an abuse, neglect, or dependency proceeding and removes the child from custody of the parent, then the parent's interest becomes qualified and therefore conditional upon his continuing to act in a parental fashion toward the child. Subsequent legal actions affecting that qualified, conditional interest would, by the analogy to Morrissey, require somewhat less due process. If the parent allows his continued interests in the child to atrophy, . . . the parent's interest devolves more and more to a mere blood relationship and becomes less and less fundamental.

Brief for Respondent at 34-36.

Since the question whether the parent has in fact abandoned the relationship with the
ble to support the *Lassiter* approach? The Court concluded that it was. That conclusion, however, is indefensible, since it depends upon blind overestimation of the capabilities of the average defendant and upon deliberate disregard of the nature of termination hearings.

Termination proceedings\(^88\) are generally formal civil trials in which the state and the parent appear in adversary roles. Timely and appropriate response to pleadings may be necessary to assure resolution of all disputed matters.\(^89\) The usual rules governing the propriety of questions and the admissibility of evidence apply, and each adversary must be able both to develop his own case within those rules and to insist that the judge require the opposition to do the same. The state will often be represented by an attorney, as it was in Ms. Lassiter's case, and may have available to it as witnesses social workers who have spent months or years gathering the information which forms the basis of the state's case. Under these conditions, any unrepresented parent is in trouble. It is as difficult for a lay person to elicit useful, admissible direct testi-

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child may be precisely the issue to be litigated at the termination hearing, it would be as unconscionable to allow a trial judge to devalue a parent's interest in her child prior to hearing and evidence as it would be to allow a judge to decide not to appoint counsel in a criminal case on the grounds that the accused had allowed his interest in freedom to become less fundamental by committing crimes.


\(^89\). For example, under the North Carolina statute in effect when the Court heard *Lassiter*, if a parent answers the state's petition within thirty days, the court must hold a hearing to resolve issues raised by the pleadings. If no answer is filed, a hearing is held at which the court may question the petitioner or others on the facts alleged in the petition. See note 67 supra. It is reasonable to assume that many parents would not grasp the significance of filing an answer, particularly since they will have some sort of hearing whether they file an answer or not.

The Court gave no indication when counsel should be appointed if the *Eldridge* factors did balance out in favor of the right to counsel. One lower federal court which did address that question in finding an absolute right to counsel in dependency proceedings suggested that counsel be required at all critical stages as it is in criminal cases. Davis v. Page, 442 F. Supp. 258, 265 (S.D. Fla. 1977), aff'd in part, remanded in part, 618 F.2d 374 (5th Cir. 1980), modified en banc, 640 F.2d 599 (5th Cir., 1981). Combining the notion that counsel shall be appointed after a judicial balancing of interests with the idea that counsel shall be appointed soon enough to do some good, it becomes apparent that, unless the trial court is to balance the interests solely on the basis of the state's pleadings, it will have to hold a preliminary hearing in each termination case for the purpose of deciding whether to appoint counsel. The delay caused by holding additional hearings might well exceed the delay which the Court assumed would be caused by having defense counsel in all cases; delay in the termination context is antithetical to the interests of of parent, child and state.
mony from her own fact witnesses or to properly cross-examine a case worker as it is for her to question a psychiatrist or other expert. The most routine procedural issues are as deep a mystery to someone in Ms. Lassiter's position as are points of law which the Supreme Court considers complicated. Since it is the formality and complexity of the trial procedure rather than the presence or absence of special circumstances, which places uncounseled defendants at a disadvantage, and since, in the Court's own words, "our adversary system presupposes [that] accurate and just results are most likely to be obtained through the equal contest of opposed interests," all termination hearings in which the parent is unrepresented present similarly high risks of erroneous outcome and there is no logical justification for case-by-case balancing.

The case-by-case approach is not even supported by the single precedent upon which the Court relies so heavily. In Gagnon v. Scarpelli, the Court found that appointment of defense counsel would significantly alter the nature of a probation revocation proceeding. It was in recognition of the weight of the State's interest in maintaining the informal, nonadversary character of its procedures that the Court decided to require counsel, where necessary to assure the effectiveness of the hearing rights afforded in Morrissey v. Brewer. This rationale for permitting ad hoc extensions of the right to counsel is absent in the termination context, where the proceedings are already adversarial and formal, and where the truth-finding process is as likely to be facilitated as hampered by the activities of counsel for the defendant. Furthermore, the Ga-

90. 101 S. Ct. at 2160.
92. The role of the hearing body . . ., aptly described in Morrissey as being "predictive and discretionary" as well as fact-finding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation.
Id. at 787-88.
93. In some cases, . . . modifications in the nature of the revocation hearing must be endured and the costs borne because, as we have indicated above, the probationer's or parolee's version of a disputed issue can fairly be represented only by a trained advocate. But due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed."
Id. at 788.
94. The excerpts from the hearing transcript cited by Justice Blackmun are telling in this regard. The judge attempted to direct Ms. Lassiter to cross-examine the social worker, but succeeded only in confusing matters because he was unable to make clear to her what cross-
court at least recognized that all cases in which factual disputes must be sorted out through the cross-examination process call for the skills of an attorney, and that some defendants may be unable to represent themselves under any circumstances. If the Court had truly "adopted the standard found appropriate in Gagnon," it could not have reached the conclusion that Ms. Lassiter was not entitled to counsel at her termination hearing, since she did dispute a key factual allegation and she was clearly incapable of handling her own defense.

An Alternative Approach

Eight members of the Supreme Court, as well as Ms. Lassiter's attorneys, agreed that the *Mathews v. Eldridge* test should be applied to Abby Gail Lassiter's due process claim. All agreed that the private interest at stake was extraordinarily important and that the state's interest, to the extent it did not coincide with the private interest, was of significantly lesser weight. The only difference between the majority and the dissent with respect to the interest balancing exercise was that the dissent was more impressed

examination was supposed to be. 101 S. Ct. at 2173 n.22, accord, Hearing Transcript at 19-20. Later, following his questioning of Ms. Lassiter, the judge expressed his exasperation with her by saying to the state's counsel, "All right ... see what you can do." *Id.* at 2174 n.23, accord, Hearing Transcript at 36. Had Ms. Lassiter been afforded counsel, the cross-examination of state's witness could have been conducted in a professional manner. Furthermore, an attorney would have been aware of Ms. Lassiter's obvious communication problems and would have worked with her to present her direct testimony in an organized, coherent fashion. Thus, both the quality of the information elicited from the witnesses and the dignity of the proceedings would have been improved had this confused and inarticulate woman been represented at her trial. *Cf.* *State v. Jamison*, 444 P.2d 15, 17 (Or. 1968).

95. 101 S. Ct. at 2159.

96. Part of the state's case for termination depended on its showing that Ms. Lassiter had not made efforts to plan for her child's future after he was removed from her custody. See text accompanying note 10 supra. As pointed out by Justice Blackmun, there was dispute at the trial over whether Ms. Lassiter's mother had really refused to take in William along with the other Lassiter children, and it was at least possible that Ms. Lassiter could have argued that she had indeed planned for William's future in a way to have preserved the parent-child relationship. 101 S. Ct. at 2174.

97. While Justice Stevens agreed with Justices Blackmun, Brennan, and Marshall that the *Eldridge* test properly applied would have resulted in a holding that all parents must have counsel in state-initiated termination hearings, he went on to argue that interest balancing should not be used at all where fundamental rights are at stake. *Id.* at 2176.

98. Brief for Petitioner at 18. The state of North Carolina had argued that *Mathews v. Eldridge* only applied where a liberty or property interest has been damaged without notice and a hearing. Brief for Respondent at 30, and had urged decision of the case according to the precedent provided by the right to counsel cases, Brief for Respondent at 12. The State saw these cases as supporting a rule that counsel need be provided only where physical liberty is at stake, but see text accompanying notes 38-47 supra.
with the contribution that counsel could have made to the accuracy of the outcome. This analytical emphasis on puzzling out whether the proceeding conceivably would have come out differently had Ms. Lassiter been provided an attorney all but obscured concern for whether the proceeding was fair.\footnote{99} A test focusing so exclusively on the extent to which procedure reduces error may be an acceptable vehicle for judicial review of the processes designed to surround legislated entitlements.\footnote{100} It is disturbingly inappropriate where a fundamental right is at stake in a formal judicial proceeding and where both the "accuracy" of the outcome of the proceeding\footnote{101} and the error-reducing capacity of the procedure in question are essentially indeterminate.

\footnote{99}{The equation of the inquiry whether procedural fairness has been achieved with the question whether maximum accuracy of result has been obtained has been justified by scholars with widely varying viewpoints on constitutional analysis. Professor Thomas Grey, for example, has argued that procedural fairness can be coherently analyzed only if it is taken in a "strict sense," i.e., as a set of rules and procedures designed to promote correct resolution of disputes. Grey, Procedural Fairness and Substantive Rights, in NOMOS XVIII: Due Process 182, 183-84 (1977). In this view, any rule which does not promote accuracy, such as the privilege against self-incrimination or the rule against use of coerced confessions, should not be considered a rule of procedural fairness at all. Rather, such rules are to be seen as related to protection of substantive rights which would be endangered by the single-minded pursuit of accuracy. \textit{Id.} at 183. In Grey's case, a restricted and technical definition of procedural due process is offset by a broad willingness to recognize new substantive rights. Thus, while he denies that the Due Process Clause requires review of procedures for the administration of entitlement programs, \textit{id.} at 191, he defends review of welfare program procedures as protection of a "shadow" or nascent constitutional right to welfare, \textit{id.} at 198-202. See also Grey, \textit{Is There an Unwritten Constitution?} 27 STAN. L. REV. 703 (1977).}

\footnote{100}{But cf. Mashaw, note 5 \textit{supra}.}

\footnote{101}{Under North Carolina law, the judge is required to make two findings before parental rights may be terminated. First, statutory grounds for termination must be found. Second, termination must be found to be in the "best interests" of the child. N.C. GEN. STAT. § 7A-289.31(a) (1981). While a person with perfect knowledge of all the facts of a case might be able to say whether a court's finding of statutory grounds was accurate, the "best interests" finding calls for an exercise of the court's subjective judgment in a way which may be more or less wise but which would be difficult to assess as accurate or inaccurate. See generally Mnookin, \textit{Child Custody Adjudication: Judicial Function in the Face of Indeterminacy}, 39 J.L. & CONTEMP. PROB. 226 (1975).}
How, then, should the Court have decided Lassiter? An alternative approach, sensitive to the values of fairness and preservation of individual dignity, as well as to concerns about correctness of result, yet reasonably consistent with the Supreme Court’s due process jurisprudence, was available. This approach, suggested by Justice Stevens in his dissent, has been developed in the body of state case law supporting an unequivocal parental right to counsel in termination hearings or appeals. An opinion drawing on the prevailing state court approach might have been constructed along the following lines:

*All parents have a fundamental substantive due process right*

102. Justice Stevens stated in his opinion that the Eldridge approach “is an appropriate method of determining what process is due in property cases” but is inappropriate where liberty interests are at stake:

> In my opinion the reasons supporting . . . [the right to counsel] in a criminal case . . . apply with equal force to a case of this kind. The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases.

101 S. Ct. at 2176. The greatest weakness in the Court’s use of the Eldridge test in Lassiter was not, however, the way in which it balanced the private and governmental interests at stake, but rather in the narrow view it took of the function and usefulness of appointed counsel.

103. Several federal courts have considered the related question whether parents have a right to counsel in dependency and neglect proceedings. The Ninth Circuit found that right to exist on a case-by-case basis, Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974), while the Fifth Circuit found an absolute right to counsel, Davis v. Page, 640 F.2d 599 (5th Cir. 1981). An absolute counsel right was also found in Smith v. Edmiston, 431 F. Supp. 941 (W.D. Tenn. 1977). The extent to which the majority’s analysis in Lassiter was shaped by its obvious belief that a woman who had not tried to see her child in several years did not deserve to relitigate her right to that child makes it difficult to guess exactly what the Court would have done with the right to counsel issue in a case in which a parent still in custody of her child was actively seeking to keep the child. After Lassiter, of course, any federal court presented with the issue of counsel rights in dependency proceedings will have to contend with the gratuitous presumption against the right to counsel erected in Lassiter. An absolute right to counsel in dependency cases could still be fitted into the Lassiter analysis if a court were persuaded that dependency and neglect proceedings so frequently involve allegations of criminally actionable parental conduct that counsel is required in all cases. Cf. 101 S. Ct. at 2162. Another possible relevant distinction between dependency and termination is that a wider variety of dispositions are possible in a dependency case, creating a special need for counsel who can identify and press for alternatives short of loss of custody. See Mnookin, *supra* note 104, at 240-44.

104. In at least three states which provide trial counsel in termination proceedings, state courts have found that Equal Protection requires provision of counsel on appeal. Chambers v. District Court, 152 N.W.2d 818, 821 (Iowa 1967); In re Welfare of Lucier, 84 Wash. 2d 135, 524 P.2d 1906 (1974); Heller v. Miller, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980).
to maintain a parent-child relationship with their children. This right is unique and may be compared in significance to the rights to life and physical liberty; indeed, permanent extinction of the right to one’s child may be worse than temporary extinction of one’s right to physical liberty. This right is the basis of but is separable from, the right to custody and control of the child. The right to be the child’s parent does not lose its fundamental character when the state removes the child from the parent’s custody. It continues unabated until and unless it is extinguished in a proceeding to terminate parental rights, just as the right to physical liberty of a person accused of crime exists until that person is convicted and sentenced.

The hearing in which Abby Gail Lassiter lost her right to be the mother of William Lassiter was in significant ways procedurally comparable to a criminal prosecution. The proceeding was initiated by the state, which was represented by counsel. The hearing took the form of an adversary trial in which the state had the burden of proving its case by admissible evidence. The reliability and veracity of the state’s witnesses were to be tested through cross examination by the defendant. In order to win its case, the state had to demonstrate that statutory criteria similar to the elements of a crime were present.

In the absence of counsel for the parent, such a proceeding is so grossly unbalanced as to be unfair. A pro se defendant will be unable to test the state’s case by making appropriate evidentiary objections and by conducting proper cross examination of the state’s witnesses. She may lack an understanding of the statutory criteria for termination and thus be unable to formulate legal arguments relating to whether those criteria have been shown to exist. She has no one to protect her from improper questioning by the state’s attorney.

This degree of unfairness violates the due process clause in a case in which the state seeks to divest an individual of a funda-

105. E.g., Heller v. Miller, 61 Ohio St. 2d at 13, 399 N.E.2d at 70.
mental right. Therefore, Ms. Lassiter was entitled to counsel regardless of whether it could be determined from the record of her trial that counsel would have changed the outcome of the proceedings.

Had the Court adopted the approach just outlined it would have avoided the artificial freeze which the majority placed on the development of the right to counsel. Instead, it would have recognized that the due process right to counsel has evolved in tandem with and by analogy to the sixth amendment counsel right and that there are contexts in addition to the juvenile justice context in which the state's actions are so closely comparable to a criminal prosecution that the rationale behind In re Gault impels provision of protections not ordinarily required in civil cases.

Most important, the Court would have stated explicitly what the state courts, not bound to adopt the Eldridge calculus, seemed instinctively to know: that the due process clauses have to do with more than accuracy of results. The suspicion that Eldridge balancing does not encompass all due process concerns has already been voiced implicitly in at least one Supreme Court decision ostensibly decided according to the standard balancing formula. In Addington v. Texas, a unanimous Court held that due process required proof by clear and convincing evidence be adduced before an adult could be involuntarily committed to a mental institution. In analyzing the effects on the risk of error of the available standards of proof, the Court found that the preponderance standard allocated

110. Several state courts compressed their analyses by simply stating that since a fundamental right was at stake, the full panoply of procedural safeguards, including the right to counsel, must be supplied. In re Chad S., 580 P.2d 983 (Okla. Sup. Ct. 1978); In re Brehm, 594 P.2d 269 (Kan. Ct. App. 1979).

111. The suggested approach would not necessarily impel the court to apply all of the safeguards of a criminal proceeding to termination cases, just as it was not impelled to apply all of those safeguards in the juvenile context. McKeiver v. Pennsylvania, 403 U.S. 528 (1971)(refusal to extend right to jury trial to juvenile proceeding). For a discussion of the juvenile delinquency model of procedural safeguards as providing a method for analysis of other due process questions, see generally Note, Due Process and Parole Revocation, 77 Mich. L. Rev. 120 (1978).

112. The analysis suggested in the text is keyed not only to the fact that the state is bringing a formal suit against an individual, but also to the fact that it seeks to deprive the individual of a fundamental right. A court adopting this analysis would not, for example, have to extend the counsel right to every civil nuisance action brought by a state attorney. The alternative analysis would apply to state-initiated paternity actions. Cf. Little v. Streeter, 101 S. Ct. 2202, 2209. See generally Note, The Right to Appointed Counsel in Paternity Actions, 19 J. Fam. L. 497 (1981).

the risk roughly equally between litigants, that the "beyond a reasonable doubt" standard placed most of the risk on the state, and that the "clear and convincing" standard was somewhere in between. But in choosing the appropriate allocation of the risk of error, the Court was forced to admit that "the ultimate truth as to how the standards affect decision-making may be unknowable," that [i]n cases involving individual rights the standard of proof [at a minimum] reflects the value society places on individual liberty”; and that “standards of proof are important for their symbolic meaning as well as for their practical effect.” In finding the criminal standard not required, the Court considered that that standard “historically has been reserved for criminal cases, . . . is regarded as a critical part of the ‘moral force of the criminal law,’ and we should hesitate to apply it too broadly or casually in non-criminal cases.” The preponderance standard was rejected because it was considered unfair to allocate the risk of error equally where the private interest was so much more weighty than the state's interest. The Eldridge test was used in Addington, but, superimposed as it was upon the clear recognition of the intangible values served by extraordinary burdens of proof, it seemed a pro forma exercise.

Due process interest balancing may once have represented a middle course between broad judicial choice in the assignment of content to the due process clause and the rigidities represented by the rights-privileges distinction and by the notion that procedural due process always equates with formal trial process. The apparent combination of objectivity and flexibility provided the Court with a framework within which to adjudicate a wide range of

114. Id. at 423.
115. Id. at 424.
116. Id. at 424-25.
117. Id. at 425, accord, Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971).
118. Id. at 426.
119. Id. at 428 (citation omitted).
120. Id. at 429.
121. As one commentator has observed, “The original motivation for judicial use of the interest balancing doctrine may well have been wariness about the wisdom of tying the meaning of due process too closely to either natural law or conventional morality standards.” Note, supra note 5, at 1539 n.127.
due process claims. But the evolution of interest balancing into a set formula which exalts utility above all other principles is out of keeping with the spirit of the due process clause. Unless the Court finds room in its due process jurisprudence for open consideration of the kinds of non-utilitarian values which underlay Addington and which cried out for recognition in Lassiter, its opinions can only become more tortured and its results less just.
SELF-PROVED WILLS—A TRAP FOR THE UNWARY*

Frederick R. Schneider**

For many attorneys in the United States, self-proved wills are a modern development. The earliest legislation was enacted in Nevada in 1953,1 followed in 1955 by legislation in Arkansas2 and Texas.3 Most similar legislation followed approval of the Uniform Probate Code in 1969. Today, thirty states authorize the use of self-proved wills in some form.4

As originally contemplated and authorized, a self-proved will is a witnessed will which is executed in the ordinary way, to which a notarized certificate or affidavit of execution is attached. This is the method authorized in Nevada, Arkansas and Texas, and first authorized by the Uniform Probate Code.5 A more recent develop-

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7. An attested will may at the time of its execution or at any subsequent date be made self-proved by the acknowledgment thereof by the testator and the affidavits of the...
ment allows the simultaneous execution of the will and certificate or affidavit. In 1975, the Uniform Probate Code was revised to accommodate both methods to be used in the alternative. This change was prompted by problems which arose when attorneys

witnesses, each made before an officer authorized to administer oaths under the laws of this State, and evidenced by the officer's certificate, under the official seal, attached or annexed to the will in form and content substantially as follows:

THE STATE OF ____________________________ COUNTY OF ________

We, ________, ________, and ________, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.

Testator

Witness

Witness

Subscribed, sworn to and acknowledged before me by ________ the testator, and subscribed and sworn to before me by ________ and ________, witnesses, this ________ day of ________.

(SEAL) (Signed)

(Official capacity of officer)

Uniform Probate Code § 2-504(b) (1969 version).

6. (a) Any will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:

I, ________, the testator, sign my name to this instrument this ________ day of ________, 19__, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Testator

We, ________, ________, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.
sought to effect a one-step execution under statutes authorizing the two-step method. As will be discussed, several cases had held such wills invalid.

The purpose of this article is to point out the danger of not following the requirements of the enabling legislation prescribing the two-step sequence employed to make a will self-proving, to briefly review the cases and arguments considered by the courts, and then

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Witness

The State of ____________________________
County of ____________________________

Subscribed, sworn to and acknowledged before me by ______ the testator and subscribed and sworn to before me by ______, and ______, witnesses, this ______ day of ______.

(SEAL) (Signed)__________________________

(Official capacity of officer)

(b) An attested will may at any time subsequent to its execution be made self-proved by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where the acknowledgment occurs and evidenced by the officer's certificate, under the official seal, attached or annexed to the will in substantially the following form:

The State of ____________________________
County of ____________________________

We, ______, ______, and ______, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time eighteen years of age or older, of sound mind and under no constraint or undue influence.

Testator

Witness

Subscribed, sworn to and acknowledged before me by ______, the testator, and subscribed and sworn to before me by ______, and ______, witnesses, this ______ day of ______.

(Seal) (Signed)__________________________

(Official capacity of officer)

UNIFORM PROBATE CODE § 2.504(a) (1975 version).
to suggest remedial action to alleviate the problem.

Basically, a self-proved will is a device used to simplify admission of the will to probate. For instance, in the absence of proof of fraud or forgery, under Section 3-406(b) of the Uniform Probate Code, it is conclusively presumed that the signature requirements for valid execution of a witnessed will are met. In addition, all other requirements for valid execution of a witnessed will are presumed, subject to rebuttal by competent evidence. All this occurs without any testimony by the witnesses to the will's execution being necessary.

For most wills, then, use of the self-proving provisions authorized by state statutes allows probate without testimony of witnesses, simplifying probate of the will. Since, in most cases, the will is admitted to probate routinely, the process makes eminent sense. In any event, contest of the will on other grounds, such as fraud or forgery, undue influence, or lack of testamentary capacity, is not foreclosed. Thus, most of the usual challenges to the validity of a will remain.

In implementing early legislation authorizing self-proving provisions, a significant problem developed: some attorneys sought to by-pass the two-step execution. This "short-cut" usually took one of two forms: either the testator executed the will, and then the testator and the witnesses executed the self-proving certificate or affidavit; or, the testator and the witnesses executed only the self-proving certificate. Naturally, litigation challenging the validity of

7. If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

Id. § 3-406(b).

Compare the foregoing with the following: "A self-proved will may be admitted to probate without the testimony of any subscribing witness, but otherwise it shall be treated no differently from a will not self-proved." This, or very similar language, is now a part of the enabling statute in several states. See, e.g., Ky. Rev. Stat. § 394.225 (Supp. 1971); Tex. Prob. Code Ann. § 59 (Vernon 1980).

8. The two-step execution process is the only self-proved will legislation (to date) in Arkansas, Delaware, Florida, Hawaii, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, South Dakota, Texas and Virginia. In addition, the two-step process was required by the original legislation in Alaska, Arizona, Colorado, Idaho, Indiana, Nebraska, North Carolina, North Dakota and Utah; in these nine states, subsequent legislation also authorized the simultaneous execution of the will and self-proving affidavit, the one-step process of section 2-504(a) of the 1975 revision of the Uniform Probate Code.
wills so executed followed.

The first cases arose in Texas. The first reported case in which an improperly executed self-proved will was challenged is McGrew v. Bartlett. In this case, the decedent and the witnesses executed only the self-proving affidavit; the will itself was not signed by the decedent or the witnesses. As the court put it: "It is clear that the will . . . was not executed in conformity with Section 59 of the Probate Code of Texas. It was not signed by the testatrix at any place, nor is it signed by any witness. The blanks for dates and signatures were never filled in."10

The court adopted a hard-line, conservative position. It quoted a sentence from a Texas Supreme Court decision, In re Price's Estate,11 decided only one year earlier. There, the court had said, "Of course, self-proving provisions have only the effect of authorizing the substitution of affidavits in lieu of testimony offered before the court."12 The Court of Civil Appeals also relied on the language of the Texas Probate Code. Section 59 of the Probate Code, which, after stating the requisites of a written will, states: "Such a will or testament may, at the time of its execution, or at any subsequent date during the lifetime of the testator and the witnesses, be made self-proved . . . ."13 The court found that the self-proving certificate was executed solely for the purpose of proving the execution of the will. The court held that the will offered for probate had never been properly executed and, therefore, could not be admitted to probate.14

Within one year, the Texas Supreme Court faced the same question in Boren v. Boren.15 Here, the decedent had signed the will and the self-proving affidavit. But the attesting witnesses had signed only the affidavit. The court again followed the hard-line, conservative position of Price.16 "The self-proving provisions attached to the will are not a part of the will but concern the matter

10. Id. at 703.
11. 375 S.W.2d 900 (Tex. 1964).
12. Id. at 903.
13. 387 S.W.2d at 705.
14. "The language clearly imports that the will must be duly signed by the testator, and subscribed by the two attesting witnesses before the self-proving affidavit can be executed. The execution of the will is a condition precedent to the execution of the self-proving affidavit under section 59." Id.
15. 402 S.W.2d 728 (Tex. 1966).
16. See text at note 12 supra.
of proof only." The court hammered its point home: "A testamentary document to be self-proved, must first be a will."

In both of these cases, the will proponents argued that the wills should be admitted to probate. In McGrew, it was contended that the decedent executed the self-proving affidavit intending to execute her will. Further, it was argued that because the affidavit was physically attached to the will, they were merged into a single instrument. The proponent also argued, in the alternative, that if the will and self-proving affidavit were considered as separate instruments, then the execution of the affidavit operated to publish the will. This argument is analogous to the rule that valid execution of a codicil operates to republish and validate a previously defective will.

As to the last argument, the court simply said the proponent's cases were factually distinguishable and that there was no republi-
cation. The court might have said that there was no execution of the will, not a defective attempted execution, and that, further, the self-proving affidavit failed as a codicil because it was not executed with testamentary intent.

The Texas Court of Civil Appeals also rejected use of a merger or integration concept, relying on a literal reading of Section 59 of the Probate Code. The section merely provides another way to

17. 402 S.W.2d at 729. The court continued:
The only purpose served by such self-proving provisions is to admit a will to probate without the testimony of a subscribing witness. The provision was introduced into the Texas Probate Code in 1955 as an alternative mode of proving a will. It was not the purpose of the Legislature to amend or repeal the requirement that the will itself must meet the requirements of the law. The execution off a valid will is a condition precedent to the usefulness of the self-proving provisions of section 59. Id. (citations omitted).
18. Id.
19. 387 S.W.2d at 704-05.
20. Although the court refers to the argument as if for merger, it seems clear that the will proponent sought to use the doctrine of integration.
21. 387 S.W.2d at 705.
22. Id. at 704-05.
23. Section 59 of the Texas Probate Code then read:
Every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator in person or by another person for him by his direction and in his presence, and shall, if not wholly in the handwriting of the testator, be attested by two (2) or more credible witnesses above the age of fourteen (14) years who shall subscribe their names thereto in their own handwriting in the presence of the testator. Such a will or testament may, at the time of its execution or at any subsequent date during the lifetime of the testator and the witnesses, be made self-proved, and the testimony of the witnesses in the probate thereof may be made
prove a will. It permits a properly witnessed will to be made self-proving.

[Section 59] refers to the last will or testament as "Such a will or testament" and does not undertake to incorporate the affidavit as a part of the will or testament. The language clearly imports that the will must be duly signed by the testator, and subscribed by the two attesting witnesses before the self-proving affidavit can be executed. The execution of the will is a condition precedent to the execution of the self-proving affidavit under Section 59.1

Because the will was not properly executed and attested by the

unnecessary, by the acknowledgment thereof by the testator and the affidavits of the attesting witnesses each made before an officer authorized to take acknowledgments to deeds of conveyance and to administer oaths under the laws of this State. Such acknowledgments and affidavits being evidenced by the certificate, with official seal affixed, of such officer attached or annexed to such will or testament in form and contents substantially as follows:

THE STATE OF TEXAS
COUNTY OF

Before me, the undersigned authority, on this day personally appeared

, known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said , testator, declared to me and to the said witnesses in my presence that said instrument is his last will and testament, and that he had willingly made and executed it as his free act and deed for the purposes therein expressed; and the said witnesses, each on his oath stated to me, in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is his last will and testament, and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said testator and at his request; that he was at that time eighteen years of age or over (or being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States or of an auxiliary thereof or of the Maritime Service) and was of sound mind; and that each of said witnesses was then at least fourteen years of age.

Testator

Witness

Witness

Subscribed and acknowledged before me by the said , testator, and subscribed and sworn to before me by the said and , witnesses, this day of A.D.

(SEAL)

(Signed)

(Official capacity of officer)


24. 387 S.W.2d at 705.
witnesses before the self-proving affidavit was signed, it was not a will at all, let alone a self-proving will.

Indeed, the court buttressed its argument by reference to the self-proving affidavit itself. "The Affidavit attached to the will, as the record shows, does not state the truth in stating that the testatrix' and witnesses' name are subscribed to the foregoing instrument in their respective capacities."25 Thus, the court rejected each of the proponent's arguments.

The will proponent's arguments in Boren are not clearly stated in the opinion. It appears, however, that the proponent argued that the legislature intended to create a new way to execute a will, a way which made the will self-proving. This argument was rejected: "The self-proving provisions attached to the will are not a part of the will but concerns the matter of its proof only. The only purpose served by such self-proving provisions is to admit a will to probate without the testimony of a subscribing witness."26 Since the decedent and the witnesses had not all executed the will, it was not a will and could not be a self-proving will.

Texas has continued to follow this precedent.27 The same problem arises under the original provision of the Uniform Probate Code, where Section 2-504 began: "An attested will may at the time of its execution or at any subsequent date be made self-proved . . . ."28 An attested will is a witnessed will. Clearly, this is what the Texas courts required.

Likewise, the language in the self-proving certificate in Section 2-504, as originally promulgated, speaks of completed execution of a witnessed will: "The testator and the witnesses . . . declare to the undersigned authority that the testator signed and executed the instrument as his last will . . . and that each of the witnesses . . . signed the will as witness . . . ."29

Thus, it could be expected that similar cases would develop in states whose legislatures had enacted the Uniform Probate Code's original provision, or a provision substantially the same in character.

The first of such cases, and one which followed the Texas prece-

25. Id.
26. 402 S.W.2d at 729.
28. The entire section appears in note 5 supra.
29. See note 5 supra.
dent, was in Montana. In *Matter of Estate of Sample*,\(^{30}\) the court considered an instrument signed only by the decedent. However, the self-proving affidavit was signed by the decedent and the two attesting witnesses.\(^{31}\) The proponent of the will argued that execution of the self-proving affidavit cured any defect in the execution of the will.

The court adopted the position espoused by the Texas courts.\(^{32}\) It found that in Montana, unless holographic, a will had to be witnessed in order to be admitted to probate. It noted that the comments to the statute showed that the purpose of the self-proving provision was to expedite testacy proceedings. Persuaded by the Texas courts, it concluded that "the execution of a valid will is a condition precedent to the use of the self-proving affidavit to admit a will to probate without the testimony of a subscribing witness . . . ."\(^{33}\)

The second such case was in Arizona. However, in *Matter of Estate of MacKaben*,\(^{34}\) the matter is clouded by questions of proof of proper execution. Here, the decedent and the witnesses had signed both the will and the self-proving affidavit. The will had no attestation clause. The self-proving affidavit was in the form prescribed by the statute. Arizona law requires that a will be signed by the testator and by at least two persons as witnesses. Both of the latter must witness either the signing of the will by the testator, or the testator's acknowledgment of the signature or of the will.\(^{35}\) Because there was no attestation clause, the court examined the self-proving affidavit to find proof of what the witnesses witnessed. It did not find evidence of compliance with the statutory requirements. At the hearing in the trial court, the witnesses offered their oral testimony concerning the signing of the will. However, their recol-

\(^{30}\) 572 P.2d 1232 (Mont. 1977).

\(^{31}\) Section 72-2-304 of the Montana Code Annotated is identical to section 2-504 of the Uniform Probate Code, as originally promulgated, except for some different comma placements. See note 5 *supra*.

\(^{32}\) Texas has held that a will was invalid even where the names of the testator and two witnesses were subscribed to an attached affidavit . . . . In *Boren*, the Texas Supreme Court found that the only purpose served by the 'self-proving' provision under Texas law was to admit a will to probate without the necessity of providing testimony from subscribing witnesses to a will at the time the will is offered for probate. 572 P.2d at 1233-34 (citation omitted).

\(^{33}\) *Id.* at 1234.

\(^{34}\) 126 Ariz. 599, 617 P.2d 765 (Ct. App. 1980) (review denied).

lections were incomplete and inconsistent; their testimony did not supply the missing evidence. This case did not really reach the issues discussed above. The will may or may not have been properly executed—the evidence was not clear. Thus, there was a failure to show that the will was entitled to probate. The properly executed self-proving certificate did not remedy this defect.

The court was explicit in requiring a validly executed will, regardless of the properly executed self-proving affidavit: “The offered document does not meet the self-proved requirements. All authority that has come to our attention on the subject requires that the formal requisites for execution of the will, A.R.S. Sec. 14-2502, . . . appear either preceding the self-proved affidavit or as supplemented in the affidavit.” Thus, another hard-line decision.

The use of testimony of the witnesses, nevertheless, raises an interesting possibility. In all these cases, the state statutes required that a will be signed by the decedent and by at least two attesting witnesses. In fact, if the self-proving certificate or affidavit is so signed, is there not an attested will? The Texas and Montana courts rejected this argument. Other courts have not.

Shortly after the Texas courts had decided McGrew and Boren, the Oklahoma Supreme Court was faced with a case where the will had been executed by the decedent, and the self proving affidavit had been executed by the decedent and the two attesting wit-

36. The Arizona statute now authorizes a will to be simultaneously executed and made self-proved. Id. § 14-2504. The will in MacKaben was executed October 1, 1975. The revision of the statute occurred in 1976. Act of June 11, 1976, 1976 Ariz. Sess. Laws § 8, at 264. Presumably, if the will in MacKaben had been executed after the date the revision became effective, using the new affidavit form of subsection (a), it would have been held a valid will. The revision, using the language of revised section 2-504, Uniform Probate Code (see note 5 supra), authorizes the simultaneous execution and making self-proved of a will. The argument the Texas courts advanced—that the Legislature did not intend a new or different form of will execution—would seem to be foreclosed by the new language of the statute. The phenomenon of the self-proving certificate or affidavit not fulfilling all the requirements for a validly executed will is not unique to the former Arizona statute. In Kentucky, for instance, self-proved wills were authorized in 1974. Act of March 28, 1974, 1974 Ky. Acts 546. In 1978, the Legislature added a requirement for a valid witnessed will: the witnesses must subscribe the will in the presence of each other. Act of March 17, 1978, 1978 Ky. Acts. 109. The form of affidavit set forth in section 394.225 of the Kentucky Revised Statutes (Supp. 1980) was not amended; a properly executed self-proving affidavit in the form and language of the statute would not show compliance with this new requirement.

37. I find this decision very troublesome. The decedent and the attesting witnesses signed both the will and the self-proving certificate. They fulfilled the statutory requirements of sections 14-2502 and 14-2504 of Arizona Revised Statutes (Supp. 1980). They fulfilled the formal requirements for a valid will. Yet, the decedent was penalized—the will was held not valid—even though the statutory form was followed.
nesses. But there was a different twist. In offering the will for probate, the attesting witnesses gave their testimony concerning the execution of the will as if it were not a self-proving will.

The contestants argued the will was not validly executed because it did not contain an attestation clause with the signatures of the witnesses. But the court found that no particular form of attestation clause was required, only compliance with the signature and witnessing requirements. The self-proving affidavit was viewed as a kind of attestation clause: “From the will ... it will be observed that witnesses signed the sworn attestation statement, reciting that the signatures were affixed in the presence of each other, and in the presence of the testatrix. The mere fact that the attestation, in form, resembled an affidavit, does not destroy its validity.” The court rejected the Texas cases which held that the will and self-proving affidavit were separate documents, commenting simply, “Those cases are not controlling here.”

The court applied the rule that the attestation clause need not be in any particular form. Thus, admission of the will to probate was affirmed. Note, however, that the will was admitted not as a self-proved will, but as an ordinary attested will.

In two other cases, courts have held, along the lines of reasoning used in Cutsinger, that a will or codicil may be validly executed by means of self-proving affidavits. In both cases, the will or codicil was held entitled to probate—but in neither case is it possible to determine, from the opinion, whether the will or codicil was admitted to probate as a self-proved will or as a witnessed will based on the testimony of the attesting witnesses. The tone of each opinion leads me to believe, however, that each was admitted without testimony. If this is true, each court followed a more liberal position than did the Oklahoma court in Cutsinger. Because of the ambiguity, neither case is useful in formulating or supporting a position in other cases.

All this leaves one in a decidedly uncertain position. Without a doubt, the Texas, Montana and Arizona courts are correct—based

39. Id. at 781.
40. Id. at 782.
41. In Dillow v. Campbell, 453 P.2d 710 (Okla. 1969), the court reaffirmed this position.
42. In re Estate of Charry, 359 So. 2d 544 (Fla. App. 1978), and In re Estate of Petty, 227 Kan. 697, 608 P.2d 987 (1980). The statutes of both states are in a form substantially identical to the original Uniform Probate Code language.
43. See note 8 supra.
on the language of the particular statute involved. In those states which have or had a statute identical to, modelled upon, or similar to the original language of the Uniform Probate Code, self-proved will authorization ordinarily begins "an attested will," or "such a will," or with a comparable phrase. These phrases clearly refer to a will that has been executed as a witnessed (or attested) will. As pointed out above, the language of the self-proving certificate or affidavit also refers to a will that has already been executed. Thus, logic and usual rules of statutory interpretation demand this argument prevail.

On the other hand, few will statutes require that an attestation clause be used or that an attestation clause take any particular form. There is a great deal of common sense and equity in the Cut-singer decision. The decedent clearly signed the will with testamentary intent. The witnesses also signed the will as witnesses. What more is required for a witnessed will? Thus, by allowing the testimony of the witness as to the execution of the will, the court is doing no more than allowing proof of a witnessed will in the usual course, just as if the will contained no attestation clause or the attestation clause were not notarized.

Texas, Montana and Arizona have rejected this concept, however. Recall that their courts clearly required that there first be a validly executed will, before that will might be made self-proving.

I reject the idea implicit in the Charry and Petty cases that a will executed in this fashion should be admitted to probate as a self-proved will. The Florida and Kansas statutes do not permit a one-step process of execution and making the will self-proved. The 1975 revision of section 2-504 of the Uniform Probate Code clearly allows the one-step execution of a self-proving will. The difference in language is significant. The statutes discussed herein ought not to be twisted and contorted to accommodate such an interpretation.

Where the two-step process is the only method authorized to make a will self-proved, it must be faithfully observed. There ought be nothing in the execution of the will which would cause its invalidity. Therefore, the will should be fully executed by the tes-

44. See note 5 supra.
45. See text accompanying notes 25, 26 and 28 supra.
46. See, e.g., note 14 supra.
47. See note 42 supra.
48. See note 6 supra.
tator and witnessed by the witnesses prior to anyone signing the self-proved certificate or affidavit. Clearly, the role of the attorney is to produce a validly executed will, one not subject to attack on the ground of improper execution.

Some attorneys have not followed the two-step process. The cases already discussed show this. I can only suggest to them that they make every effort to have their clients' wills reexecuted in proper fashion. This may not always be possible. Some clients may now be dead. Others may be incompetent to execute a will. Some may be distrustful or obstinate.

In the event an improperly executed self-proved will is offered for probate, I believe that offering it as an ordinary witnessed will, relying on the testimony of the attesting witnesses, is the better route to follow. Indeed, it is likely to be the only method which will succeed in most courts. The witnesses are not required to witness in a particular way. Occasionally an attorney—for reasons that remain obscured—has had a will notarized. However, if the decedent has not signed the will, and has signed only the self-proving certificate or affidavit, the argument can be raised that it was not signed with testamentary intent. In fact, this seems to be so, except where one-step authorization is permitted. Where the two-step process is required, the self-proving certificate or affidavit is signed to evidence the will's proper execution. The other arguments raised by the will proponents in the cases in Texas, Montana and Arizona, seem to be bootstrap and to lack legal weight.

Attorneys ought to seek to have the revised Uniform Probate Code section 2-504 enacted in their jurisdictions. Legislative authorization of the one-step process of making a valid self-proved will would simplify future will executions.

North Carolina has gone one step further. In 1977, the legislature enacted the original Uniform Probate Code language. In 1979, the legislature adopted the revised language in place of the 1977 law. The legislature also enacted a saving statute to validate prior self-proved wills that had not been separately executed and then made self-proved. Such a provision insures the validity of

49. Perhaps the only useful function this has served, absent the self-proving will provisions, is to emphasize to the client the importance and legal nature of the act of executing the will.
52. The execution of an acknowledgement of a will by a testator, and of the affidavits
wills executed by testators who relied on the supposed expertise of their legal counselors and did everything they thought was necessary to execute a valid will. The law ought to protect them against this particular problem. Thus, this provision ought to be adopted along with the one-step execution authorization. In so doing, the legislature protects testators who have defectively executed self-proved wills. These testators have followed substantial formalities in executing their wills; the law ought to recognize their wills as valid.

of witnesses, made before an officer authorized to administer oaths under the laws of this State and evidenced by the officer's certificate substantially in the form set out in G.S. 31-11.6 during the period between October 1, 1977, and October 1, 1979, shall be considered to be a valid execution and attestation of a written will even though the will was not signed and attested under the provision of G.S.31-3.3 separately from the execution of the acknowledgement by the testator and the affidavits of the witnesses. Such wills may be probated in accordance with G.S. 31.18.1(a)(4).

Id. § 2.
By Robert M. Bratton*

Introduction

On July 15, 1980, the Kentucky Legislature effectuated paragraph 3 of section 403.270 of the Kentucky Revised Statutes which permits a court to grant joint custody to a child's parents in the event of a divorce, if it is the best interest of the child.\(^1\)

Prior to the enactment of this section, as far back as 1917\(^2\) and up to and including 1974\(^3\), the courts of the Commonwealth had granted a form of "joint custody" of children to parents. This practice has continued in the trial courts of the Commonwealth. A review of the reported decisions\(^4\) readily shows that no standard definition of "joint custody" has been adopted or applied by the courts of the Commonwealth.

In addition to examining the new statute, the culmination of approximately fifty-seven years of joint custody practice, this article will look at the cases which represent this practice, study the subject of joint custody generally and its definitions, compare the advantages and disadvantages of joint custody, and suggest criteria for awarding joint custody. Suggested provisions for a joint custody agreement and guidelines for future use are contained in an appendix.

As of the date of this article, no reported Kentucky decision defines "joint custody." Thus, understanding what the statutory language "joint custody" means is difficult for the practitioner. It is hoped this article will add to the general understanding of the term as it is used in Kentucky.

The Joint Custody Statute

According to section 403.270(3) of the Kentucky Revised Statutes, "The court may grant joint custody to the child's parents if it is in the best interest of the child."\(^5\) Along with section 405.020 of

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4. See text accompanying notes 16-68 infra.


6. (1) The father and mother shall have the joint custody, nurture and education of their
the Kentucky Revised Statutes, this statute represents a codification and reaffirmation of the unisex approach to the child custody presumption which has been in dynamic evolution in the United States since around 1930. The legislative reform movement toward joint custody, the ranks of which Kentucky now has officially joined, began in North Carolina in 1957. Exactly what Kentucky's statute means as written is subject to varied interpretation.

It is clear that Kentucky now recognizes joint custody as a viable legal alternative to sole custody. At first glance, if read in conjunction with section 405.020 of Kentucky Revised Statutes, it seems that a presumption of joint custody has been created. In reality, no such presumption is required, however, because each case must be decided on its own facts. In Brown v. Brown, the Kentucky Supreme Court specifically said that the overriding determination is, as stated in the new statute, "the best interest of the child," the relevant guidelines being those enumerated in section 403.270 of the Kentucky Revised Statutes and Parker v. Parker. Interestingly, section 405.020 of the Kentucky Revised Statutes was ini-
JOINT CUSTODY


tially passed in 1952 and amended in 1968. These guidelines are flexible enough to adequately determine the "best interest of the child." No presumption is needed or called for.

Though the new Kentucky "joint custody" provision gives the courts statutory authority to grant joint custody, a review of past case law in the Commonwealth, shows that conferring joint custody is not a new practice. The descriptions of the custodial arrangements in these cases, however, are vague, confusing and far from precise definition. Nevertheless, they all amount to a sharing of legal and physical custody of children. Later decisions such as Wilhelm v. Wilhelm and Brown v. Brown, discussed below, are consistent with the apparent statutory presumption found in section 405.020 of the Kentucky Revised Statutes. Following the direction of the court to consider the best interest of the child in Brown v. Brown still requires finding a suitable legal definition of "joint custody" in order to uniformly implement the statute. For this definition, other sources, such as Kentucky case law, must be examined.

KENTUCKY CASE LAW

As previously noted, the courts of the Commonwealth have permitted joint custodial arrangements in some form since 1917. In the first reported decision dealing with joint custody, Towles v. Towles, the trial court awarded custody of two sons to both father and mother, one parent to have custody one month, the other, the next month. On appeal, the court reversed, reasoning that such an arrangement would demoralize the children, would be destructive to good citizenship, and would deny them a fixed and permanent home. Interestingly, the court did not attempt to define "joint custody," but only gave their disapproval of it.

It was nine years before the court dealt with another joint custodial arrangement. In 1926, in Riggins v. Riggins, the trial court gave custody of the only child, an eight-year-old son attending school, to the father for two-thirds of the time when school was not in session, and every other weekend from Friday to Monday morning when school was in session. The trial court was reversed, on

13. 504 S.W.2d 699 (Ky. 1974).
14. 510 S.W.2d 14 (Ky. 1974).
15. Id. at 16. See text accompanying notes 10-12 supra.
17. Id. at 228, 195 S.W. at 438.
18. 216 Ky. 281, 287 S.W. 715 (1926).
appeal, the court stating that

> both parents have excellent homes and would afford moral training. A child of tender years should be committed to care of its mother, if she is a proper person. The trial court ruling does not properly safeguard the child or the rights of the mother. An infant of tender years should not, for any great length of time, nor for any considerable portion of the time, be separated from his mother. A child should not be separated from its mother for a longer period of time than 2 weeks.\(^\text{19}\)

Again, no definition of, or guidelines for, joint custody was offered, and only disapproval of any concept of custody other than sole custody was given.

During the next decade "joint custody" seemed to be a dead issue. The "tender years presumption" expressed in Riggins, whereby it was thought harmful to separate the child from the mother for any length of time, was the guiding concept and sole custody the necessary means of realizing this ideal. In 1936, however, the court liberalized its attitude to custody. In Belknap v. Belknap,\(^\text{20}\) the parents each had requested sole custody of their three children. Reversing and remanding the case upon the trial court's refusal to grant a divorce, the court of appeals, for the first time, approved an alternative to one parent's sole custody:

> Each parent should be given the right to custody and care as nearly equal as is practical and compatible with the convenience and welfare of the children. Both parties are proper and suitable to have custody of the three children. The mother should be given the custody during the school year and the father during vacation periods. In case of disagreements of parents as to where children should attend school, the matter will be submitted to determination by the Court.\(^\text{21}\)

A year later the court of appeals retrenched somewhat. In Crow v. Crow\(^\text{22}\) the trial court had ordered custody of the one child born of the marriage divided between the mother's and the father's parents for alternate months. The appellate court reversed and voiced opposition to such an arrangement between the grandparents: "It is not in the best interest of the child to be shuttled back and forth

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19. Id. at 285, 287 S.W. at 717.
20. 265 Ky. 411, 96 S.W.2d 1012 (1936). See also Wright v. Thomas, 306 Ky. 736, 209 S.W.2d 315 (1948), wherein a split custody arrangement like that in Belknap was approved.
21. Id. at 412-13, 96 S.W.2d 1013.
22. 270 Ky. 571, 11 S.W.2d 275 (1937).
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every month between the two places. Under present circumstances, custody should be given to mother with father having, as a matter of right, reasonable visitation."\(^{23}\) However, the court went on to approve a form of joint custody for the parents: "When the child becomes school age, he should be left with the mother during the school term and with the father during vacations with the right of the mother to visit her child in the same way as his father as above stated (reasonable)."\(^{24}\) The court reaffirmed the position it had taken earlier in *Belknap v. Belknap.*\(^{25}\)

In 1939 the court of appeals approved a new alternative to sole and joint custody. In *Braden v. Braden,*\(^{26}\) it affirmed a lower court ruling denying a divorce, but awarding custody of a four year old boy to his father and a two month old daughter to the mother. The court's rationale for this arrangement was based upon a review of the evidence which disclosed a marriage filled with turmoil and conflict:

The four year old boy was left with his father in a good home, and while he needs the care of his mother, we think the circumstances as presented to us in the record are such that he will be better cared for if left with his father. Obviously, the young daughter, who was only a few months old at the time the judgment was entered, was properly left in the care of the mother.\(^{27}\)

This division of the children, properly called split custody because of the custodial division of the siblings, emphasizes the lack of uniform application of a custodial arrangement beyond sole custody. It does, however, illustrate the court's changed attitude toward the necessity of sole custody and separation of a child from its mother.

A year later, the court approved a similar arrangement in *Travis v. Travis.*\(^{28}\) Contrary to its previous decisions, the appellate court modified a lower court ruling awarding custody of a ten-year-old girl and an eight-year-old boy to the father, stating:

A mother may be a satisfactory person for custody but an impossible wife. The only female in the father's family who could take care of the children is his mother, and she is physically unable to take

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23. *Id.* at 574, 110 S.W.2d at 276.
24. *Id.*
25. 265 Ky. 411, 96 S.W.2d 1012 (1936).
26. 280 Ky. 563, 133 S.W.2d 902 (1939).
27. *Id.* at 567, 133 S.W.2d at 904. *Cf.* Brown v. Brown, 510 S.W.2d 14 (Ky. 1974), wherein custody of a five-year-old daughter was given to the mother, and of a seven-year-old son to the father.
charge of and rear the children. The mother is to have custody from September to June with the right of father to have them on weekends and on holidays. The father is to have custody during the summer months with the right of the mother to have visitation.29

This ruling appears to be a retreat from split custody and inclines toward some form of shared or alternating custody. This case illustrates one of the causes of the semantic confusion that exists in distinguishing different custodial arrangements and in attempting to arrive at a definition of “joint custody.” In Travis, the court seems still to accept the joint custody concept as an alternative to sole custody, but the lines of distinction between it and other forms of custody are blurred.

In 1942, the court of appeals took a significant step in the direction of a pure form of joint custody. In Davis v. Davis,30 the custody of a three-year-old child was granted to the mother. In affirming the lower court's decision, the court modified the decree by stating:

Where both parents are proper and suitable to have custody and are similarly situated, each should be given the right of custody for as nearly equal a period as is practical and compatible for the welfare and convenience of the children. The general rule is that the well-being of a young child requires that he be kept and controlled by his mother. If circumstances remain substantially the same, the decree should be modified to enable the boy to spend more time with his father and paternal grandparents.31

The court's language encouraged a more equitable division of the time the child was to spend with each parent.

Despite the inclination toward joint custody in Davis, the court reaffirmed the tender years doctrine32 in 1946 in Roberts v. Roberts.33 It reversed and modified a lower court ruling awarding custody of two daughters, ages eleven and five, to the father. Voicing its agreement with the concept that the mother should have charge of younger children, the court permitted the older child to remain with the father and granted custody of the younger to the mother.34 Though its primary emphasis was on the “tender years”

29. Id. at 217, 138 S.W.2d at 337.
30. 289 Ky. 618, 159 S.W.2d 999 (1942).
31. Id. at 622, 159 S.W.2d at 1001 (emphasis added).
32. See text accompanying note 19 supra.
33. 302 Ky. 423, 194 S.W.2d 1003 (1946).
34. Id.
The court did permit a form of "joint custody."

The Kentucky Court of Appeals came to use different forms of joint custody more as the fifties dawned. In *Stamper v. Stamper* in 1949, it affirmed the lower court grant of custody of the children under sixteen to the wife for seven months of the year and to the father for the remaining five months. In 1951, in *Heltsley v. Heltsley*, the court of appeals affirmed a lower court's custody award of an eight-year-old boy and a five-year-old girl on an alternating two month basis, first to the mother then to the father:

Both homes are suitable for the rearing of the children even though ordinarily it is considered better for young children to have one haven which they consider home, and not be switched back and forth in such a way that they develop a sense of insecurity, and ordinarily, such young children should be with the mother. Both father and mother live in walking distance of each other. Trial court's ruling apportioning custody was in the best interest of the children. 87

The court somewhat grudgingly accepted the alternative to sole custody but still did not offer to distinguish between split, alternating, divided and joint custody.

The confusion was continued in the unusual case of *Meredith v. Sigler*, in which the appellate court modified the trial court ruling giving custody of a daughter to the mother and the son to the father. The court made the children wards of the court, giving the custody of the boy to the maternal grandparents and the father. The mother, in whose custody the girl remained, was given reasonable visitation, tempered by stringent limitations on removal out of state guaranteed by a performance bond. The custodial arrangement in *Meredith* had the appearance of split or conditionally divided custody, but the court did not attempt to make the arrangement consistent with rulings in previous cases.

The court eventually did identify the form of custody it was conferring, espousing the concept of alternating custody in *Garner v. Garner* in 1955. Custody of two children was granted to both parents for alternating months. The court justified this in terms of what it considered best for the children: "The best interest and welfare of the child is the test. The court recognizes the inherent
evils of alternating custody, but since the order will terminate in two years, the trial court's order will not be disturbed."\textsuperscript{40}

In another 1955 case, \textit{Sharp v. Sharp},\textsuperscript{41} the court first appeared to recognize the father's interests, granting the mother custody of all three children for approximately eleven months of the year, and the father custody each August and the first weekend of each month. However, the court recognized the special nature of the case: "The Chancellor's determination is not disturbed. The decree is of an interlocutory nature and, if the arrangement worked out should be detrimental to the welfare of the children, the decision as to them may be revised at a proper hearing."\textsuperscript{42} While technically not a joint custody decision, the court seemed to give consideration to the interest of the father and the children in regularly spending time together, one of the arguments for joint custody.\textsuperscript{43} Although the amount of time the father was to spend with the children was quantitative, it is significant that the court supported this important aspect of joint custody as we know it today.

The court of appeals first expressly recognized split custody as valid in \textit{Conlon v. Conlon}.\textsuperscript{44} The trial court had equally divided custody of two boys, age two and a half and four, between the mother and father, for six month periods. The appellate court affirmed, indicating that both parents were suitable and morally fit. The court labelled this arrangement "split custody," stating, "The court ordinarily does not look upon split custody with favor; nevertheless, under facts and circumstances of this case, the trial court did not err."\textsuperscript{45} Though cautious not to recommend the split custody practice, the court nevertheless acknowledged it as a viable alternative to sole custody.

The court more strongly called attention to the father's rights in \textit{Babb. v. Babb}.\textsuperscript{46} In that case, in which each parent was given custody of the children for alternating three week periods, the court stated: "But a father's rights may not be ignored. The welfare of the child is the chief consideration."\textsuperscript{47} Prior decisions regarding

\begin{footnotes}
\item[40.] Id. at 851.
\item[41.] 283 S.W.2d 172 (Ky. 1955).
\item[42.] Id. at 174-75.
\item[44.] 293 S.W.2d 710 (Ky. 1956).
\item[45.] Id. at 713.
\item[46.] 293 S.W.2d 728 (Ky. 1956).
\item[47.] Id. at 729.
\end{footnotes}
"alternating custody" were brought into focus in McLemore v. McLemore.\textsuperscript{48} Custody of three girls, ages eight, five and two, was conferred upon each parent alternating for a week at a time. Discussing the reasoning underlying this arrangement, the court was careful to note its consideration of the interests of both parents:

A child's well-being is usually fostered and developed better by awarding custody to the mother because of the nature of their relationship. The Court is always loath to deprive a mother of the custody of very young children, especially in the case of young girls. The Court does not look with favor upon split custody of small children. The best interest and welfare of the child demand that divided custody should be avoided if possible, and it will not be approved except under exceptional circumstances or for a strong and convincing reason. The father here, due to his employment, requires his absence from home much of the time, and the children would be left in the care of his sister and parents.\textsuperscript{49}

The court noted a new important consideration, in addition to achieving an equitable balance of the interests of father and mother, in Barrier v. Brewster.\textsuperscript{50} It affirmed the lower court's award of custody of a six-year-old girl to the father for nine months (the school year) and the mother three months (summer vacation). It called attention to the fact that "[b]oth parents had taken new spouses":\textsuperscript{51} "Here, the awarding of the custody to the father, since he is remarried, would not deprive the little girl of a woman's care since the new wife was willing and suitable to serve in a maternal capacity. Further, the conduct of the mother's new spouse was something below a top rating as a potential stepfather."\textsuperscript{52} The additional factors of both parents' remarriage and the stepfather's apparent unsuitability as a father-figure were crucial to the court's determination. It is impossible to tell whether the court would have approved the arrangement otherwise.

Similarly, in Maxwell v. Maxwell\textsuperscript{53} in 1961, the appellate court affirmed the awarding of custody of a thirteen-year-old boy to his father, from the time school was out in the spring until mid-July, a period of about six weeks. The court said: "Nothing has been presented which would lead us to conclude that he (the Chancel-

\textsuperscript{48} 346 S.W.2d 722 (Ky. 1961).
\textsuperscript{49} Id. at 724.
\textsuperscript{50} 349 S.W.2d 823 (Ky. 1961).
\textsuperscript{51} Id. at 824.
\textsuperscript{52} Id.
\textsuperscript{53} 351 S.W.2d 192 (Ky. 1961).
lor) did not act with the best interest of the child in mind—the main criterion in this type of case."

There was no expressed approval, however, of the joint custody arrangement in this case.

Finally, in 1965, in *Ralston v. Ralston,* the court of appeals dealt squarely with a "joint and concurrent" custody arrangement, which had been ordered by the trial court. The case involved an uncontrollable twelve-year-old boy whose father and mother were granted joint and concurrent custody, with the option given the boy to determine with which parent he would live. Evidence had shown the child brandishing a pistol which neither father nor mother had been able to take from him. Focusing on the case's peculiar facts, the court treated the issue of custody very briefly, and did not define joint custody or offer to describe the joint custody arrangement it had proposed. Perhaps this may be attributed to the court's evident dislike of the concept:

Under ordinary conditions we condemn such a provision for custody of any child. Evidence indicates that *neither the father or mother have control of this boy.* Joint custody is not merely to correct this lack of control. We think the trial court should re-examine the situation with respect to custody of the boy and make such an order as circumstances justify.

Another approval of alternate custody may be found in *Knight v. Knight.* Though the court stated that it "disfavored joint custody," it affirmed the trial court's provision for custody alternating between the parents. The decision apparently rested on the fact that the order was temporary and the court's feeling that the proper place to determine the child's permanent custody was at the trial level.

Not until eight years later, in *Wilhelm v. Wilhelm,* did the court of appeals deal again with a version of joint custody. The custody of two children, a son three and a daughter five was awarded to the mother and the father was granted very liberal visitation privileges (two afternoons a week from twelve to five, alternate weekends from Friday evening until Sunday evening, and two

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54. *Id.* at 193.
55. 396 S.W.2d 775 (Ky. 1965).
56. *Id.* at 776.
57. *Id.* at 777.
58. *Id.* at 778.
59. 419 S.W.2d 159 (Ky. 1967).
60. *Id.* at 159.
61. 504 S.W.2d 699 (Ky. 1974).
weeks in the summer), which the court analogized to split custody. The reason for the trial court’s unusual ruling was the father’s insistence on being permitted to take part in the children’s religious instruction and education. In affirming the arrangement, the court noted that the “visitation rights granted in the instant case [were] extremely liberal, almost ‘amounting to split custody,’ and though it could not say ‘that the visitation provisions constitute[d] an abuse of discretion,’ it believed ‘the trial court should remain alerted to the potential of trouble in weekly exposure of the children to conflict.’”

Though the arrangement in Wilhelm would appear to substantiate the argument that joint legal custody and sole custody with liberal visitation are identical, the two may be distinguished. Certainly, the line between divided custody and liberal visitation is blurred, and the true difference may only be quantitative, relating to the amount of time a non-custodial parent may spend with a child. There is a clear qualitative distinction, however, between joint custody and liberal visitation. Joint custody demands active, shared participation and decision-making between both parents. Wilhelm, therefore, should be kept in proper perspective.

The final important recent Kentucky decision providing direction in defining joint custody is Brown v. Brown. There the court of appeals affirmed the trial court’s award of custody of a five-year-old daughter to the mother, and twelve-year-old daughter and seven-year-old son to the father. What is significant is that the court insisted the children be given their choice as to with which parent each would reside, and that, despite the splitting of custody, each parent be permitted to contribute to the “future directing and planning” of the lives of the three children. The court also approved the trial court’s reliance on the factors outlined in section 403.270 of Kentucky Revised Statutes, and its interviewing of the children pursuant to section 403.290, implying the appropriateness of the lower court’s interpretation of these statutes.

As a review of the cases shows, the Kentucky court has never defined “joint custody.” The court has specifically acknowledged “split custody,” “joint and concurrent” and “divided cus-

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62. Id. at 700.
63. 510 S.W.2d 14 (Ky. 1974).
64. Id. at 15-16.
65. Id. at 16.
66. See Braden v. Braden, 230 Ky. 563, 133 S.W.2d 902 (1939); Conlon v. Conlon, 293
tody," but has never clearly distinguished these terms. Since the terms seem to have been used interchangeably, and without clear definition by the courts or by statute, other sources must be looked to for clarification and guidance, in order to arrive at a proper interpretation of the Kentucky joint custody statute.

Definitions

As is evident from the foregoing review of Kentucky case law, precise definition of joint custody is impossible because the courts have used a variety of terms to describe their understanding of the concept. In referring to various forms of joint custody terms such as split custody, separate custody, divided custody, shared custody, shifting custody, concurrent custody, alternate custody and joint custody, all have been employed, loosely and interchangably, resulting in no uniform application of the term. Further, "no single arrangement can be found which results when a joint custody award is made."69 Probably the definition which best serves to clarify the various terms courts have employed is found in Alexander Lindey's Separation Agreements and Ante-Nuptual Contracts.70 In Kentucky, the essence of joint custody is that both parents share responsibility for and authority over their children, consistent with section 405.02071 of Kentucky Revised Statutes. Both parents, therefore, must spend time with each child.

There are two basic types of joint custody: joint legal custody and joint physical custody. Under joint legal custody, each parent has an equal voice in the care, upbringing, and education of the children. They share the decision-making function, and the responsibility for raising the children.72 This requires combined parental consultation and agreement on all major decisions affecting the children, such as decisions concerning their upbringing, education, religion, financial support, medical and psychological health, school vacation, trips, and extracurricular activities. The specific

S.W.2d 710 (Ky. 1956); McLamore v. McLamore, 346 S.W.2d 722 (Ky. 1961); Knight v. Knight, 419 S.W.2d 159 (Ky. 1967).
67. See Ralston v. Ralston, 396 S.W.2d 775 (Ky. 1965).
68. See Brown v. Brown, 510 S.W.2d 14 (Ky. 1974); Wilhelm v. Wilhelm, 504 S.W.2d 699 (Ky. 1974).
70. A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTUAL CONTRACTS § 14-60 to 61 (1977).
71. See note 6 supra, in which Ky. REV. STAT. § 405.020 (1972) is quoted in full.
72. See note 11 supra, in which Ky. REV. STAT. § 403.270 (1972) is quoted in full.
details of these decisions are left to the parents, who, under the joint custody arrangement, are on an absolutely equal footing in the eyes of the law.

The concept of joint physical custody adds the element of residence. Under this arrangement, the children live with each parent on an equal alternating basis. The making of all decisions is not shared by both parents where only one parent makes the minor day to day decision, such as what the children will eat, and when they will go to bed. The joint physical custody concept has caused considerable confusion since it sometimes has been referred to as “divided custody” and “split custody.” Yet, this arrangement also constitutes joint custody under the statute.

Divided custody, it should be remembered, refers to an arrangement in which a child lives with one parent for part of the year (usually during school term) and with the other parent for the remainder of that year (usually out of school term), both parents having reciprocal visitation privileges. The main difference from joint custody, however, is that the parent with whom the child lives has total control over the child during that period of time of the child’s residence. There is none of the joint decision making that distinguishes joint custody. Split custody, on the other hand, is a traditional sole custody arrangement with siblings being divided between the parents and each parent having full-time custody of at least one of the children.

Kentucky’s adoption of Lindey’s definition of joint custody with its two subdivisions would help it to achieve the uniformity necessary to implement the new statute and avoid confusion of the foregoing terms. Lindey’s definition effectuates the intent of the legislature by providing guidelines useful to the parties and the courts, and the specificity that practitioners, scholars and the judiciary need, consistent with the wording of the statute.73

**ADVANTAGES AND DISADVANTAGES OF JOINT CUSTODY**

Advocates of joint custody allege that the arrangement is superior to sole custody. Their arguments are persuasive. They claim that joint custody can be adapted to the changing needs and circumstances of the children.74 Judicial intervention is not required to determine the living schedule of the children and adjustments

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74. See Kubie, *supra* note 43, at 1199.
may be made as personal relationships change. Parents are able to be far more flexible in their sexual-social roles. Joint custody is said to stabilize the equilibrium of all the parties concerned.

Another argument on the side of joint custody is that the child receives maximum benefits from the relation with both parents, receiving the love, attention, and influence of both of them which fosters a more natural relation and which more closely approximates the intact nuclear family. Moreover, joint custody is said to satisfy the desire by parents to have more than momentary contact with the children and to enable the children to live routinely with a parent. According to Dr. Andrew Watson, this allows the child to see the parents in a proper perspective, and avoids the problem, common to children raised in a sole custody arrangement, of fantasizing about the absent parent. The problem may only be prevented through intensive contact between parents and children.

Another plus for joint custody is that it gives the father needed and desired contact with children. The arrangement also lessens the burden in the past often foisted on the mother which is the natural result of sole custody. It more equitably allocates the duties inherent in child rearing. The joint custody concept emphasizes the obligations of parenthood. It helps improve parental cooperation, and is consistent with modern social trends, such as the movement toward sexual equality, women's entry into the labor market, and increased acceptance of divorce.

76. It should be noted that under the 1978 amendment to section 403.270(1) of the Kentucky Revised Statutes each parent must be given equal consideration. This may in fact repeal the tender years presumption in favor of the mother. See Moore v. Moore, 577 S.W.2d 613 (Ky. 1979). The repeal of such presumption would allow the greater flexibility which sole custody to a mother would not allow.
83. Ellsworth & Levy, Legislative Reform of Child Custody Adjudication, 4 Law & Soc'y. 167 (1969); Hudals, Seize, Run and Sue: The Ignorance of Interstate Child Custody in American Courts, 39 Mo. L. Rev. 521 (1974); J. Goldstein, A. Freud & A. Solnit, Beyond
The critics of joint custody, on the other hand, focus on the potential the concept creates for instability in the lives of the children. There is merit to the argument that joint custody may be a confusing experience for a child. Joint custody precludes the finality and certainty, desirable psychologically and judicially advocated, of custody that is present when sole custody is conferred.

Joint custody, it has also been said, requires a high level of good will between the parents which may be inconsistent with divorce, since divorce is typically an adversary confrontation. If the parties could not maintain a harmonious, satisfying marriage, the argument goes, it is unlikely they will be able to achieve the high degree of cooperation demanded by a joint custody arrangement.

Joint custody, say the opponents, creates confusion for the child and disciplinary problems for the parents because of the two different lifestyles, the child is shuttled between, the possible undermining by one parent, of the other (which is so frequently found in divorce situations), and the lack of one consistent authority figure. There is a danger of the parent’s manipulating the children for affection or revenge, creating constant tension.

Finally, the best argument against joint custody from the legal and medical standpoint, focuses primarily on the effect of the arrangement on the child’s social growth:

Certainly, no child could grow up normally when it is hawked from one parent to the other with the embarassing scene of changing homes. Such degrees are usually prompted by the allatable desires to avoid injuring the feelings of the parents, but the net result is a permanent injury to the child without any substantial benefit to the parents. In addition, to the lack of stability and surroundings, the child is constantly reminded that he is the center of a parental quarrel. It is readily apparent that such practices are calculated to arouse serious emotional conflicts in the mind of the child and are not conducive to good citizenship. Moreover the parents are continuously pitted against each other in the unenviable contests of undermining the child’s love for the other parent. Each parent is
afraid to exercise any sort of discipline for fear of losing out in the contest. As a result, the child is reared without parental control. The ones that come from the quaint custom of awarding the child to each of the parents for alternate periods would make lively writing, but you wouldn’t believe the stories. Apparently it remained to the modern Solomons to be the ones who really cut a child in two. . . . I can’t imagine a situation in which it is fair to a child to divide him.89

CONSIDERATIONS RELEVANT TO THE AWARDING OF JOINT CUSTODY

Three conditions need to be met before any form of joint custody is established. First, the parents must be suitable: they must be physically and psychologically capable of filling the parental role. This is the most crucial criterion. A second prerequisite is some degree of cooperation and mutual respect and trust between the former spouses. Unless the parents are able to engage in honest communication, they are not suited for joint custody. It is unrealistic to expect hostilities between the parties to remain submerged beneath the surface. Each parent’s acceptance of the other parent’s ability to positively influence the children is very important. There is no reason the relationship between the parents, where the children are concerned, cannot be maintained on a businesslike level.90

A third requirement is that the parents must share similar values. Joint custody cannot succeed if the parents insist on adhering to irreconcilable theories of child rearing. Fathers can learn to fulfill the responsibilities traditionally consigned to mothers. The laws recognize this fact in presuming the fitness of both parents.91 Observers are divided, nevertheless, on the issue whether spousal hostilities may be augmented or diminished over time under a joint custody arrangement.92

Other factors may be important to determining the appropriateness of joint custody. Although not absolutely necessary to the success of a joint custody arrangement, the presence or absence of any of them may be a significant asset or liability.

1. The parents must be willing. The chances of the success are enhanced enormously if the parents are committed to making the system work. For this reason alone, joint custody must remain a volun-

90. Co-PARENTING, supra note 82, at 90.
91. KY. REV. STAT. § 403.270 (Supp. 1980).
92. THE DISPOSABLE PARENT, supra note 81.
2. The parents need to have flexible work schedules. An occupational aspiration may have to be sacrificed for the success of the joint custody arrangement. Obviously, workaholics would be totally unsuited for a joint custody arrangement.

3. The parents' homes should provide similar environments for the children. Discrepancies in the physical environment of the two households serve to emphasize the dislocation caused by frequent residence changes.

4. The financial ability of the parents to raise the children must also be considered. Joint custody is expensive, requiring the maintenance of two separate homes. Usually children in a joint custody arrangement have two sets of clothes and two sets of books and toys. For this reason, joint custody is more costly than child support required by sole custody. Thus, one of the criticisms of joint custody is that it is exclusively a middle class or upper middle class phenomenon. In those cases where joint custody arrangements have succeeded the parents were people with financial stability and were usually professionals. Joint legal custody, however, may be an attractive alternative for working class parents, since it requires few, if any, additional expenses. Joint physical expenses might be reduced by the taking of smaller apartments or by sharing houses with other people, or by the child's staying in the maternal residence and the parents' alternating periodically.

5. Geographic proximity of the parents' residences is another factor that should be considered, though not necessary to the arrangement. This factor is not as important to joint legal custody as it is to joint physical custody. It has been said that geographical closeness is the sine qua non of joint custody. Geographical proximity avoids the long commutes for the child and allows him or her to maintain a single set of friends and enjoy neighborhood activities, which are important in the child's development. There are no reported joint custody cases in which both parents lived on the opposite coasts of the United States. Serious scrutiny should be given to a joint custody arrangement in which the parents do not plan to live relatively near one another.

6. A final consideration in determining the appropriateness of a joint custody arrangement is...
custody arrangement is the age and number of children involved. The authorities are widely split on these issues and some believe that joint custody is more appropriate for younger children than for older ones.  

Another area that should be of concern to Kentucky courts in implementing the joint custody statute has come to light as the result of a California decision. The case deals with the interpretation of a statutory provision very similar to a Kentucky provision. In Burge v. San Francisco,\(^9^9\) the statute dealt with the single parents' right to compromise a minor child's claim. A child, custody of whom had been granted jointly with personal custody in the mother, was injured in an accident. The child's father filed a suit on his behalf and, subsequently the mother reached her own out of court settlement with the defendant's insurance company unknown to the father. On appeal, the court held that since the mother had personal or physical custody of the child, she was empowered to settle out of court without the father's permission.\(^0^0\) The effect of that decision was to diminish the power of the parent sharing legal custody but not having physical custody. A dissenting judge complained that the majority's decision had virtually nullified joint custody orders in that state.\(^0^2\) As pointed out, the minor's claim was to be paid to the person having custody and that

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99. Handling amount of not more than $10,000 due to person under disability.—Whenever a person under disability, having no guardian or committee, is entitled to receive a sum not exceeding ten thousand dollars ($10,000), exclusive of interest, in any action wherein real estate has been sold or in the settlement of any estate has been sold or in the settlement of any estate or from any other source, the court in which the action is pending, or, if the sum does not derive from such action, the district court, may order the sum to be paid to the persons having custody of such ward. Before entering the order, the court shall be satisfied by affidavit or oral testimony that the ward is in the custody of the person to whom it is proposed to pay the money, and the latter, upon withdrawal of the money, shall be under obligation as trustee to expend it, for the support, maintenance or education of the ward. When the order is made no bond shall be required of the person having custody of the ward and the purchaser of the real property may pay the share into court, and no lien shall remain on the property therefor and the money may be withdrawn by the person mentioned in the order without his giving bond. A release executed by the person to whom the court has ordered the sum paid shall have the same effect as a release by a duly appointed guardian or committee.


100. 262 P.2d 6 (Cal. 1953).
101. Id. at 10-11.
102. Id. at 13 (Carter, J., dissenting).
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person could also sign appropriate releases. It appears, therefore, that this problem could be solved beforehand in the drafting of the joint custody agreement.

A word should be said here about a legal problem which may arise due to a lack of specificity in the joint custody agreement. It relates to taxation. The basic problem is that the tax laws are not drafted with joint custody in mind, resulting in ambiguities and confusion when they are applied to parents who have joint custody. If one parent, for example, supports the other, the relative merits of such a device are periodic payments, and there should be a waiver for funds designated for child support.\footnote{I.R.C. §§ 71(a)-71(b); Treas. Reg. § 1.71-1(E) (1978).} It should be noted, however, that there are some sections of the Internal Revenue Code\footnote{Id. § 44(A).} that take into account a divided custody situation. For example, section 44(a)\footnote{Id. § 44(A)(F)(5)(b).} of the Internal Revenue Code allows a tax credit for qualifying individuals, including dependent children under fifteen. Section 44(A)(f)(5)(b)\footnote{Id. § 44(A)(E)(5)(b).} of the Internal Revenue Code provides that if a child is in the custody of one or both of its parents for more than one half of a calendar year such child shall be treated as a qualified individual with respect to the parent who has custody for the longer period and shall not be treated as being a qualifying individual with respect to the other parent.

Another section of the Internal Revenue Code that raises potential problems from the tax standpoint is section 152\footnote{I.R.C. §§ 71(a)-71(b); Treas. Reg. § 1.71-1(E) (1978).} defining a dependent for the purpose of the dependent exemption under section 151.\footnote{Id. § 44(A).} The general rule of section 152(e)(1)\footnote{Id. § 152(e)(1) (1978).} is that if a child receives more than half of his or her support from divorced or legally separated parents, and if the child is in the custody of one or both the parents for more than one half of the year, the parent having custody for the greater portion of the year is entitled to the exemption. The exemption this general rule concerns is found in section 152(e)(2).\footnote{Id. § 152(e)(2).} While the Internal Revenue Code poses inconveniences for those wishing to obtain joint custody, none of these potential obstacles warrant abandonment of the joint custody concept. Perhaps the growing use of the joint custody arrangement

103. I.R.C. §§ 71(a)-71(b); Treas. Reg. § 1.71-1(E) (1978).
104. Id. §§ 44(A), 44(A)(F)(5)(b).
105. Id. § 44(A).
106. Id. § 44(A)(E)(5)(b).
107. Id. § 152.
108. Id. § 151.
110. Id. § 152(e)(2).
will force a revision of the sections just mentioned.

One of the final areas of concern in considering a joint custody arrangement relates to the issues that are raised when a substantial change of circumstances succeeds a joint custody decree. Perhaps the most common change that demands a reevaluation of the custody arrangement is remarriage. The authorities are divided as to the impact of remarriage on joint custody, some saying that remarriage doesn’t disrupt the joint custody arrangement¹¹¹ and others taking the opposite view.¹¹²

Another area of concern is relocation. This can be a formidable problem in transient modern society. The choice between losing joint custody and losing one’s job is obviously a difficult one.¹¹³

Other problems may be presented when joint custody is shared by parents who are initially compatible but later develop irreconcilable antagonisms, when an older child chooses to live exclusively with one parent, or when a family member becomes mentally or physically disabled. These situations may call for a modification of the arrangement. The probability of the occurrence of such events should be in the mind of the drafter of the agreement. Nevertheless, it is impossible to foresee all potential crises that may arise in families.

CONCLUSION

It should be evident that the joint custody concept has blossomed into a recognized and sometimes preferred alternative to sole custody. With the codification of joint custody in Kentucky, the bell has tolled for the tender years presumption.¹¹⁴

Joint custody is not a panacea and was not intended to be. Whether it will be granted will depend upon its appropriateness to the circumstances of the case.¹¹⁵

Lawyers and judges will play an important role in the implementation of the joint custody statute. The parties seeking it, however, will play a more significant part. Joint custody will be used only in limited situations and the successful use of the concept will depend

¹¹¹. Co-Parenting, supra note 82, at 122.
¹¹³. See Ryan v. Ryan, 174 Minn. 577 (1974) for an example of this dilemma although this was a sole custody case.
¹¹⁴. See Moore v. Moore, 557 S.W.2d 613 (Ky. 1979); Roth, The Tender Years Presumption in Child Custody Dispute, 15 J. Fam. L. 423, 425 (1977).
upon the cooperation of the parties to whom joint custody is granted. Acceptance by the courts of this concept will depend upon their eagerness in assuming the burden it will place upon them of inquiring into its practicability and its weighing benefits against detriments.

The joint custody arrangement has been received with enthusiasm in other jurisdictions. The viability of the concept is evidenced by its use in other types of custody disputes.116 It is hoped the concept will meet with a hospitable reception in the Kentucky courts.

116. Man's best friend is his dog, and there is little argument about it, either—unless, that is, his wife is equally fond of Fido, and the marriage sours. If this should happen, the struggle over who keeps the canine could be almost as painful as divorce settlements involving children. Last week, Ingham County, Mich., Circuit Court Judge James R. Giddings took a page from child-custody precedents and issued a rare joint custody of a Shetland sheepdog. When Preston and Mary Brazee's divorce case came to trial Aug. 11, they could not agree on who would keep Blackie. The dog had been with the Lansing, Mich., couple since shortly after their marriage three years ago. Giddings ordered the Brazees to share custody of Blackie, exchanging the dog at 4 p.m. each Sunday.

Cincinnati Enquirer, Aug. 21, 1981, at E9, col. 4.
APPENDIX

Suggested Provisions in the Joint Custody Agreement

The provisions set out in this appendix should not be considered models but only suggestions. They may be overcomprehensive for some purposes and undercomprehensive for others. They are offered to emphasize the issues that arise when the drawing up of a joint physical custody agreement is contemplated.

First, the joint physical custody agreement ought to be completely separate from the original separation agreement. It should begin with a preamble stating that both parents are capable and loving in spite of their choice of different lifestyles and outlook, and that they have loving relationships with their children. It should be further stated that the parents live geographically close to each other to date, and that they are open and flexible in the sharing of child care responsibilities. The agreement should specify that the time spent with the children and the custody of the children will be joint and that both parents will have direct input in major and minor decision-making, carefully distinguishing the two types of decisions and offering examples of each. It is also important that the agreement define any terms which are critical to an understanding of it, particularly its most pervasive term, "joint legal custody."

Second, the parties may compile a detailed living schedule to be placed in the agreement, discussing such subjects as how the children will be transferred from one house to the other, visitation with the children, vacations, holidays, and birthdays. The schedule may then be revised annually or when needed.

Thus, an additional provision should be included taking into account necessary modifications of the agreement. Regardless of how detailed the schedule is, room will need to be left for changes. Short term schedule changes, caused by illness or unexpected job demands, may be specifically authorized. Provision should be made for notification and assistance in the event of an emergency. Long term schedule changes may be necessitated as the children age and circumstances change. Clauses calling for periodic, annual renegotiation of the living schedule may be incorporated in some agreements.

Another important provision will be that relating to finances and the allocation of expenses. In addition to the distribution of the financial burden, such things may be taken into account as the definition of income for purposes of the agreement, a reciprocal right
to inspect the ex-spouse's paycheck and tax returns, a contingency plan in the event of one parent remarrying, stopping work or changing jobs. If the major expenses are specified, they might include educational, medical and dental expenses, and costs for life insurance, transportation of the child, food, clothing, shelter, gifts and emergency expenses. Tax questions, such as who will claim the child as a dependent, should also be resolved.

Heading the list of miscellaneous inquiries that need to be made in shaping the joint custody agreement is the frequent question concerning what happens if one parent desires to move. A number of approaches are possible. Provisions may be made for mandatory renegotiation of joint custody when a move is contemplated. A prohibition against taking the child out of the state without the other parent's permission may be included, or schedule modifications favoring the non-moving parent.

A provision for dispute resolution should also be incorporated into the agreement. This may be handled either through modification of the custody decree, which will obviously necessitate the judicial intervention, or through an alternative mechanism such as mediation or arbitration. Though details may vary, the mediation clause should name one who is familiar with the family situation, either an impartial expert or a friend, as mediator. Decisions which the parents are unable to reach mutually must be presented to the mediator by both parties. The mediator will then discuss the problem with the parents and suggest a compromise. This system offers privacy, speedy decisions, and individual attention, all of which are scuttled by judicial review of disputes. Arbitration is another non-judicial procedure for resolution of post-divorce disputes with similar advantages to mediation, the main difference being that arbitration decisions are binding. The parties may also provide for resolution of disputes through an interdisciplinary committee. The committee is chosen by the parents to decide questions upon which they cannot agree and might include a pediatrician, member of the clergy, psychiatrist, educator, and an impartial lawyer. In addition, there should be an ally of each adult and a child psychologist with whom the child may openly discuss his or her feelings.

Other items that may warrant explicit delineation in the joint custody agreement are a description of disciplinary theories and procedures to be practiced by the parents, provisions for the child's input as he or she grows older, prohibitions against attempting to prejudice the child's view of either parent, and an
itemization of the duties and responsibilities of the parent with whom the child is residing. The parties should also append a survival clause to the effect that the divorce decree will not affect the separation agreement.

It should be noted that the foregoing suggested provisions are intended for inclusion in joint physical custody agreements. A joint legal custody agreement need not concern itself with scheduling and modifications of schedules. Issues relating to expenses and miscellaneous provisions, however, generally do arise in both joint legal as well as joint physical custody arrangements.

While the importance of devising a lucid, accurate and flexible agreement may not be overemphasized, the nature of the agreement alone does not guarantee its success. It must be stressed again that the family must strive to make the agreement function as it was intended. This may require a reevaluation and restructuring of habits and patterns of interacting and will necessitate a strong commitment to carry forward the agreement.
A WORD TO THE WISE: INTERSPOUSAL IMMUNITY IN OHIO IN LIGHT OF BONKOWSKY V. BONKOWSKY

Bonkowsky v. Bonkowsky

Hanna Bonkowsky was injured when an automobile driven by her husband, Otto, was involved in a collision with another car. The incident occurred in Vermont, though both were citizens of Ohio. Hanna and Otto were married at the time and still are today. Mrs. Bonkowsky filed suit in common pleas court seeking damages for the injuries she suffered in the crash, and alleging that her husband’s negligence caused the mishap. It was stipulated that Mr. Bonkowsky’s insurance policy did not expressly bar the action.

Otto filed a motion for summary judgment contending that Ohio’s adherence to the doctrine of interspousal tort immunity barred Hanna’s recovery, even though the law of Vermont, the lex loci delicti, would allow such a claim. The plaintiff countered by filing a motion in opposition, arguing that Ohio is among a shrinking minority that adheres to the outdated doctrine. She argued that the doctrine is without rational basis, and the time had come for Ohio to reconsider and discard the archaic concept.

The trial court granted Otto’s motion for summary judgment. Hanna appealed to the Court of Appeals of Cuyahoga County presenting three assignments of error. This comment will deal only with the second assignment of error, which claimed that the trial court should have stricken down the doctrine of interspousal tort immunity. The court of appeals affirmed the judgment of the trial court by ruling that Ohio’s public policy, as expressed by the Supreme Court of Ohio, expressly prohibits the maintenance of negligence actions between spouses. However, in a concurring opinion, Justice Day expressed a desire that the doctrine be overturned but felt that such a decision should be made by the supreme

2. Id. at 113.
3. Id. at 114.
In a separate concurring opinion, Justice Patton strongly attacked the doctrine and explained that his concurrence was not without deep misgivings. The remainder of this comment will analyze the origin of interspousal tort immunity and present many of the common arguments in favor of it. An attempt then will be made to present countervails taken by many courts that have discarded the immunity in an effort to show why Ohio should do likewise.

**Historical Background**

Prosser states that few topics in the law of torts are filled with such inconsistency and unsatisfactory reasoning than that of injury.

5. 19 Ohio Op. 3d at 114 (Day, J., concurring).
6. Id. at 114-16 (Patton, J., concurring).

ries to members of families inflicted by other family members:

Here there is waged a battle between conflicting conceptions of the family and between idea [sic] of individual and relational rights and duties. Here the last few decades have witnessed a great revival of interest, and a shift in the tendencies of the law in the direction of liability where it did not exist before. 8

An important concept behind the doctrine came from early common law which considered the husband and wife as one person, at least under the law, with the husband the controlling party. 9 Hence, Prosser notes, “It has been said, whether humorously or not, that at common law husband and wife were one person and that person was the husband . . . .” 10 While this is not entirely true, the common law stripped the wife of her legal identity for most purposes. 11 She lacked the power to bind herself in a legal contract 12 during coverture. 13 Nor was she capable of acquiring or disposing of property without the consent of her husband. 14 Furthermore, all personal property owned by her at the time of marriage or acquired during coverture vested absolutely in the husband. This rule included the wife’s choses in action, if the husband reduced them to possession during marriage. 15

The reasoning behind these rules may never really be understood, but they probably combined to form the basis of interspousal tort immunity. That is the view espoused by Prosser:

It is perhaps idle to speculate at this late date as to how far the historical basis of these rules is a mixture of the Bible and medieval metaphysics, the position of the father of the family in Roman law, the natural law concept of the family as an informal unit of government with the physically stronger person at the head, or the property law of feudalism. A combination of all these things made it impossible to maintain a tort action between husband and wife. 16

One may easily follow such reasoning. If a man committed a tort against his wife and she attempted to sue this would be a chose in action against him. At common law he was entitled to his wife’s

9. Collidge v. Parris, 8 Ohio St. 594, 595 (1858).
10. W. Prosser, supra note 8, at 859.
12. Mc Clellan v. Filson, 44 Ohio St. 184, 186, 5 N.E. 861, 862 (1886).
15. Walden v. Chambers, 7 Ohio St. 30, 33 (1857).
16. W. Prosser, supra note 7, at 860.
chooses in action. Therefore, he would be entitled to an action against himself. Such suits were not allowed.\textsuperscript{17} Other courts rejected this approach and simply stated that during marriage the husband and wife were one and to entertain a suit by an entity against itself would be frivolous.\textsuperscript{18}

**Abrogation of Interspousal Immunity**

To inquire further into the underlying basis of the doctrine would be fruitless, for it was part of a social order that ended over one hundred years ago with passage of the first Married Women's Act or Emancipation Act, as it was called in some jurisdictions.\textsuperscript{19} Today, where the immunity survives, it seems to be based on various social policy concerns.

Emancipation acts vary from state to state, but for the most part, they return to the wife the power taken from her and vested in her husband by the common law. Primarily, they endow the wife with a separate legal identity capable of ownership and control of property including choses in action. She can now sue and be sued in her own name as well as entering contracts independently. Almost without exception, a married woman can now maintain an action in tort against her husband regarding a property interest. However, the extent to which courts allow tort actions by one spouse against the other varies greatly from jurisdiction to jurisdiction.\textsuperscript{20}

A court's interpretation of state statutes is usually vital to its determination whether a state retains the interspousal immunity doctrine. Some legislatures have drafted specific provisions that prohibit husband and wife from suing one another during coverture.\textsuperscript{21} Most of these statutes, however, do not specifically mention personal torts. This has permitted courts of different states in interpreting almost identical statutes, to arrive at opposite conclusions to allow or disallow interspousal tort immunity.

The original Ohio act was passed in 1887, and it is silent as to personal torts.\textsuperscript{22} The modern version permits a married woman to own and control property the same as a single woman,\textsuperscript{23} to enter

\begin{footnotesize}
17. Id.
20. Id. at 861-62.
\end{footnotesize}
into contracts with her husband or anyone else, and to sue and be sued as if unmarried. The exact wording of the last statute is, "A married woman may sue and be sued as if she were unmarried, and her husband may be joined with her only when the cause of action is in favor of or against both." According to the Ohio Supreme Court,

Ohio courts have interpreted the statutes to mean that in Ohio a wife may "take, hold and dispose of property, real or personal, the same as if unmarried," and she may enter into contracts with her husband and she may "sue and be sued as if she were unmarried" but such legislation does not abrogate the common-law principle, founded on a wise public policy, which precludes the wife from maintaining an action against her husband to recover damages for a tort committed by the husband upon the wife, while they are living together as man and wife.

In another case, Madget v. Madget, the court pointed out that the Married Women's Act was silent on the matter of personal torts between spouses and reasoned that, if the legislature had intended to abrogate the immunity, an express provision would have been added. The court also explained that the immunity did not bar some property actions between spouses. An earlier decision had expressed concern that, if personal tort actions were allowed, the number of differences to be settled in court would increase one hundredfold.

The cases cited above are very old and were litigated at a time when most jurisdictions still adhered to the common law rule. More recently, however, in Lyons v. Lyons in 1965, and Varholla v. Varholla in 1978, the Ohio court has expressed a willingness to retain the doctrine.

Ohio is not alone in this. Nevertheless, it should be noted that other jurisdictions have arrived at broader interpretations of very similar provisions. The pertinent Alaska statutes give a married woman the right to own and control property, to make contracts

24. Id. § 3103.05.
25. Id. § 2307.09.
27. 85 Ohio App. 18, 32, 87 N.E.2d 918, 926 (1949).
28. Id.
30. 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965).
31. 56 Ohio St. 2d 269, 383 N.E.2d 888 (1978).
and incur liabilities as a single woman, and to prosecute and defend actions protecting her rights and property as if she were unmarried. These provisions neither grant nor deny a wife the right to sue her husband, but the Alaska court has interpreted them liberally enough to cover the matter and to allow interspousal suits for personal torts. 32

It is doubtful now if any state maintains as its reason for the continued use of the doctrine the old legal fiction of legal identity of husband and wife. Rather, the present day rationale is based on one or more policy considerations. 33 One of the most commonly expressed reasons for immunity is that it promotes marital harmony by discouraging a spouse from pursuing claims to the detriment of personal family relations. 34 According to Prosser, this is the chief reason given by most courts, but he finds it highly unpersuasive and questions how much marital harmony there is left to preserve after a husband has beaten or otherwise committed a tort upon his wife. 35 Prosser's reasoning is employed in case after case where the doctrine has been abrogated. 36 The North Carolina expression of the new rationale is typical:

Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to 'love, cherish, and protect' her. We have progressed that far in civilization and justice. 37

Though no one can question the promotion of marital harmony as a worthy state interest, with the ever-climbing divorce rate it seems doubtful that the doctrine has preserved many marriages. Moreover, the strain of injuries caused by negligent or even intentional conduct is a more serious threat to harmony than imposition of the resulting suit. 38 One does not have to strain very hard to see this. Refusing to allow a wife to sue her husband will not increase his love and respect for her. It is the root of the trouble and not the lawsuit that causes the disharmony. In fact, it almost seems

33. Id. at 96.
34. 2 Ohio St. 2d at 244, 208 N.E.2d at 535.
35. W. Prosser, supra note 7, at 863.
36. 259 Ind. at 20-21; 284 N.E.2d at 796; 262 S.W.2d at 484; 388 A.2d at 958; 287 P.2d at 595.
38. 19 Ohio Op. 3d at 115 (Patton, J., concurring); 56 Ohio St. 2d at 274, 383 N.E.2d at 891 (Brown, J., dissenting).
INTERSPOUSAL IMMUNITY

absurd to suggest that mere removal of the possibility of suit would take with it the animosity resulting from the tortious conduct. The remedy may go, but the discord remains.

Also, the argument is presented that to allow such suits would open the door to collusion between spouses to bring fraudulent claims against the defending spouse's insurance company. The response is that there is a possibility of fraud in every kind of action. The courts and the jury system have been disposing of fictitious claims for years and can similarly perform that function in these cases. It would indeed be unfair to bar all legitimate cases in an attempt to prohibit recovery in the few fraudulent ones. This point also suggests the interesting argument that the doctrine is unconstitutional. In dissenting, in Varholla, Justice Brown argued that the immunity denied equal protection and due process of law by creating an irrebuttable presumption of collusion. He reasoned that barring an action because of threat of collusion presumes that all such suits are collusive, when in fact this is not universally true. He felt it grossly unfair to deny all injured parties their remedy in order to prevent recovery in some fraudulent cases. The majority of these cases probably would be legitimate and most of the fictitious ones would fail.

There are still other courts that do not rest on the foregoing arguments but simply state that such a policy decision is better left to the legislature. While it is true that the doctrine is a part of the common law, stare decisis should not be carried so far as to ignore reality. The very strength of the common law is its ability to adapt to meet the ever-changing needs of society. Therefore, it seems that, while adherence to stare decisis may be an argument, it does not build the impenetrable barrier around immunity that some courts seem to stress.

Furthermore, a fear seems to persist that "matters of no serious moment" would be brought into court. This has prompted some states to abrogate immunity with caution. Most courts that have abrogated immunity have emphasized that a husband and wife are

39. 262 S.W.2d at 484; 26 Cal. Rptr. at 105, 376 P.2d at 73.
40. 56 Ohio St. 2d at 273-74, 383 N.E.2d at 891 (Brown, J., dissenting); see Vlandis v. Kline, 412 U.S. 441, 446, 452 (1973) (irrebuttable presumptions disfavored).
41. 2 Ohio St. 2d at 246-47, 208 N.E.2d at 537.
42. 259 Ind. at 22-23, 284 N.E.2d at 797; 262 S.W.2d at 484.
still not to be treated totally as if separate and single individuals. There is a sharing in marriage that is entirely different than a contact between two strangers. The risk of intentional contact is so great that normally there will be no recovery unless the contact was excessive.44 The problem, of course, is determining what contact is actionable between spouses and what is not. The Oklahoma court illustrated this problem by explaining that no wife could maintain an action against her husband for an unwanted kiss as a single woman could sue a stranger, but it would be equally ridiculous to bar a wife from recovering damages for a gunshot wound inflicted by her husband. When immunity was abrogated, however, courts had difficulty distinguishing between actions that could be brought and those that could not. Courts should not, nevertheless, retain immunity “merely because of the difficulty in drawing the exact line of demarcation between assault with a gun and assault by a kiss.”45 Other courts have said that these fears are unfounded:

There is nothing in the experience of the dozen or more jurisdictions in this country which do permit spouses to sue one another for personal torts which would indicate that court calendars have become cluttered with trivial matrimonial disputes. We think it is fair to assume that few litigants would consider it worthwhile to initiate such actions.46

Furthermore, should there be an inordinate number of such trivial claims, the courts could dispose of them with the doctrines of consent and assumption of the risk arising out of the marriage relationship.47 The courts probably would not be bothered primarily with trivial claims, but would hear many in which the injury is substantial.

Still another justification courts use for not changing the old rule is that wives have adequate remedies already and therefore do not need the added protection of a tort claim. This approach posits that she may press criminal charges48 against her husband or divorce him and collect alimony. The argument fails as to criminal proceedings because their purpose is to prevent certain conduct and to punish or reform the actor. They are not intended to, and

46. 500 P.2d at 775.
47. Id.
48. 28 Ohio Jur. 2d Husband and Wife § 95 (1958) (there is no general criminal immunity between husband and wife).
do not, compensate an injured party. Similarly, alimony is not intended to compensate a wife, but is a discharge of the obligation to support. To argue otherwise is absurd. The only usefulness of these actions is to prevent such wrongs from occurring again; they in no way compensate for past wrongs. One final absurdity of this assertion is the conflict between it and another of the favored arguments for immunity, preserving marital harmony. It is an obvious anomaly to preach that immunity promotes marital harmony and in the next breath to say that abrogation is not needed because the spouse can sue for divorce or press criminal charges. Divorce or criminal action seems more disruptive of conjugal harmony than a civil action.

Most of the arguments in favor of the doctrine, along with their counterarguments, have been expressed above. It seems that Ohio should take action to allow some interspousal tort claims. Following are the three most common approaches taken by states that have discarded the old rule. The most popular approach was taken by California in allowing claims for both negligent and intentional torts, reasoning that there was no logical or legal reason to draw a distinction between the two. Obviously all of the foregoing reasons for abrogating immunity hold for negligent as well as intentional actions, even if not as strongly.

Other courts, however, have limited the kinds of personal torts they will hear. In Rupert v. Stienne, the Supreme Court of Nevada was faced with deciding a negligence action in which an automobile driven by a man crashed, injuring his wife. In Nevada, the law requires that car owners take out liability insurance policies. Therefore, the court reasoned that in such actions the insurance company would usually bear most of the financial burden of the damages so that there would be little disruption within the marriage. The injured party would be compensated by the insurance company, so marital harmony would flourish. Resting on this rationale, the court stressed that it would wait until presentation of a more fitting fact situation before it would consider further departure from the rule.

51. 87 P.2d at 666.
52. 26 Cal. Rptr. at 104, 376 P.2d at 71.
53. 528 P.2d 397 (Nev. 1974).
54. Id. at 1016-17.
At this time, Ohio does not require the purchase of liability insurance. It is conceivable, then, that one injured spouse could sue the other with no insurance to bear the burden. The majority of drivers are conscientious and the purchase of automobile liability insurance is becoming universal. During the arms-length negotiations the insurer could bargain to have it expressly stated in the contract that the insured’s spouse is not covered by the contract. This is a much better approach than simply having a court imposed blanket exclusion of all such suits.55

The final alternative would not help the plaintiff in a negligence case like Bonkowsky, but it has been adopted by some states. This version would lower the common law barrier only for cases involving intentional torts. The Supreme Court of Texas has noted that, in recent years, the doctrine has come under severe attack, and has been abolished or modified by many jurisdictions. In deciding to withdraw immunity from intentional conduct, the court reasoned:

[W]e do not believe that suits for wilful or intentional torts would disrupt domestic tranquility. The peace and harmony of a home which has already been strained to the point where an intentional physical attack could take place will not be further impaired by allowing a suit to be brought to recover damages for the attack.56

While there could be no insurance coverage of an intentional tort, the point is well made that, when intentional injurious acts occur, there is no harmony left to preserve.

Conclusion

The doctrine of interspousal immunity has its origin far back in the common law. It seems to have been founded on notions of unity between husband and wife. In the mid-eighteen hundreds, the Married Women’s Acts did away with this archaic concept. Instead of abrogating immunity at that time, however, most states retained it, based on public policy considerations. Slowly, court after court has come to realize that even these considerations are outdated. There is a growing refusal to accept the ideas that marital harmony still may exist when one injured spouse is denied recovery from the other, that most of these suits are fraudulent, or that abrogation will result in a flood of petty claims. Many courts now realize that what is at issue is the principle, strongly entrenched in American law, that an injured party should have a

55. 300 A.2d at 641.
56. 560 S.W.2d at 927 (Tex. 1978).
remedy. Ohio should carefully analyze its bases for the immunity and decide whether the doctrine rests on concern for public well-being or merely on the quicksand of hollow words. It may then be able to release itself from a shrinking, deluded minority and join a growing, realistic majority.

Stanley T. Turner
TOXIC AGENTS, CARCINOGENS, WORKER HEALTH, COST-BENEFIT ANALYSIS AND THE CLAMOR FOR REASONABLE OSHA REGULATIONS: A SURVEY OF JUDICIAL AND OTHER ANSWERS TO A COMPLEX SOCIO-TECHNOLOGICAL CONTROVERSY

On June 17, 1981, in the consolidated cases of American Textile Manufacturers Institute, Inc. v. Donovan and National Cotton Council of America v. Donovan (hereinafter American Textile or the Cotton Dust Decision), the United States Supreme Court held that the Occupational Safety and Health Act (hereinafter OSH Act) does not require the use of cost-benefit analysis by the Occupational Safety and Health Administration (hereinafter OSHA) prior to the promulgation of a standard under the same act. The OSH Act had declared as national policy the assurance of safe and healthful working conditions for every working man and woman in the United States. As part of the delegation of legislative power, Congress authorized OSHA to promulgate standards which have the force of law limiting the levels of toxic chemical and physical

2. Id. [hereinafter cited as American Textile or the Cotton Dust Decision].
5. The Occupational Safety and Health Administration is the name of the agency within the Department of Labor that was created to execute the intent of the OSH Act.
agents, including carcinogens, in the workplace. Subsequent efforts to implement and enforce OSHA's mandate spawned the series of litigation that culminated in American Textile, which at last dealt head-on with the issue of cost-benefit analysis. American Textile, also known as the Cotton Dust Decision, laid to rest a question that has haunted both the federal courts of appeals and the Supreme Court since the enactment of the OSH Act in 1970. The Supreme Court left the issue unanswered a year ago in Industrial Union Department, AFL-CIO v. American Petroleum Institute, also known as the Benzene Decision.

The question has been a difficult one, encompassing multifaceted disciplines including economics, engineering technology, and medicine. While, on the one hand, it is scientifically esoteric, on the other, it is highly charged emotionally, juxtaposing the financial health of companies against the bodily health of workers. Despite the apparent scientific complexity of American Textile, the Supreme Court had to address an axiological question which cried out for an axiological answer. The scientific uncertainties which shrouded the controversy, while holding the key to its understanding, turned out to be peripheral complications. They had to be judicially disposed of along the way in as satisfactory a manner as permitted by the dearth of factual information available. This comingling of factual science and axiological policy, required the Supreme Court to settle the controversy in two parts over a two term duration: American Petroleum dealt with the issue of scientific proof; American Textile addressed the axiological or policy issue. While the question presented in American Textile was narrowly framed, and consequently narrowly decided, it and American Petroleum are landmarks, which will have tremendous impact on

7. Id. § 655(b).
8. Id. § 659.
10. The courts have recognized the scientific and technological complexities involved in such litigation and the knowledge limitations of the judiciary during review. For example, the District of Columbia Court of Appeals in Industrial Union Department, AFL-CIO v. Hogdson, (see note 40 infra), the first OSHA health standard case, observed that "some of the questions involved in the promulgation of these standards are on the frontiers of scientific knowledge, and consequently as to them insufficient data is presently available to make a fully informed factual determination." Later, the same court also noted in AFL-CIO v. Marshall that "[j]udging the technological feasibility of a particular agency goal is beyond the expertise of the judiciary especially where the assessment involves predictions of technological change." 617 F.2d 696, 696 (1979).
the law governing future socio-technological disputes. These Supreme Court cases, as well as the courts of appeals decisions preceding them, are interesting not only because of their advanced-but-narrow socio-technological subject matter but also because they help define, in a timely manner, the constitutional framework for the functioning of the three branches of the federal government and the role of federalism in resolving the ever-increasing number of complex socio-technological disputes in the nation's courts.

This comment, after first surveying the often inconsistent decisions of the federal courts of appeals, will analyze and discuss the multidisciplinary ramifications of the Benzene and Cotton Dust Decisions.

I. The OSH Act: Root of Controversy

The OSH Act is a comprehensive piece of labor standard legislation enacted to alleviate a specific societal problem: the "ever-increasing human misery and economic loss in the workplace." Not surprisingly, implementation of the Act has generated criticism from many sectors, principally from businesses subject to its regulations. The OSH Act affects diverse interest groups; a court has noted that it is "the wide variety of conflicting interests that make OSHA's task a difficult one." In addition, its comprehensiveness makes the OSH Act vague, especially in the sections governing toxic materials and harmful physical agents. Toxic agents today

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12. On a federal regulatory level, socio-technological disputes result not only from OSHA activity but also from that of the U.S. Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), the Consumer Product Safety Commission (CPSC), and the National Highway Traffic Safety Administration (NHTSA). The relationship of the numerous regulations promulgated by these federal agencies with the other branches of the federal government, with the various state governments and with the public at large gives rise to many complex legal questions that may require constitutional answers.
13. 29 U.S.C. § 655(f) (1976) provides for initial review by the United States Courts of Appeals with appropriate jurisdiction. For the text of the section, see note 26 infra.
14. For a history of the implementation of the OSH Act, see generally N. Ashford, Crisis in the Workplace: Occupational Disease and Injury (1976).
18. In all probability, the generality of the statute was unavoidable, given the state of the
cannot exclude carcinogens and other chronic poisons. 19 A primary purpose of the OSH Act is to enable the Secretary of Labor (hereinafter the Secretary) to promulgate and enforce standards designed to control the hazards to workplace health from these chemicals. 20 The findings of the Secretary are conclusive if supported by substantial evidence in the record considered as a whole. 21 In so delegating its legislative authority, Congress has propelled OSHA into a frontier zone of scientific controversy and uncertainty. 22 However, the key defect may lie in the silence of the OSH Act on the proper approach for the allocation of risks in the industrial environment and the cognate costs among the elements of society. 23 The OSH Act does not address the policy question how far it should go in the promulgation and enforcement of its standards with any measure of concreteness.

Section 6(b)(5) of the OSH Act directs the Secretary to

set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with [toxic materials or harmful agents] by such standards for the period of his working life. 24

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19. The legislative history of the OSH Act presented the example of lung cancer or mesothelioma from inhaling asbestos dust as an example of the severity of occupational disease. Other agents listed as incipient threats to the health of the worker include lasers, ultrasonic energy, beryllium metal, epoxy resins, and pesticides. [1970] U.S. Code Cong. & Ad. News 5179.


A search of legislative history does not uncover any information defining "feasible." The exact meaning of "feasible" has been left to OSHA standard-making, and to subsequent review by the courts. Similarly, the concepts of risk allocation and cost assumption are not adequately addressed in the OSH Act. The only other section that provides guidance to the courts during review also perplexes them. Section 3(8) defines an OSH standard as one "which requires conditions, or the adoption or use of one or more practices, means, methods, operations or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." Unfortunately, the key phrase "reasonably necessary or appropriate," as contained in the OSH Act, is a term of art which conceivably could, and indeed did, fail to meet the level of quantitative precision that may be the sine qua non for the definitive resolution of a complex problem touching the state of the art in science and technology.


26. The section provides:

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

27. See note 21 supra.


29. A most interesting debate between a lawyer and a scientist occurred between Prof. Green and Dr. Handler over the role of quantitative scientific techniques in public policy and law making. Prof. Green opened by commenting on Dr. Handler's speech at a 1973 National Academy of Sciences forum entitled How safe is safe? See generally Green, The Risk Benefit Calculus in Safety Determinations, 43 GEO. WASH. L. REV. 791 (1975). Dr. Handler's speech is reprinted at 794-803. For Dr. Handler's reply, see Handler, A Rebuttal: The Need for a Sufficient Scientific Base for Government Regulation, 43 GEO. WASH. L. REV. 808 (1975). In essence, Prof. Green argued that public policy-making by any government unit must necessarily be based in a combination of fact and policy judgement based on perceived values. Dr. Handler, on the other hand, argued for scientific quantification wherever possible. This debate, which occurred in 1975, is remarkable in that it preceded the dilemma presently confronting the courts by about half a decade. For a commentary on the debate, see Masten, Epistemic Ambiguity and the Calculus of Risk: Ethyl Corporation v. EPA, 21 S.D.L. REV. 425 (1976). See also Miike, Behney & Gough, Identifying and Regulat-
II. COURTS OF APPEALS' CASE LAW

Case law from the various circuits is vast, diverse, and often inconsistent. Because of the obvious divergence of opinion among the circuits concerning the necessity for cost-benefit analysis prior to OSHA standard-making, the Supreme Court finally had to decide the outstanding issue. Before the Supreme Court decisions may be discussed or understood, it is necessary to survey and present the major legal issues addressed and decided by the courts of appeals in a series of health standard cases.

A. Jurisdiction, Scope of Review and Judicial Construction

The jurisdiction of the courts of appeals to review directly OSHA standard making cases is clearly set forth in section 6(f) of the OSH Act. The controversy among some of the circuits, however, concerns the substantive issues encompassed by the courts' scope of review of OSHA's "hybrid-legislation," and of the latitude of judicial construction courts possess when the OSH Act had delegated legislative responsibility for a scientifically complex problem to an expert administrative agency.

For example, in the last OSHA health standard case to be decided by a court of appeals, United Steelworkers of America v. Marshall, the District of Columbia Court applied the statutorily required evidence test based on the "record considered as a whole." This standard of review is more rigorous than the traditional "arbitrary and capricious" test that is characteristic of environmental litigation. However, in so doing, the court noted that we do not pretend to have the competence or the jurisdiction to re-
solve technical controversies in the record, . . . or, where the rules require setting a numerical standard to second-guess an agency that falls into the zone of "reasonableness." . . . Rather, our task is to "ensure public accountability," . . . by requiring the agency to identify relevant factual evidence, to explain the logic and the policies underlying any [hybrid-] legislative choice, to state candidly any assumptions on which it relies, and to present reasons for rejecting significant contrary evidence and argument.38

The subject matter under review which has troubled the courts most is not OSHA's factual determinations, but its "regulations which are essentially legislative and rooted in inferences from complex scientific and factual data."39

Judge McGowan of the District of Columbia Circuit in the pioneering asbestos dust case, Industrial Union Department, AFL-CIO v. Hodgson,40 recognized that "[t]here are areas where explicit factual findings are not possible, and the act of decision is essentially a prediction based upon pure legislative judgment, as when a Congressman decides to vote for or against a particular bill."41 Because of the judgment involved, the court declared that such decisions "are not susceptible to the same type of verification or refutation by reference to the record as are some factual questions."42

The court acknowledged that one of the roots of the difficulty in selecting OSHA standards is the inherent scientific uncertainty which very often necessitates the application of extrapolated judgment:

But some of the questions involved in the promulgation of these standards are on the frontiers of scientific knowledge, and consequently as to them insufficient data is presently available to make a fully informed factual determination. Decision making must in that circumstance depend to a greater extent upon policy judgments and less upon factual analysis.43

Given this combination of scientific uncertainty and the need for policy judgment, the court, after careful analysis, limited its role as

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37. Such mixed standard-making that involves both scientific facts and value judgements has also been called "quasi-legislation."
38. 647 F.2d at 1207.
39. Id. at 1206.
40. 499 F.2d 467 (D.C. Cir. 1974).
41. Id. at 474. Also cited in Society of Plastics Industry, Inc. v. OSHA, 509 F.2d 1301, 1304 (2d Cir. 1975).
42. Id.
43. Id.
reviewing tribunal:

Judicial review of inherently legislative decisions of this sort is obviously an undertaking of different dimensions.

But it is surely not to be taken as a direction by Congress that we treat the Secretary's decision making under OSHA as something different from what it is, namely, the exercise of delegated power to make within certain limits decisions that Congress normally makes itself, and by processes, as the courts have long recognized and accepted, peculiar to itself. A due respect for the boundaries between the legislative and the judicial functions dictates that we approach our reviewing task with a flexibility informed and shaped by sensitivity to the diverse origins of the determinations that enter into a legislative judgment.44

In spite of a limited role, the court did require OSHA, when challenged, to proffer reasons for any choice of a course of action. Where facts existed, the court expected OSHA to "find those facts from evidence on the record," and "where no factual certainties exist or where facts alone do not provide the answer, [OSHA] should so state and go on to identify the considerations [it] found persuasive."

Judge Bazelon further elucidated the role of the court in AFL-CIO v. Marshall:46

The tasks of this reviewing court are thus to ensure that the agency has (1) acted within the scope of its authority; (2) followed the procedures required by the statute and by its own regulations; (3) explicated the bases for its decisions; (4) adduced substantial evidence in the record to support its determinations.47

In AFL-CIO v. Marshall, the court also struggled to define the meaning of "substantial evidence" in the face of scientific uncertainties and knowledge gaps in the area affecting human health and safety. The court felt that

[ factual proof about particular health risks may not be substantial in the traditional sense simply because the medical and scientific communities do not yet understand the nature of threatening diseases. To protect workers from material health impairment, OSHA must rely on predictions of possible future events and extrapolations from limited data. . . . Thus a court entrusted with the rigorous

44. Id. at 475.
45. Id. at 475-76.
46. 617 F.2d 636 (D.C. Cir. 1979).
47. Id. at 650 (citations omitted).
"substantial evidence" review must examine not only OSHA's factual support, but also the "judgment calls" and reasoning that contribute to its final decision.48

The court expected OSHA to "pinpoint the factual evidence and the policy considerations upon which it relied" and to include "the assumptions underlying predictions or extrapolations, and of the basis for its resolution of conflicts and ambiguities."49

As can be seen, during the review of an OSHA standard, the majority of the circuits would "combine supervision with restraint"50 and give due deference to the substantive expertise and subsequent findings of the agency, as long as OSHA can offer a reasonable explanation of the bases or assumptions underlying its combined technical-policy decisions. However, there is an additional question whether OSHA acted within the limits of the powers delegated by Congress. According to the court in Synthetic Organic Chemical Manufacturers v. Brennan,51 "by one formulation or another each [court of appeals] seems to have found room under Section 6(f) for judicial review for consistency between the Secretary's rule and the statutory language or purpose."52 The Fifth Circuit more plainly echoed this reasoning in the lower benzene decision, American Petroleum Institute v. OSHA,53 opining that a review under Section 6(f) "includes, of course, a review whether the Secretary exercised his decision-making power within the limits imposed by Congress."54 As will be noted below, it is when comparing OSHA's standard-making with the language of the OSH Act that various Courts of Appeals adopted differing philosophies of statutory interpretation and construction, and consequently, delivered diverging opinions. On the appellate level, the degree of self-imposed limitation upon judicial construction has varied from circuit to circuit, and the rulings on the substantive issues reflect each court's philosophy of judicial construction.55

48. Id. at 650-51.
49. Id. at 651.
50. Id. at 652.
52. Id. at 1159.
53. 581 F.2d 493 (5th Cir. 1978), cert. granted, 440 U.S. 906 (1979).
54. Id. at 497.
Thus, the law among some circuits was split, a state of affairs eventually resolved by the Supreme Court through *American Textile*. Of course, these same problems of judicial interpretation and statutory construction in the area of policy-directed, hybrid-legislation involving controversial scientific subject matter, the Supreme Court broached, vigorously argued, but left undecided in *American Petroleum*.56

B. Technological Versus Economic Feasibility

*Industrial Union Department, AFL-CIO v. Hodgson*57 identified and reviewed two types of feasibility: technological and economic. Although the court did not precisely define technological feasibility, it may be assumed that the court focused on and accepted OSHA’s findings on engineering controls, work practices like moisturization and monitoring programs, as the technological methods of compliance.58 In that early decision, the District of Columbia Circuit set forth the boundaries of feasibility:

Congress [did not intend] to require immediate implementation of all protective measures technologically achievable without regard for their economic impact. To the contrary it would comport with common usage to say that a standard that is prohibitively expensive is not “feasible.”

Congress does not appear to have intended to protect employees by putting their employers out of business – either by requiring protective devices unavailable under existing technology or by making financial viability generally impossible.59

The court found that standards could “be economically feasible even though, from the standpoint of employers, they are financially burdensome and affect profit margins adversely.”60 Under the concept, the continued existence of individual employers is not guaranteed. Indeed, the court felt that “[i]t would appear to be consistent with the purposes of the [OSH] Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of employees and is consequently financially unable to comply with the new standards as

56. For further discussion of their *ratio legis*, see text accompanying notes 101-34.
57. 499 F.2d 467 (D.C. Cir. 1974).
58. Id. at 482-88.
59. Id. at 477-78.
60. Id. at 478.
other employers." Subsequent federal case law has recognized and further interpreted the diametrically opposed technological and economic feasibility dichotomy.

Despite the elusive definition of economic feasibility, there appeared to be agreement among the circuits that Congress meant the OSH Act to be technology forcing. The case that followed and reaffirmed Hodgson is a safety standard case involving the prevention of injury by industrial machines. AFL-CIO v. Brennan upheld OSHA's no-hands-in-die standard, simultaneously setting the upper ceiling on technology forcing as the "massive dislocation of an industry." The court accepted the possibility of the demise of some marginal firms as the price of improving working conditions and realizing the goals set by the OSH Act.

The vinyl chloride decision, Society of Plastics Industry, Inc. v. OSHA similarly established that OSHA's policymakers were "not restricted by the status quo," could "raise standards which require improvements in existing technologies or which require the development of new technology," and were "not limited to issuing standards based solely on devices already fully developed." The vinyl chloride standard was promulgated by OSHA on May 24, 1974, after various toxicology and epidemiology research had shown vinyl chloride monomer to be a "'very virulent' carcinogen" which causes angiosarcoma, a fatal cancer of the liver, and other kidney and liver diseases. Petition for review by industry was denied on the ground that "the challenged aspects of the Secretary's vinyl chloride standard are supported by substantial evidence in the record."

61. Id.
62. A safety standard is distinguishable from a health standard. Safety violations increase the likelihood of traumatic injury, while health violations increase the likelihood of occupational disease. A traumatic injury, as its name suggests, is characterized by a sharp, easily determined causation, while the relationship between causative agents and the occupational disease is more difficult to establish. A disease is usually chronic and factors such as smoking, alcohol use, off the job exposure to causative agents, etc. are only some of the factors that complicate the etiology of the disease.
63. 530 F.2d 109 (3d Cir. 1975).
64. Id. at 123.
65. Id. at 122, quoting Hodgson, 499 F.2d 467, 477-78 (D.C. Cir. 1974).
66. 509 F.2d 1301 (2d Cir. 1975).
67. Id. at 1309.
68. The standard for vinyl chloride is found in 29 C.F.R. § 1910.1017 (1980).
69. 509 F.2d at 1308.
70. Id. at 1311.
The coke oven decision, *American Iron and Steel Institute v. OSHA*71 differed slightly from *Plastics*. It held that OSHA could impose a standard which required "an employer to implement technology 'looming on today's horizon,'" and was not "limited to issuing a standard solely based on technology that is fully developed today," though "the statute does not permit the Secretary to place an affirmative duty on each employer to research and develop new technology."72

Regulations controlling exposure of workers to coke oven emissions were promulgated by OSHA in October of 1976,73 after scientific research and testimony had shown that coke oven emissions were carcinogenic. The reviewing court found unequivocal evidence of this in the record.74 The court also accepted OSHA's highly controversial generic finding that there is no safe level for a carcinogen. The court evaluated technological feasibility by exposure level measurements obtained by field researchers, including the National Institute for Occupational Safety and Health, at various coke oven plants with advanced or exemplary emissions controls such as engineering controls, work practices and even respirator programs.75 The court also reviewed the issue of economic feasibility: "Although we are very sensitive to the financial implications of the standard and have endeavored to carefully weigh its effect upon the well-being of the industry, we are not persuaded that its implementation would precipitate anything approaching the 'massive dislocation' which would characterize an economically infeasible standard."76

The court upheld unanimously the coke oven standard, the specific performance standards, provisions for technology forcing with limits on research forcing as discussed above, and OSHA's carcinogen policy. It did note, in passing the statement of the Ad Hoc

71. 577 F.2d 825 (3d Cir. 1978). The law on judicial review of OSHA's carcinogen policy set out here appears to have been reversed by the Supreme Court in the Benzene Decision.
72. Id. at 838.
73. The standard for coke oven emissions is contained in 29 C.F.R. § 1910.1029 (1980).
74. Many scientists and researchers testified as to the carcinogenicity of the emissions. For example, Dr. Eula Bingham of the University of Cincinnati (later the Assistant Secretary for OSHA) testified that "there is overwhelming scientific evidence that coke oven emissions are carcinogenic" and that "the ambient atmosphere of coke ovens is a carcinogen rich environment." 577 F.2d at 831-32.
75. The use of respirators, a personal protective device to be used only as a control of last resort was struck down by the court when OSHA refused to defend that provision upon challenge by the petitioners. Id. at 839.
76. Id. at 836 (citation omitted).
Committee on the Evaluation of Law Levels of Environmental Chemical Carcinogens that "the concept of 'socially acceptable risk,' represents a more realistic notion," but the court did not dwell upon or explain it. When the Supreme Court later reviewed the benzene standard, it introduced a similar concept which it called "significant risk of harm" and, by judicial construction, grafted the concept onto section 6(b)(5) of the OSH Act. Thus, what the Third Circuit noted but passed over, in effect, returned to overrule parts of American Iron and Steel.

In the cotton dust decision, AFL-CIO v. Marshall, the District of Columbia Circuit ruled that "standards do not become infeasible simply because they may impose substantial costs on industry, force the development of new technology, or even force some employers out of business." The litigation over the cotton dust standard will be treated in greater detail below in the discussion of the Supreme Court decision.

The various courts of appeals have made clear that, while technological feasibility is of primary importance, it must always be viewed in combination with economic feasibility. For instance, according to the Third Circuit, economic feasibility cannot be overlooked because "Congress did not intend to eliminate all health hazards to industrial employees at the price of crippling an industry or rendering it extinct." As will be discussed shortly under cost-benefit analysis, it is over the question of what procedure is to be used for the determination of how much technology-forcing in light of economic constraints that the circuits collide.

In the last OSHA health standard case to be heard before an intermediate federal court, United Steelworkers of America v. Marshall, the Court of Appeals for the District of Columbia upheld OSHA's lead standard by a 2-1 vote. This decision, delivered

77. Id. at 832.
78. 617 F.2d 636 (D.C. Cir. 1979).
79. Id. at 655.
80. 577 F.2d at 835.
81. 647 F.2d 1189 (D.C. Cir. 1980).
82. The lead standard is found in 29 C.F.R. § 1910.1025 (1979). Lead in industry has been the subject of health scrutiny and standard-making for a number of years: (1) 1933-U.S.P.H.S. limit of 150 micrograms/cubic meter (ug/m³), (2) 1957-ACGIH limit of 200 ug/m³, (3) 1971-OSHA-ANSI limit of 150 ug/m³, (4) 1973-recommendation of a permissible exposure limit (PEL) of 150 ug/m³, (5) 1975-NIOSH-OSHA proposed PEL of 100 ug/m³, announced in 40 Fed. Rec. 45834 (1975), and (6) 1978-Final OSHA PEL of 50 ug/m³, published at 43 Fed. Rec. 53007 (1978). Essentially, the lead standard required a final PEL of 50 ug/m³ plus specifications for environmental monitoring, employee medical surveillance,
six weeks after the Supreme Court had invalidated OSHA's benzene standard and adversely affected its generic carcinogen policy, revitalized OSHA's health standard making under section 6(b)(5) of the OSH Act. The lead standard has been promulgated to control the accumulation of blood-lead in exposed workers. Judge Skelly Wright, writing for the majority, reviewed and upheld OSHA's lead standard in light of the law the Supreme Court enunciated in American Petroleum. It is important to note that, in United Steelworkers, the threshold question of "significant risk of harm" was a relatively easy one to answer when compared with that concerning the benzene standard. Lead is a better understood chronic poison than benzene, a carcinogen. The scientific uncertainties which plagued the benzene standard and OSHA's generic carcinogen policy are not present in the toxicology of lead poisoning.

The court began by analyzing the plurality opinion in the benzene decision and the reasons for the failure of OSHA's benzene standard. It then reviewed OSHA's lead standard in light of American Petroleum and found it passed muster. It noted that

1-10 years implementation time, respirator use in interim, medical removal protection, keeping of detailed records and the availability of records to workers and their representatives. 647 F.2d at 1204. See also NIOSH, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, CRITERIA FOR A RECOMMENDED STANDARD FOR INORGANIC LEAD (1978).

83. OSHA's beleagured carcinogen policy is found in 42 Fed. Reg. 54148 (1977). OSHA is currently working towards a revised carcinogen policy that will not be inconsistent with the Benzene Decision, but at time of writing, no official revision has been published.

84. 647 F.2d at 1203-07.

85. The court noted the availability from OSHA of a correlation of air-lead levels to blood-lead levels, and the likely distribution of blood-lead levels at a permissible exposure limit (PEL) of 200 micrograms (ug) of lead per cubic meter (m³) of air:

<table>
<thead>
<tr>
<th>Blood-lead level in ug/100g</th>
<th>% of population with given blood-lead level.</th>
</tr>
</thead>
<tbody>
<tr>
<td>over 60</td>
<td>22.4</td>
</tr>
<tr>
<td>50-60</td>
<td>32.6</td>
</tr>
<tr>
<td>40-50</td>
<td>28.7</td>
</tr>
<tr>
<td>under 40</td>
<td>16.7</td>
</tr>
<tr>
<td>total over 40</td>
<td>83.7</td>
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</tbody>
</table>

The distribution for a PEL of 50 ug/m³ is

<table>
<thead>
<tr>
<th>Blood-lead level in ug/100g</th>
<th>% of population with given blood-lead level.</th>
</tr>
</thead>
<tbody>
<tr>
<td>over 60</td>
<td>0.5</td>
</tr>
<tr>
<td>50-60</td>
<td>5.5</td>
</tr>
<tr>
<td>40-50</td>
<td>23.3</td>
</tr>
</tbody>
</table>
 unlike the benzene standard making, in devising the lead standard, OSHA did not aim at an absolutely risk-free workplace. In pre-enforcement review of technological feasibility, the court required OSHA to prove general feasibility of the standard within the industry. This could be done by "pointing to technology that is either already in use or has been conceived and is reasonably capable of experimental refinement and distribution within the standard's deadline." The court found that such proof will "establish a presumption that industry can meet the permissible exposure level (PEL) without respirators," and that "insufficient proof of technological feasibility for a few isolated operations within an industry, or even OSHA's concession that respirators will be necessary in a few such operations, will not undermine this general presumption in favor of feasibility." While the court held firms responsible for installing engineering and work practice controls to the extent feasible, it also ruled that any insufficient proof or conceded infeasibility of such methods can be offered to justify the use of respirators. The court examined the evidence for specific industries, upheld the lead standard for some industries, and remanded the rest to OSHA for further evidence-gathering and explanation in accordance with the decision.

OSHA's blood-lead level goal of 40ug/100g was supported by clinical data. The court concluded that "[a]s with OSHA's choice of a blood-level goal, so with its choice of a permissible exposure limit, we affirm the agency's chosen number as lying within a 'zone of reasonableness.'" The court also noted that, unlike the making of the benzene standard, this standard OSHA did not aim for an absolutely risk-free workplace. This is in line with the Supreme Court's conclusion from its reading of legislative history that Congress was concerned not with absolute safety, but with the elimination of significant harm. The court also recognized that respirators are a "last resort" type of control. They are to be employed only when engineering controls have failed or cannot be used. The use of respirators shifts a large part of the burden of vigilance on to the individual worker rather than onto a more foolproof-engineered system. The industries are primary lead smelting, secondary lead smelting, battery manufacture, brass and bronze (nonferrous) foundries, pigment manufacture, shipbuilding, automobile manufacture, electronic, gray iron foundries, ink manufacture, paints and coatings manufacture, wallpaper manufacture, can manufacture, printing, solder manufacture, wire patenting, pottery industries, brick manufacture, agricultural pesticide manufacture, leather manufacture, pipe galvanizing, gasoline additives manufacture, linoleum-rubber-plastics manufacture, paint spraying, ammunition manufacture, smelting and
In United Steelworkers, the court repeated its well-established opinion that "for economic feasibility, OSHA must construct a reasonable estimate of compliance costs and demonstrate a reasonable likelihood that these costs will not threaten the existence or competitive structure of an industry, even if it does portend disaster for some marginal firms." Thus, the court restated the rationale of its previous decisions on the cotton dust standard and the asbestos standard, as well as the ratio legis of the Third Circuit's coke oven decision and of the Second Circuit's vinyl chloride decision. The District of Columbia Circuit's ruling on economic feasibility has been consistent and unyielding ever since Hodgson. Since the issue of whether quantitative balancing of cost to benefit is necessary under the OSH Act was not addressed by the court in United Steelworkers, the law enunciated in the court's prior decisions remained in force. Hence, although United Steelworkers interpreted and applied the law set forth in American Petroleum, it was far from conclusive: not only did it fail to settle the clamor by certain groups for reasonable OSHA regulations, but in all likelihood, it reignited the debate, thus preparing the stage for final resolution by the Supreme Court.

C. On the Question of Cost-Benefit Analysis

The leading appellate decisions on OSHA standards, handed down by the District of Columbia Circuit, do not require OSHA to

refining of zinc, silver, gold, platinum, copper, and aluminum, machining, lead burning, glass manufacture, textile manufacture, book binding, steel alloy manufacture, terne metal manufacture, glass polishing and spinning, cutlery manufacture, diamond processing, plumbing, jewelry manufacture, pearl processing, casting, cable coating, electroplating, explosives manufacture, lamp manufacture, sheet metal manufacture, tin rolling, telecommunications, and independent collecting and processing of scrap lead excluding collecting and processing that is part of a secondary smelting operation. The industries marked with an asterisk (*) are those whose standards were upheld by the court. New findings on the remanded industries are to be submitted to the court for review in six months, and a partial stay for the industries in question was granted in the interim. Like risk of significant harm, technical feasibility can be proven by "best available evidence." Data and estimates obtained by consultants, and by the industry itself may be used. The court also upheld OSHA's medical removal protection and multiple physician review programs. The first five industries were classified by OSHA as "first priority," and were studied in depth. The industries were selected from a list of industries representing 70,000 workplaces and 5.3 million exposed workers. OSHA used the following criteria to determine feasibility: (1) the general innovativeness of the industry, (2) the financial and technical resources available to the industry, (3) the degree of change needed and its stage of development, (4) the certainty of the product market, (5) the size and complexity of the plant or process requiring change, and (6) the experience of recent technological change in similar industries. Id. at 1274-75.

91. Id. at 1274.
perform a cost-benefit analysis prior to promulgating a standard. In AFL-CIO v. Marshall, the court said: "Nothing in the statute or its legislative history requires a further determination that the costs of the standard bear a reasonable relationship to its benefits. Nor may this court impose additional procedural requirements."92 This self-imposed limitation on judicial construction, vis-a-vis the question of the necessity of cost-benefit analysis, has been echoed by the Second and Third Circuits, but contradicts the Fifth Circuit. For the District of Columbia Circuit to require otherwise would be inconsistent with its interpretation of economic feasibility in all its cases. Of the law of the Fifth Circuit,93 and of the Seventh Circuit,94 the court had this to say: "Indeed the only authorities [decisions of the Fifth and Seventh Circuits] cited by petitioners are not binding on this circuit, and in any event, they are not persuasive in this context."95

Of the decisions of the Fifth Circuit, the most poignant one is the benzene appeal, American Petroleum Institute v. OSHA.96 In this case, the Fifth Circuit had invalidated OSHA's benzene standard partly because OSHA failed to show by substantial evidence "whether the benefits expected from the standard bear a reasonable relationship to the costs imposed by the standard."97 To the court, the OSH Act did not give "OSHA the unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of cost."98 A "rough but educated"99 cost-benefit analysis was the method to ensure that the standard was "reasonably necessary or appropriate." Like the District of Columbia Cir-

92. 617 F.2d at 664. The court treated cost-benefit analysis as a procedural requirement.
93. Industry petitioners had cited American Petroleum Institute v. OSHA, 581 F.2d 493 (5th Cir. 1978) (the benzene case at the appellate level), Florida Peach Growers Ass'n v. Dept. of Labor, 480 F.2d 120 (5th Cir. 1974) (emergency temporary standard governing pesticide residue without the involvement of control technology), and a non-OSHA case, Aqua Slide "N" Dive Corp. v. Consumer Product Safety Commission, 569 F.2d 831, 844 (5th Cir. 1978) (swimming pool slides involving consumer safety regulation). See also DeSanti, supra note 4.
94. Here, the petitioners relied on Turner Co. v. Sec'y of Labor, 561 F.2d 82 (7th Cir. 1977) (noise abatement and not toxic chemicals and merely remanding because OSH Review Commission failed entirely to consider costs).
95. 617 F.2d at 665.
96. 581 F.2d at 505. Although this decision was upheld by the Supreme Court, the question of cost-benefit analysis was not addressed by the plurality. The cost-benefit question, of course, was decided in the Cotton Dust Decision.
97. Id. at 503.
98. Id. at 502.
99. Id. at 504.
cuit, the Fifth Circuit was not unaware of the other circuits' holdings:

We will not attempt to reconcile our decision with the cases from other circuits which uphold other standards regulating exposure to carcinogens.... Those opinions did not address what Congress meant by requiring the conditions imposed by standards to be reasonably necessary to provide safe or healthful places of employment.... In addition those cases were decided on their own records.100

From the development of the case law, it is possible to distill the divergence of opinion among the circuits into two questions: (1) "What is the meaning of 'reasonably necessary or appropriate'?" and (2) "For whom is the OSH Act 'reasonably necessary and appropriate'?"

III. The Supreme Court Decisions

A. The Benzene Decision

Benzene and leukemia have been the subjects of scientific scrutiny for many years.101 On May 3, 1977, OSHA issued an emergency standard reducing the permissible exposure level for benzene from ten parts per million to one part per million.102 This emergency standard was enjoined by a temporary restraining order by the Court of Appeals for the Fifth Circuit. On May 27, 1977, how-

100. Id. at 505.


ever, OSHA issued a proposal for a permanent standard patterned after the emergency standard.\textsuperscript{103} The final standard was issued on February 10, 1978, after public hearings.\textsuperscript{104}

On October 5, 1978, the Fifth Circuit, on pre-enforcement review, invalidated the one part per million standard,\textsuperscript{105} reasoning that section 6(b)(5) of the OSH Act does "not give OSHA the unbridled discretion to adopt standards designed to create absolutely riskfree workplaces regardless of cost,"\textsuperscript{106} that OSHA was under a duty to "provide substantial evidence that the benefits achieved by reducing the permissible exposure limit from ten ppm to one ppm bear a reasonable relation to the costs imposed by the reduction,"\textsuperscript{107} and that "OSHA's failure to provide an estimate of expected benefits for reducing the permissible exposure limit, supported by substantial evidence, makes it impossible to assess the reasonableness of the relationship between expected costs and benefits."\textsuperscript{108} The Fifth Circuit interpreted the intent of Congress to require OSHA to "regulate on the basis of knowledge rather than the unknown," requiring OSHA to "make rough but educated estimates of the extent of benefits expected" from its health standards.\textsuperscript{109} Since the cost-benefit analysis part of the decision conflicted with the law of the Second, Third and District of Columbia Circuits, arguments over the benzene standard were subsequently heard by the Supreme Court.

On July 2, 1980, the Supreme Court handed down the decision that invalidated the one part per million standard.\textsuperscript{110} The case elicited diverse opinions and dicta from the Supreme Court. Five of the nine Justices concluded that the standard was invalid. The plurality opinion was written by Justice Stevens with the Chief Justice and Justice Stewart joining. Chief Justice Burger also added a short note of concurrence. Justice Powell concurred in part.

\textsuperscript{105} 581 F.2d 493 (5th Cir. 1978). For a favorable discussion of this decision, see generally Elliott, OSHA—American Petroleum Institute v. OSHA—A Model for Judicial Review of OSHA Standards, 5 J. CORP. L. 222 (1980).
\textsuperscript{106} 581 F.2d at 502.
\textsuperscript{107} Id. at 504.
\textsuperscript{108} Id. at 505.
\textsuperscript{109} Id. at 504.
\textsuperscript{110} Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607 (1980).
He and Justice Rehnquist both wrote separate opinions, setting forth their own distinct opinions for invalidating the standard. Justice Marshall wrote a sharp dissent in which the remaining justices joined.

Although a number of key issues were presented to the Court, the Benzene Decision resolved only the question of how much scientific evidence must be obtained before OSHA can promulgate a standard regulating the exposure of workers to the chemical in question.

Only Justice Powell addressed the question of cost-benefit analysis. He agreed with the Fifth Circuit's interpretation:

I conclude that the statute also requires the agency to determine that the economic effects of its standard bear a reasonable relation to the expected benefits. An occupational health standard is neither "reasonably necessary" nor "feasible" as required by statute, if it calls for expenditures wholly disproportionate to the expected health and safety benefits.

In this case, OSHA did not find that the substantial costs of the benzene regulations are justified. But the record before us contains neither adequate documentation of this conclusion, nor any evidence that OSHA weighed the relevant considerations. The agency simply announced its finding of cost-justification without explaining the method by which it determines that the benefits justify the costs and their economic effects. No rational system of regulation can permit its administrators to make policy judgments without explaining how their decisions effectuate the purposes of the governing law, and nothing in the statute authorized such laxity in this case.112

The remainder of the plurality justices affirmed the Fifth Circuit on other grounds.

The main issue decided by the plurality was encompassed by OSHA's carcinogen policy.113 The Court analyzed OSHA's reasoning which had lead to the one part per million benzene standard and reduced OSHA's rationale to four points. First, OSHA had unequivocally concluded that benzene is a human carcinogen at high enough levels.114 Second, OSHA had determined that the regulated

111. Id. at 664-88 (Powell, J., and Rehnquist, J., concurring).
112. Id. at 667 (Powell J., concurring) (citation omitted).
113. For an insight into OSHA's thinking on this subject, see Cancer Science and Cancer Policy, 14 Env. Sc. & Tech. 257 (1980), which contains an interview with Grover Wrenn, who directs OSHA's health standards program.
114. 448 U.S. at 694. This finding of carcinogenesis is at levels generally well above 10
party had failed to prove that there is a safe threshold level of exposure to benzene below which no excess leukemia cases will occur. Third, since benzene had been shown to be a human carcinogen at certain levels, then a generic carcinogen policy should be applied: specifically, in the absence of definitive proof by the regulated party of a safe level, it would have to be assumed that any level above zero presented some increased risk of cancer. Thus, the only safe level would be zero. Fourth, OSHA finally had invoked section 6(b)(5) of the OSH Act to set the lowest feasible level, after having defined "feasible" to mean "technically feasible without threatening the financial welfare of the affected firms or the general economy." The government had argued that section 3(8) merely required a standard that is reasonably calculated to produce a safer or more healthy environment, without imposing further limits on the agency’s power, and that the controlling statute is section 6(b)(5) which requires an absolute assurance of safety for each and every worker or one that reduces exposures to the lowest feasible level as long as the viability of the entire industry is not threatened.

The Court was impressed by the phrase "reasonably necessary and appropriate" in section 3(8), and was concerned that the OSH Act not become a "sweeping delegation of legislative power." Otherwise, the Court hinted that it might have to declare the statute unconstitutional under the 1935 law of *Schechter Poultry*

parts per million. The court found "evidence in the administrative record of adverse effects of benzene exposure at 10 parts per million is sketchy at best." Id. at 631.

115. Id. at 634.


117. Id. at 637. This carcinogen policy position was adopted by OSHA primarily because, under current knowledge, it is often next to impossible to construct a dose-response curve for a carcinogen, and much uncertainty shrouds the actual biochemical and metabolic mechanisms of carcinogenesis. For a very readable summary of current state-of-the-art knowledge on carcinogenesis, see generally U.S. CONG., OFFICE OF TECHNOLOGY ASSESSMENT, ASSESSMENT OF TECHNOLOGIES FOR DETERMINING CANCER RISKS FROM THE ENVIRONMENT (1981). For an introduction to the technical subject matter, see generally B. DINMAN, THE NATURE OF OCCUPATIONAL CANCER: A CRITICAL REVIEW OF PRESENT PROBLEMS (1974), and P. LEHMAN, CANCER AND THE WORKER, (1977). See also Christensen & Zenz, Compounds Associated With Carcinogenesis, in OCCUPATIONAL MEDICINE (1975). For a more extensive bibliography of the literature on cancer risk, see Krewski & Brown, CARCINOGENIC RISK ASSESSMENT: A GUIDE TO THE LITERATURE, 3 TOXIC SUBSTANCES J. 84 (1981).


119. 448 U.S. at 646.
Corp. v. United States and Panama Refining Co. v. Ryan. However, the present Court, with the exception of Justice Rehnquist, agreed that "construction of the statute that avoids this kind of open-ended grant should certainly be favored." The Court agonized over the meaning of "safe" which had been left essentially undefined in the OSH Act. The statutory vacuum was filled by introduction of the concept of risk through the phrase "significant risk of harm." To the Court "'safe' is not the equivalent of 'risk-free.'" Chief Justice Burger's concluding statement on risk in his separate opinion is more descriptive: "Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible.

The Court then addressed the difficult question of defining and allocating the burden of proving this significance of risk in an area where scientific knowledge is imperfect and where techniques of risk quantification are lacking. OSHA, of course, argued that there is no absolutely safe level of exposure for a carcinogen, and that therefore, under the OSH Act, the burden should be shifted to industry to prove with rigor the existence of a safe level for benzene. As a practical matter, OSHA felt that, given the uncertainties and dearth of scientific method in this area, "any other approach would render [the agency] helpless, forcing it to wait for the leukemia deaths that it believes are likely to occur." The Court read

120. 295 U.S. 495 (1935).
121. 293 U.S. 388 (1935).
122. Justice Rehnquist's opinion concurring in the judgement provided the most severe instance of judicial surgery in the Benzene Decision: he proposed the removal of the first sentence of section 6(b) as a constitutionally invalid delegation of Congressional authority because "[f]or Congress to pass that decision on to the Secretary in the manner it did violates, in my mind, John Locke's caveat . . . that legislatures are to make laws, not legislators." 448 U.S. at 686. He urged the Court "not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era." Id.
123. Id. at 646.
124. Id. at 641.
125. Id. at 642.
126. Id. at 664.
127. The scientific, as well as statutory, difficulty confronting the Court and OSHA has been well recognized by Chief Justice Burger: "This case presses upon the Court difficult unanswered questions on the frontiers of science and medicine. The statute and legislative history give ambiguous signals as to how the Secretary is directed to operate in this area." Id. at 662.
128. Id. at 652. For a discussion of the merits of OSHA's carcinogen policy, see the dissent. Id. at 688.
the meaning of the OSH Act differently, placing "the burden on the Agency to show, on the basis of substantial evidence, that it is at least more likely than not that long term exposure to 10 ppm of benzene presents a significant risk of material health impairment."129

The Court searched for, but failed to discover, a black and white provision within the OSH Act that indicated congressional intent to shift the burden of proof to the party opposing a proposed rule. It agreed with the finding of the Fifth Circuit that OSHA's benzene standard was not supported by substantial evidence and indicated that, in view of the Court's "significant risk of harm" construction, the benzene standard would have failed even if it had been supported by substantial evidence.130 The Court went on to explain, through dicta, the procedure for assessing "significant risk of harm":

[T]he requirement that a "significant" risk be identified is not a mathematical straitjacket. It is the Agency's responsibility to determine, in the first instance, what is considered to be "significant" risk. . . . Although the Agency has no duty to calculate the exact probability of harm it does have an obligation to find that a significant risk is present before it can characterize a place of employment as "unsafe."131

The Court gave recognition to the scientific difficulties faced by OSHA during the gathering of data on carcinogenesis: "OSHA is not required to support its finding that a significant risk exists with anything approaching scientific certainty. Although the Agency's findings must be supported by substantial evidence, section 6(b)(5), 28 U.S.C. § 655(b), specifically allows the Secretary to regulate on the basis of the "best available evidence."132 Thus, OSHA was excused from the need to obtain exact numerical quan-

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129. Id. at 653.
130. Although not an authority on toxicological risk assessment, the Court proceeded to explain, through dicta, its impression of the meaning of "significant risk of harm":

Some risks are plainly acceptable and others are plainly unacceptable. If, for example, the odds are one in a billion that a person will die from cancer by taking a drink of chlorinated water, the risk clearly could not be considered significant. On the other hand, if the odds are one in a thousand that regular inhalation of gasoline vapors that are two percent benzene will be fatal, a reasonable person might well consider the risk significant and take appropriate steps to decrease or eliminate it.

Id. at 655. See also Jacobs, Analyzing Environmental Health Hazards, 13 ENV. SC. & TECH. 526 (1979).
131. Id.
132. Id. at 656.
tification of risk. The Court went even further in allowing OSHA a counterweight to balance the current gaps in scientific knowledge:

As several courts of appeals have held, this provision requires a reviewing court to give OSHA some leeway where its findings must be made on the frontiers of scientific knowledge. [citations omitted]. Thus, so long as they are supported by a body of reputable scientific thought, the Agency is free to use conservative assumptions [benefiting the worker's health] in interpreting the data with respect to carcinogens, risking error on the side of over-protection rather than under-protection.133

Hence, when all arguments had been considered, the benzene standard was disposed of by a narrow 5-4 vote. OSHA failed to prove by the "best available evidence" that a "significant risk of material harm" existed in the old standard of ten parts per million. Consequently, since there was no "significant risk of harm" at ten parts per million, no benefit could possibly accrue from a new one part per million standard. The Court reasoned that under the OSH Act it was not "reasonably necessary or appropriate" to revise the standard downwards to one part per million. The failure of scientific proof on the existence of benefit resulted in a limiting case where cost-benefit analysis was not necessary. Hence, the plurality did not reach the issue of the necessity of cost-benefit analysis prior to OSHA standard-making.134

B. The Cotton Dust Decision135

In applying the "substantial evidence" test, the three judge panel of the District of Columbia Circuit had upheld the cotton dust standards except for that affecting the cottonseed industry.136 The court analyzed the question of feasibility in three parts: (1)

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133. Id. (emphasis added).
134. Justice Powell, being the exception. Id. at 664-71.
135. American Textile Manufacturers Institute v. Donovan, 101 S. Ct. 2478 (1981). The Cotton Dust cases were argued before the Supreme Court as test cases for the resolution of the cost-benefit question. This case replaced the coke oven case, American Iron and Steel Institute v. OSHA, 577 F.2d 825 (3d Cir. 1978), that was initially pending as the test case. American Iron may have been withdrawn because according to a Republic Steel Corporation spokesman, the "appeal had become a 'moot' issue, because steel companies had largely met the coke oven standard's provisions and, thus, there was no point in pursuing the case." There are also indications that "OSHA had stronger data in the coke oven case than in benzene, and that the steel industry would have been bucking the odds in trying to win its appeal." Crapnell, 1981-85: The Federal Courts will Leave Their Imprint on OSHA Policy, Occ. Hazards 86 (Oct. 1980). This is of particular significance in light of United Steelworkers.
technological feasibility, (2) economic feasibility, and (3) cost-benefit analysis and cost-effectiveness analysis. In the first part of the opinion written by Judge Bazelon, the court acknowledged that "judging the technological feasibility of a particular agency goal is beyond the expertise of the judiciary, especially where the assessment involves predictions of technological changes." 137 Instead, the court confined its review to a determination whether the agency's position was supported by evidence in the record. Hence, the court examined the technological, as well as the economic, record.

With respect to the economic record, the court concluded that "OSHA fairly considered all the economic data submitted before constructing its estimates . . . [,] responded to significant criticisms of the cost estimates it used, and explained the economic impact it projected for the textile industry." 138 The court accepted the evidence that tended to show the industry could pass the cost of compliance on to its customers and that the overall industry would not be threatened save for some marginal operations. Industry had petitioned the appellate court to require OSHA to show that "the benefits of the standard are in proportion with the costs which it imposes," 139 that "OSHA must justify the expense imposed by its standard by comparing it with the industry's proposed alternative," 140 and that OSHA's failure to do neither rendered OSHA's perception of economic feasibility invalid. The court disagreed. Instead, the court concluded that the "reasonably necessary and appropriate" language of the OSH Act and the "clear intention of Congress" 141 imposed no "additional constraint" upon OSHA when it is promulgating a health or safety standard. The court interpreted the legislative history to signal that

Congress itself struck the balance between costs and benefits in the mandate to the agency . . . . Thus Congress concluded that the benefits of health protection warranted the expense of an effective standard. . . . In contrast to the Acts for which Congress contemplated a cost-benefit requirement, the legislative history of the OSH Act contains no reference to this kind of economic analysis. . . . Nothing in the statute or its legislative history requires a further determination that the costs of the standard bear a "reasonable" re-

137. Id. at 656.
138. Id. at 662.
139. Id.
140. Id. at 663.
141. Id.
On the corollary question of cost effectiveness analysis, the court held that “OSHA considered the alternative proposed by the industry and found it inadequate to protect against the health risk at issue.”

The Supreme Court first reviewed the adequacy of the scientific evidence of the relationship between cotton dust and byssinosis and agreed that OSHA had satisfied the threshold requirement of “significant risk of harm.” The Court then addressed the question of cost-benefit analysis, and by a 5-3 vote, upheld the decision of the lower court on this all-important question. The Court agreed with the reasoning of the District of Columbia Court of Appeals:

In effect then, as the Court of Appeals held, Congress itself defined the basic relationship between costs and benefits, by placing the “benefit” of worker health above all other considerations save those making attainment of this “benefit” unachievable. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in section 6(b)(5). Thus, cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is.

The Court felt its reading of the OSH Act was reinforced by the fact that, when Congress intended the use of cost-benefit analysis, it had used specific language to convey its intentions.

142. Id. at 663-65.

143. Cost effective analysis is generally the quantitative technique used to compare two or more policy alternatives according to a selected criterion. Cost effectiveness analysis, thus, is a more limited, technical method of cost counting. It compares the technical effectiveness or efficiency of two or more engineering solutions to a physical problem. The method tends to avoid the more difficult or intangible social or axiological ramifications presented by the technology. While arguably different from cost-benefit analysis, the distinctions are not totally clear and some time may elapse before a definitive separation of the two can be developed.

144. 617 F.2d at 666.

145. Byssinosis is also known as brown lung disease.


147. Id. at 2490 (emphasis added).

After reviewing section 6(b)(5) of the OSH Act, the Court dissected section 3(8) both standing alone and "in tandem with section 6(b)(5)." The controversial key phrase in the section was "reasonably necessary or appropriate." The Court expressly dismissed the significance of section 3(8) by itself and without reference to other parts of the OSH Act:

We need not decide whether section 3(8), standing alone, would contemplate some form of cost-benefit analysis. For even if it does, Congress specifically chose section 6(b)(5) to impose separate and additional requirements for issuance of a subcategory of occupational safety and health standards dealing with toxic materials and harmful physical agents: it required that those standards be issued to prevent material impairment of health to the extent feasible.

The Court rejected any implication that "Congress intended the general terms of section 3(8) to countermand the specific feasibility requirement of section 6(b)(5)." Thus, in the event of a confrontation between the meanings of section 3(8) and section 6(b)(5), the latter would determine OSHA's course of action.

It is worthwhile at this point to note that the last section of the majority opinion explicitly recognized the axiological nature of the issues involved and reiterated Chief Justice Burger's suggestion for possible new forums into which the quest will go and in which the next battle will be fought: "[T]he judicial function does not extend to substantive revision of regulatory policy. That function lies elsewhere - in Congressional and Executive oversight or amendatory legislation."

C. The Petition to Review the Lead Standard

On June 29, 1981, the Supreme Court denied review to the consolidated appeals by the lead industry in Lead Industries Association v. Donovan. This action concluded litigation resulting from OSHA's standard-making and enforcement activities under the OSH Act.

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1251-1376 (1970), and the Clean Air Act Amendments of 1970 42 U.S.C. §§ 1857-1857l (1970) as examples where cost-benefit analysis was stipulated by Congress. Id. at 4725.

149. Id. at 4722.


151. 101 S. Ct. at 2492 (emphasis added).

152. Id.

153. Id. at 2506 (citation omitted) (emphasis added).

D. Some Constitutional Aspects of the Benzene and Cotton Dust Decisions

While it is not the purpose of this comment to study in depth the constitutional ramifications of the decisions, a brief discussion of them is included. It is impossible to survey the law in this rapidly developing area without an awareness of the constitutional superstructure that underlies resolution of socio-technological disputes on a national scale, via the American system of federalism.

The Supreme Court's Benzene and Cotton Dust Decisions are but two examples of the many public socio-technological disputes that daily find their way into our courts, the institution traditionally called upon to settle America's public and private disputes. Our judicial system derives from the English common law in which the doctrine of stare decisis serves as the foundation of jurisprudence. This doctrinal practice of looking backwards into time for precedents ill equips the judiciary to confront novel issues of technological innovation and to resolve modern socio-technological problems.

The inability of judge-made law to keep up with social problems associated with technological advances may have activated another process: statutory lawmaking. When the results of technology have grown so pervasive as to affect interstate commerce, Congress is empowered, pursuant to the Commerce Clause, to pass laws to regulate any cognate problems. Historically, society has sought to keep in check perceived risks posed by technology through the democratic process, by giving its publicly elected legislators the mandate to regulate through legislation the offending technology. With the boom of innovation in the twentieth century, legislature-made or statutory law has, for better or for worse, kept pace with this boom. The method today is to respond with more statutes as yet another technology-related crisis develops. It is indeed ironic that, while technology on the whole increases our quality of life, it also unearths new and hitherto unknown risks in old technology which had once been considered "safe." Some now marvel while others despair at our intellectual nakedness in the area of risk prediction and control.

This expansion in scope, complexity, and responsibility to regu-
late socio-technological risk has made the modern public law-making task all the more difficult, especially for a non-technological body like Congress. When formulating policy embodied in a bill, the legislator has to grapple with two types of questions: (1) objective questions of fact, and (2) subjective questions of value. Value and fact often form an azeotropic mixture in socio-technological disputes because the scarcity of factual information may necessitate the use to extrapolated judgement to devise an answer.  

Faced with this complexity, and the concomitant need to enforce the law in the face of ever-changing technological circumstances, Congress has created administrative agencies within the executive branch, as well as independent regulatory agencies, to which it has delegated authority to promulgate detailed rules and regulations having the force of law, and to enforce, and interpret them. Often the same agencies that make the regulations enforce them. Thus, an agency may become simultaneously a quasi-legislator and an enforcer of quasi-legislation.

The delegation by Congress of its legislative power does not comport with a strict reading of Article I of the Constitution. Ever since the days of Marbury v. Madison and McCulloch v. Maryland, when Chief Justice Marshall poured the foundations for the federal system of government, courts have in successive cases, been asked to rule on the constitutionality of delegation. This difficult question calls for the balancing of strict theoretical doctrine and the practical realities of everyday public administra-

157. Although the legislator in theory represents the values of his or her electing constituency, and the legislator's vote is cast accordingly, the legislator is bound to work within the ambit of physical laws, especially when treading in the realm of technology. This physical law limitation is more than adequately epitomized by the joke about the well-meaning legislator who proposed to legislate \( \pi \) to be 3.0 for the mathematical convenience of all.


159. U.S. Const. art. 1.

160. 5 U.S. (1 Cranch) 137 (1803).

tion. Since the last century, the Supreme Court has often upheld the delegation of specified authority to the President, for example, in *Brig Aurora v. United States*, 162 *Field v. Clark*, 163 *United States v. Curtiss Wright Export Corp.*, 164 and *Zemel v. Rusk*. 165 Sometimes the Court has ruled certain delegations of "fill-in-the-detail" or "sublegislative" power not to be delegations of legislative power at all, but the mere conferring of "administrative function."166

The limits of delegation were set in *Panama Refining Co. v. Ryan* 167 and *Schechter Poultry Corp. v. United States*. 168 Subsequent to these two seminal, but seldom used cases, however, the Court has sustained all delegations. 169 A Court minority did argue that the *Schechter* reasoning should have governed in *United States v. Sharp Mack*, 170 and, of course, Justice Rehnquist argued for the application of the constitutional standards of *Panama* and *Schechter* in the Benzene Decision. 171 As previously noted, the plurality disposed of *American Petroleum* through statutory review rather than the constitutional review proposed by Justice Rehnquist. While it is true that neither *American Petroleum* nor *American Textile* invoked any landmark principles of constitutional law, these cases are, nevertheless, important. They authoritatively define the separate roles of the three branches of government with respect to the resolution of future socio-technological disputes, and thus restate the principle of separation of powers in this increasingly ubiquitous and complex area of controversy.

IV. THE POSSIBLE FUTURE MEANING OF "REASONABLY NECESSARY OR APPROPRIATE"

As the OSHA health standard cases developed, it became clear that section 3(8) presented an enigma to the courts that interpreted and ruled upon the statutory meaning of the OSH Act. Be-

162. 11 U.S. (7 Cranch) 382 (1813).
163. 143 U.S. 649 (1892).
164. 299 U.S. 304 (1936).
165. 381 U.S. 1 (1965). It can be easily observed that all the above four cases involved delegations of legislative power over matters touching foreign commerce.
169. Of course, it can be proposed that Congress has heeded the legal standards enunciated in *Panama* and *Schechter* and has observed their judicial pronouncements.
171. See note 122 supra, and accompanying text.
cause of the contradictions and ambiguities implicit in "reasonably necessary or appropriate," the discussion that follows will focus on this elusive concept.

A. A Survey of the Opinions of the Courts of Appeals

Despite the existing incongruities among the circuits, all the courts of appeals that have ruled on section 3(8) agree that it is not reasonable for OSHA to promulgate and enforce a standard that would destroy the existence or the competitive structure of an entire industry. No court will permit such clearly unreasonable economic disruption. The question of cost versus benefits has very indirectly but, nevertheless, very certainly been broached and answered by all courts applying section 3(8) to a health or safety standard. Only each court's interpretation of "reasonably necessary or appropriate" is different.

Those who petition against OSHA standards have argued that the benefits derived from the standards should bear a "reasonable" relationship to the cost imposed. The courts which reject this argument represent one boundary of the continuum of possible solutions. The other boundary is represented by abolition of the OSH Act by either judicial decree, for being unconstitutional or flawed in some other way, or by Congressional amendment. The courts that accept the latter argument may not necessarily align themselves with the outer extreme, but most probably take positions that fall somewhere along the continuum just delineated.

Of the courts which accept the "reasonable relationship" argument, none have ventured a more quantitative definition of "reasonable" than the balancing of costs against benefits. The critical question, then, is how can a decision to accept or reject a standard be made using quantitative techniques of cost-benefit analysis when the yardstick or criterion of decision is unavailable or left undefined? In the absence of such an indispensable deci

172. They are the D.C., Third, and Second Circuits. For cases, see text accompanying notes 64, 69 and 92 supra.
173. None of the courts of appeals have explicitly pronounced any part of the OSH Act unconstitutional.
174. They are the Fifth and Seventh Circuits. For cases, see text accompanying notes 93 and 94 supra.
175. Cost-benefit analysis consists essentially of three steps: (1) identification and counting of costs incurred, (2) identification and counting of benefits incurred, and (3) the comparing of (1) and (2). A decisional criterion, usually using a weighting ratio of one to one, is needed to do step (3).
sional criterion, the quantitative information generated during the course of a cost-benefit study is rendered useless.

Thus, when the issue of mandatory cost-benefit analysis by OSHA is before any court or public forum, the first question which should be asked is, if cost-benefit analysis is to be used prior to the promulgation of a safety or health standard, what is the reasonable or appropriate numerical ratio which is to be used as the decisional criterion? Perhaps a decision of the Sixth Circuit has shed some light on this difficult question. In *RMI Co. v. Secretary of Labor,* Judge Celebreze asserted that "the primary purpose of the [OSH Act] and regulations [promulgated under the OSH Act] is 'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve human resources,'" and that "the benefits to employees should weigh heavier on the scale than the costs to employers: Controls will not necessarily be economically infeasible merely because they are expensive." Even then, upon further discussion, the court defined the limits of statutory construction: "We do not today prescribe any rigid formula for conducting such analysis. We only insist that the Secretary, and the OSHRC (Review Commission) on review, weigh the costs of compliance against the benefits expected to be achieved thereby in order to determine whether the proposed remedy is economically feasible." Thus, it appears that the Sixth Circuit, without addressing the constitutional question of delegability, ruled that, under the OSH Act, the power to decide the appropriate cost versus benefit ratio was vested in the OSH Review Commission.

B. Possible Developments After the Supreme Court Decisions

Through the Cotton Dust and Benzene Decisions, the Supreme Court settled the scientific evidence and cost-benefit questions arising under the OSH Act. As hinted by the Court, the battle over the use of cost-benefit analysis for national policy-making may not be finished in the executive and legislative branches of government.

It has become apparent from developments since *American Textiles* that, despite the Supreme Court decisions, the clamor for the

176. 594 F.2d 566 (6th Cir. 1979).
177. Id. at 572 (citation omitted) (emphasis added).
178. Id. at 573.
use of cost-benefit analysis will continue. Consequently, if cost-benefit is ever to be used in the context of occupational safety and health, the question what numerical ratio will serve as the decisional criterion will have to be broached, and, it is hoped satisfactorily resolved.

It appears certain that petitioners opposing stringent OSHA standards will continue the clamor to make cost-benefit analysis a prerequisite to OSHA standard-making, and it appears possible that, in line with traditional business decision-making practice, such petitioners may argue for a one to one ratio as the decisional criterion for the balancing of business costs with social benefits.

Before this approach is accepted or rejected, it may be beneficial to recall that the OSH Act of 1970 was not passed by Congress to promote business ventures: it was adopted to protect the lives and health of the nation's workers. It should be for the nation's workers that OSHA standards be found "reasonably necessary and appropriate." The Congressional intent to achieve this goal under the OSH Act as it stands today is unequivocal. Given the embodiment in the OSH Act of Congress' intent to protect worker safety and health, the one to one ratio appears to be not reasonably appropri-


180. Stated simply in economic terms, a firm seeking to maximize returns or profits will continue to invest or produce until the marginal revenue from its product is equal to its marginal cost of production. In other words, for a venture to be profitable, the firm must derive a revenue of at least one dollar for each additional dollar it sinks in. Otherwise, the business becomes a losing proposition and the firm will stop committing its dollars. See generally E. Mansfield, Microeconomics (2d ed. 1975).
ate or necessary under the spirit of the OSH Act. The OSH Act is not, and should not be made into, profit-making legislation and the traditional yardstick for measuring business profitability should not be applied in the arena of occupational safety and health. It is interesting to review again the Supreme Court plurality's admonition in the Benzene Decision concerning the latitude of discretion afforded OSHA in its standard-making: "Thus, so long as they are supported by a body of reputable scientific thought, the Agency is free to use conservative assumptions in interpreting the data with respect to carcinogens, risking error on the side of over-protection rather than under-protection."\(^{181}\)

C. Cost-Benefit Analysis As a Tool in the Quest for "Reasonably Necessary or Appropriate" OSHA Standards

While the mere uttering of the words "cost-benefit analysis"\(^{182}\) in the presence of certain parties is sufficient to provoke a highly emotional exchange, the technique contains strong potential for continued development and refinement. The parameters encompassed and accounted for by the nature of the technique makes it a valuable analytical and decision-making tool, if it is used with sufficient oversight and without preconceived biases. The reason for its usefulness is rooted in the physical world. We as a society are the obvious beneficiaries of technological progress. Technological advances have created conveniences: the marketplace is filled with complex but beneficial products which enhance enjoyment of life. However, technology has affected certain groups of people more adversely than others. The disparity is easily observable in the industrial workplace, where modern technology has been harnessed to produce goods which add to the consumer's quality of life, but where, at the same time, the technological processes of production can have a detrimental or even fatal impact on the health and safety of the production worker.

While on the one hand society as a whole enjoys the fruits of production, on the other, a small number of less fortunate members bear the human costs. Very often these human costs are hidden from the plain view of the beneficiaries. Undeniably, benefits and costs are exchanged among different groups of people with different values and goals.

It is another physical fact that the world is neither resource-infi-

\(^{181}\) 448 U.S. at 656 (emphasis added).

\(^{182}\) For a survey of materials on cost-benefit analysis, see note 4 supra.
nite nor risk-free. There is an on-going, unresolved debate over the correct distribution of the inherent risks of technological processes among members of society, who, as a whole, enjoy the benefits. Pressing questions of policy include, (1) how much of society's resources should be allocated to alleviate the known risks, (2) how much of the same finite resources should be spent to research suspected, or discover heretofor unknown but potential, risks, and (3) who among the various members of society should bear the costs of control measures? This policy debate attains a new level of intensity in an economy with a shrinking supply of natural resources and escalating prices.

From an epistemological or even pragmatic point of view, the resolution of the foregoing multifaceted questions necessarily requires a multidisciplinary attack. For the sake of simplicity of conceptualization, society can be grouped into a number of subsets that include industry, labor (organized and individual), consumers, and government. Each group has non-identical expectations and this difference in expectation contributes to the occupational safety and health problem. For instance, industry strives for a viable business operation as measured by its business accounting system; the worker seeks higher wages and safer working conditions; the consumer expects improved and more affordable products; the executive branch of government works to protect the public good as indicated by voting returns. The expectations of these groups are plainly not simultaneously compatible.

The economic concept of public versus private good, and the theory of externalities which generally evolved from studies on environmental pollution,\(^{183}\) appear to be applicable, with minor dis-

183. The problem of balancing health and the environment against progress and technology is not a phenomenon of the last twenty or thirty years. The following anecdote is reproduced here to give an insight into the persistence and pervasiveness of this socio-technological problem:

In the British Parliament the Lord Stratheden and Campbell is introducing, for the tenth time in six years, a bill to abate smoke in London. It has been a winter of dense sulphurous fogs; visibility is reduced sometimes to no more than a yard; traffic is paralysed; even walking along the streets is at times impossible. The stuff seeps into theatres so that audiences cannot see the stages.

No one in the Parliament of 1892 is ignorant of the facts about fog. The politicians often had to grope their way through fog to get there. They had learnt from dozens of speeches what causes the fog, what damage it does, how it could be prevented. They are now going to be asked to pass a law to abate it.

Industrial smoke from boilers generating steam was already controlled by law in the metropolis; these London fogs were caused mainly by domestic fires from nearly a
tinctions,\textsuperscript{184} to occupational safety and health problems. A theoretical definition is appropriate here: an economic externality exists whenever social entity A selects its utility or production function or behavior without due regard for that of entity B because entity A’s cost allocation system is not subject to or does not account for adverse impacts on entity B. In other words, because of the way costs are defined by a social system, be it legal or otherwise, the costs that are actually borne by entity B are external to entity A.

Million homes burning high-sulphur coal. The damage was obvious: Smoke corroded metal and stonework and it killed as many people as were killed in outbreaks of cholera, a death less dramatic only because it was insidious and delayed. During the three weeks in the winter of 1880, more than 2,000 Londoners died from ailments attributable to the fog. The smoke could be prevented, simply by giving up the use of soft coal in open fires and heating homes by closed stoves burning coke or anthracite coal. This was the way homes were heated on the Continent, though in some countries it was easier to do because there was a plentiful supply of wood, which could be used instead of coke or hard coal.

The hazards of smoke were evident; the nuisance of it blighted the city; the cure was at hand. But . . . Lord Stratheden and Campbell again fails to get his bill approved. Worse than that, he is ridiculed by the Prime Minister, Lord Salisbury. The bill proposed to make it an offense for a householder to allow opaque smoke to issue from his home. “How,” says the Prime Minister, “Do you define the word ‘opaque’?” Defining it would “give infinite pleasure, amusement and occupation to Her Majesty’s Courts of Justice. I do not know whether my noble friend thinks he would ever get Parliament to pass such a measure as this, or whether he would get the English people to obey it if it were passed. It would condemn Londoners to live in homes where they would never see a fire with a flame in it. I do not think that, for the sake of avoiding an occasional inconvenience, grave as it is [not a very felicitous way to describe dying from bronchitis] for a certain number of days in the winter, people would condemn themselves to a flameless fire all the winter through.” He continues his ridicule: “Conceive of an inspector going to every house in London and seeing that the grate was properly fitted in order not to emit smoke. The burden . . . would be worse than the London fog.” The bill was rejected.


\textsuperscript{184} However, a number of distinctions exist between the occupational health externality and the other common externality of environmental pollution. For instance, the pollution of the environment affects ubiquitous public goods like water and air, both of which are needed by all consumers, while the occupational health externality is confined to workers in the factory, or at most to their families. In addition to this insulation effect, an inherent dichotomy exists between lower consumer product prices and improved health for the worker. The above, however is counter-balanced by the fact that overall industrial productivity is directly affected by worker health, worker morale in general, and individual productivity. The nexus between industrial vitality and environmental well-being is less apparent on its face. For a critical discussion of the efficacy of using economic theory in environmental legislation see Sagoff, \textit{Economic Theory and Environmental Law}, 79 Mich. L. J. 1393 (1981).
and, for the purposes of entity A, simply do not exist. The cost burden of the externality is shifted wholesale, with an outright circumvention of the marketplace, without benefit of offer and acceptance, onto entity B. No value or price may be placed on the externality by market mechanisms. The ever-expanding pool of technology has, on the whole, generated net benefits to society. In industry’s haste to reap the technological advantage, however, and because of the uncritical acceptance of the benefits of technology by the consumer, induced in part by aggressive marketing, both producer and consumer have often shifted onerous costs to another unsuspecting or captive entity.

It is the existence of this externality that gives an opportunity for the judicious use of cost-benefit analysis for the solution of a complex socio-technological problem. Cost-benefit analysis can be used objectively to identify this externality and, then, objectively and equitably to appraise and quantify the various component costs and benefits that comprise the occupational safety and health issue under consideration, provided that appropriate ground rules for its use are laid, a priori, by legislation. Such a methodology could also systematically evaluate and compare the consequences of different policy alternatives.

D. Benefit Counting: The Price of Life and the Price of Death

In the arena of social legislation, the counting of costs has traditionally been easier than the quantification of benefits. It is at this point that the most difficult axiological question, the price of human life, needs to be addressed.

There are at least two situations in which the pricing of human life can occur: (1) before death, when the person is alive, and (2) after death. In the second situation, the pricing of death is easier to rationalize and accept: the person is dead and the only thing left that can be done for the deceased is to calculate the compensation due his or her survivors. The assigning of a dollar value to death, of course, is done regularly in the determination of awards in worker compensation and in the determination of damages in trials for wrongful death. In a sense, the question is rendered irrevocably moot by the death which created the question in the first place, for

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185. For a recent accounting of costs imposed by government regulations, see generally Cost Of Government Regulation Study For The Business Roundtable, (1979).
nothing within our current scientific or medical knowledge will reverse the process of death.

The question that is more difficult is what happens afterwards. What is society going to do to prevent or reduce the risk\(^{187}\) of a reoccurrence of the disease or injury that killed before? How much is society going to spend to protect the living worker from the risk of death in the workplace? Does society have to put a price on life (in contrast to a price on death) in order to determine this answer?\(^{188}\) The latter question is one that cost-benefit analysis cannot answer alone. If an answer to the price-of-life question is a matter of life-or-death, then it is best left to the most democratic and pluralistic branch of representative government: Congress. In light of the effect of axiological policy decisions on diverse members of society, it is prudent that the pricing of life, the decisional criterion (ratio of benefit to cost), and other ground rules for cost-benefit analysis be viewed as nondelegable questions. Questions of such paramount national importance should be left to be broached, discussed, debated and defined by Congress. Otherwise, unilateral cost-benefit analysis would run roughshod over the rights of certain people in favor of those of others and very easily overwhelm any benefits gained by use of the technique in policy-making.

Even so, what numerical ration would be "reasonably necessary or appropriate" for the OSH Act? What price is the nation, as a whole, willing to pay, in face of ever-shifting economic uncertainty, for gains in worker safety and health? As we face economic uncertainty, we also face scientific uncertainty, especially when working with carcinogens. What margin of safety should we build into our health policies, through the decisional criterion, to compensate for the effects of cancer? What will the working man and woman accept as compensation for risk?\(^{189}\) Should an effort be made with the admittedly infant techniques of cost-benefit analysis? The answer to the latter is probably yes, but where does the golden opti-

\(^{187}\) The difficulty of making value judgements is illustrated by an analogy given by Dr. Handler: "[O]ne can imagine value judgements that override seemingly rational "dollar considerations." For example, I do not know the dollar costs to the nation of drug abuse. But we find drug abuse so repugnant that our willingness to combat it may well exceed the "dollar value" of the lives destroyed by drugs." Reprinted in Green, The Risk-Benefit Calculus in Safety Determinations, 43 Geo. Wash. L. Rev. 791, 799 (1975).

\(^{188}\) For a definitive discussion of risk quantification, see note 9, supra.

\(^{189}\) An interesting question is whether this problem can be approached using the data available from the life insurance market or is it morally wrong to do so? See also Risk and an Informed Public, Chem. Eng., July 14, 1980, at 5.
mal lie, and where will the balance come to rest, if it can ever be
determined?

Perhaps it would be best for Congress first to define, in sufficient
detail, the procedure[190] and other ground rules for the proper con-
ducting of cost-benefit analysis to ensure equity and fairness. If
specific numbers cannot feasibly be assigned, then perhaps Con-
gress should specify a working range to allow the administrative
agency latitude to customize policies for each individual regulated
industry or technology. These problems call for a resolution that
necessarily encompasses the balancing of diverse political, eco-
nomic, medical, scientific, technological and, above all, human con-
siderations—a resolution requiring the type of interest balancing
that the legislative branch is best designed and equipped to
perform.[191]

There is always the possibility that Congress, or for that matter,
any other branch of government might be unwilling to assume the
inordinately extraordinary burden of assigning a price to human
life.[192] If Congress were unable to perform this critical function
and arrive at a consensus, then the technique of cost-benefit analy-
sis, despite its merits, should not be used in place of feasibility
analysis[193] as a tool for formulating occupational health and safety

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190. See the dissent by Justice Marshall in the Benzene Decision. 448 U.S. at 688. See,
e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435
U.S. 519 (1978), which suggested that a reviewing court must be conscious of the limited
nature of its role when it imposes an obligation on an agency beyond the minimum imposed
by Congress and by the Administrative Procedure Act (5 U.S.C. § 551 (1976)) or the ena-
bling statute. This case will be particularly relevant if cost-benefit analysis is viewed as a
procedural requirement rather than a substantive element of decision-making.

191. The expert agency receiving the delegated authority remains in the best position to
implement the will of Congress, especially on scientific and technical questions.

192. The gravity of lawmaking involving such a paramount question as the price of
human life (when the human is still alive) is well conveyed in the lines ascribed to Sir
Thomas More by Robert Bolt:

The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's
legal . . . I'm not God. The currents and eddies of right and wrong, which you find
such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh
there I'm a forester . . . . What would you do? Cut a great road through the law to get
after the Devil? . . . And when the last law was down, and the Devil turned round on
you - where would you hide, Roper, the laws all being flat? This country's planted
thick with laws from coast to coast - Man's laws not God's - and if you cut them
down . . . d'you really think you could stand upright in the winds that would blow
then? . . . Yet, I'd give the Devil benefit of law, for my own safety's sake.

R. BOLT, A MAN FOR ALL SEASONS 147 (1967).

193. This is the heart of the decision in American Textile. The Court held that "cost-
benefit analysis by OSHA is not required by the statute because feasibility analysis is." 101
S. Ct. at 2490.
policy. Policies affecting the health, safety and welfare of such a large segment of the public should be made in an accountable, rational manner. Congress' delineation of a well-designed quantitative set of laws defining the procedure for conducting cost-benefit analysis is the sine qua non for government use of the technique in making occupational health and safety policy. Precise definition would enable uniform, confident comparing, on a common basis, of the results of differing case studies using cost-benefit analysis, and would make the law conform to the due process requirements.\textsuperscript{194}

In addition, inherent constitutional checks and balances would require that the judiciary vigilantly review the fundamental fairness of any policy made under cost-benefit analysis. The role of the courts in socio-technological disputes will only increase. With the expansion of technology, the judiciary will have to become knowledgeable about scientific advances and the limits of scientific knowledge as the prerequisites to the understanding of socio-technological problems.\textsuperscript{195}

Quantitative cost-benefit analysis may, then, under controlled circumstances, provide a rational and balanced answer to the meaning of "reasonably necessary or appropriate" after the decisional criterion, the price of life, and other accounting rules have been set by the mellowing processes of legislative debate and compromise. The importance to society as a whole of rationality, quantitative precision, and correct decision-making takes on additional urgency in a period of depleting natural resources and rising prices.

V. Conclusion

Under the OSH Act of 1970, cost-benefit analysis is not required of OSHA before its promulgation of a health standard, because Congress had prescribed feasibility analysis in its place. If cost-benefit is ever used, then Congress should first answer non-delegable questions. Specifically, on the question of assigning of proper

\textsuperscript{194} Analogous to the rules presently used in business accounting, cost-benefit analysis might be viewed as a more comprehensive system of accounting that encompasses certain social costs and benefits that are now external to the pricing mechanism of the marketplace. Of course, a democratic legislative body should first supply the rules and certain values or prices that are currently not available with any certainty or uniformity. Such a law could also conform to the procedural due process standard required by the Due Process Clause of the fifth amendment.

\textsuperscript{195} For a discussion from the point of view of an experienced judge of the District of Columbia Circuit Court of Appeals, see generally Bazelon, The Judiciary: What Role in Health Improvement? 211 \textsc{Science} 792 (1981).
weights to the cost-benefit equation, the resultant ratio should logically not be one to one, but a number greater than one, in favor of protection of worker health and safety. If the spirit of the OSH Act is to be preserved, the decisional criterion selected should first be "reasonably necessary or appropriate" to protect the declared goal of worker safety and health, and second, be "reasonably necessary or appropriate" to protect the viability of the regulated party. On the more critical question of the price of life, it appears best that Congress, through the legislative process, first agree on a value to facilitate the consistent counting of the dollar benefits accrued from lives saved under the OSH Act. These are minimum procedural due process protections that fall under the ambit of the Due Process Clause of the Fifth Amendment. Thus, under such conditions, cost-benefit analysis can be very effectively used to fine-tune public decision-making, provided that the decisional criterion for the acceptance or rejection of a standard be in accord with the aggregate will of the nation, as manifested by relevant Congressional legislation. However, before cost-benefit analysis is adopted for use by the government, Congress must, by democratic consensus, accurately define through legislation, the ground rules for the proper conduct of cost-benefit analysis. Otherwise, cost-benefit analysis should not be used to determine occupational health and safety policy. In addition, the courts must be prepared to review policy made under the guise of cost-benefit analysis to ensure its equity and constitutionality. The use of multidisciplinary quantitative cost-benefit analysis would provide a broader, more rational insight into the resolution of urgent policy questions concerning occupational safety and health. The necessity for such analysis will become more apparent as society's problems become more technologically complex.

Charleston C. K. Wang
Early in the Carter years, the United States Congress and the Securities and Exchange Commission began mustering forces to bring integrity to the international corporate arena. The public was not happy with headlines which spotlighted corporate officials bribing American and foreign political figures. Corporate America reacted by initiating investigations which they or outside, independent law firms conducted, identifying problem areas and attempting to conform to the new regulations. Corporations soon learned, however, that they had been tricked into providing the information for their own indictments. The Securities and Exchange Commission (SEC) or the Internal Revenue Service (IRS) sat back and watched corporations gather the necessary evidence, then, pursuant to powerful administrative subpoena powers and the liberal rules of civil discovery, subpoenaed all documents relating to the investigation. Corporate counsel could only rely on the protection, however illusory, provided by the common law attorney-client privilege. United States v. Upjohn Company did little to quell the fears and nothing to order the chaos created by varying federal court applications of the privilege.

The facts of United States v. Upjohn, while relatively simple, illustrate this point clearly. Upjohn contracted with an independent accounting firm to audit its entire operation. The audit showed that in January, 1976, "questionable payments" were being made by Upjohn's subsidiaries in all its overseas offices. Specifi-


3. "There has been a sharp rise in the number of companies, which, either of their own volition or in accordance with SEC settlement decrees have retained special counsel to investigate and prepare reports about alleged corporate wrongdoing." Brodsky, The "Zone of Darkness": Special Counsel Investigations and the Attorney-Client Privilege, 8 Sec. Reg. L.J. 123 (1980) (citations omitted).

4. See In Re Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979); In Re Grand Jury Subpoena, 599 F.2d 504 (2d Cir. 1979). For a good discussion of the powers of an administrative agency to subpoena see B. Schwartz, Administrative Law §§ 41-43, 48 (1976). See also note 17 infra.

cally, the audit showed that $4.4 million in payments had been made to officials in 136 countries in which Upjohn does business. The information was relayed to corporate in-house counsel, Gerard Thomas, who decided to investigate for himself. In March, 1976, cooperating with outside counsel, Thomas sent a questionnaire “to all foreign and general managers,” requesting data for the period from January 1, 1974, to present. The letter asked for information relating to (1) any payments made “to or for the benefit of” government employees or officials, (2) any payments made to candidates for political office, (3) any payments not reflected on the financial records, and (4) any third party transactions. The letter suggested that the answer report even the slightest evidence of one of the species of payments under investigation. The letter demonstrated that, above anything else, the officers of the corporation wanted to know what was going on, and they wanted corporate counsel to know.

In March, 1976, Upjohn voluntarily submitted two reports to the SEC, which promptly forwarded the reports to the IRS. The IRS commenced an investigation of Upjohn’s deductions of the “questionable payments” as business expenses. Upjohn was willing to give the IRS detailed information about $700,000 in payments but would not release information concerning another $3.7 million. Upjohn also willingly reported the names of the interviewees, subsequent to their return of the questionnaires. These documents had been kept confidential within the corporation. Eighty-two people were listed, including all managers of Upjohn’s operations in each country, for example, Roberto Brenes, General Manager of Guatemala; directors of specific districts of the globe, for example,

6. Id. at 1225.
8. Id.
9. Id. at 41a-42a.
10. The letter said, “If you cannot absolutely establish that any payments of the type described above have been made, please provide also whatever information may be available within the subsidiary indicating that such payments might well have been made.” Id. at 41a. Further, the letter instructed the answerer: “In considering your answers to each of these questions, you should interpret broadly any terms which you find ambiguous. For example: the term ‘payments’ would include money payments, gifts or the payment of expenses such as those incurred for a weekend holiday or vacation . . . .” Id. at 42a.
11. 600 F.2d at 1225.
Brian Ellis, General Manager, Near East District; directors of general divisions of the company, for example, Michael G. Beck, Director, Commercial Division, International. Plainly, those interviewed were executives not bottle-cappers or capsule-fillers.

On November 23, 1976, the IRS issued a summons to produce "files relative to the investigation." The IRS also wanted "memoranda or notes of the interviews." The summons was issued pursuant to 26 U.S.C. § 7602, which allows the IRS to conduct tax audits. Upjohn refused to produce either the interview notes, or the impressions of Thomas at the time of the interviews. In the hearing to enforce the summons, the magistrate employed the theory that a voluntary disclosure to the SEC acted as a waiver of the attorney-client privilege. Upjohn then appealed to the Court of Appeals for the Sixth Circuit.

The Sixth Circuit, the case being one of first impression, compared the two tests then available in determining attorney-client privilege in the corporate setting. In preference to the "subject matter" test, it chose to adopt the narrower "control group" test. It found that "only the senior management, guiding and integrating the several operations . . . can be said to possess an identity analogous to the corporation as a whole." Judge Merritt argued that use of the broader "subject matter" test incorporated two evils in decisions to grant or refuse the attorney-client privilege. First, allowing the privilege to extend to communications with lower-echelon employees created an atmosphere that encouraged

15. "The records should include but not be limited to written questionaires sent to the managers of the Upjohn Company's foreign affiliates, and memoranda or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries." Id. at 682.
For the purpose of ascertaining the correctness of any return . . . the Secretary is authorized—
(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
(2) To summon the person liable for tax . . ., or any officer or employee of such person . . . to appear before the secretary . . . and to produce such books, papers, records, or other data and to give such testimony, under oath, as may be relevant or material to such inquiry . . . .
17. [1978] 78-1 TAX. CT. MEM. DEC. (CCH) 83,603 (W.D. Mich.).
18. 600 F.2d 1223 (6th Cir. 1980).
19. Id. at 1226-27.
such employees to bypass senior management and make corporate counsel the "sole repository" of unpleasant facts. 20 Second, a broad privilege acted "as a bar to the discovery of the truth." 21

THE ATTORNEY-CLIENT PRIVILEGE BEFORE UPJOHN

Before a discussion of the Supreme Court's reversal of the Sixth Circuit opinion, a synopsis of federal opinions on attorney-client privilege in similar fact situations is necessary to show that, at the time of the Sixth Circuit decision, the circuits were in a state of confusion. There even may have been a third test waiting off stage, in addition to the two existing tests and their variegated applications.

The case most frequently cited for establishing the "control group" test is City of Philadelphia v. Westinghouse Electric Corp. 22 In that case, ironically, the court was concerned with being fooled by "rank" or fancy title, and instead chose to explore the illusive concept of corporate persona, creating its own fancy titles, rather than relying on the existing corporate hierarchy. A majority of courts have adopted this test and they have construed it narrowly, looking for policy control rather than day-to-day business control. 23

The other test is actually a general concept of which several versions are extant. Results of its application show, however, consistent extension of the privilege no matter what permutation of the test is used. Harper & Row Publishers, Inc. v. Decker, 24 first applied the "subject matter" test. The facts were similar to Upjohn's: an attorney had "debriefed" 25 employees after a grand jury questioning in an antitrust case. The government sought discovery of the interview notes but the court refused to enforce the summons. The court's analysis focused first upon the reason the employees were interviewed, and the fact that the interviewees possessed the sought-after information as a direct result of their employment at

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20. Id. at 1227.
21. Id.
25. Id. at 490.
Harper & Row. The court distinguished their situation from one in which the witness is a bystander by virtue of fate. Three criteria were used to determine the scope of the privilege: (1) the employee's communication with the corporate attorney had to be at the direction of his superiors, (2) the legal advice the corporation needed had to relate to the employee's duties on the job, and (3) the subject matter of the communication had to be within the purview of the employee's performance of his or her job duties.

The next case to utilize the "subject matter" test expanded the tripartite test to a five step conglomerate. The additional elements were first, that the communication not be "disseminated beyond those persons who, because of the corporate structure, need to know its contents," and second, that "the superior [have] made the request so that the corporation could secure legal advice." While the extra elements clarify the Harper test, they make it more rigid.

Yet another case combined the "control group" test and the "subject matter" test in such a way as to make them cumulative. In Duplan Corporation v. Deering Milliken, Inc., chronologically between Diversified and Harper, the court was faced with a complicated fact situation involving numerous documents, and interviewees, and complex issues of patent interference and antitrust

26. The court said: "It is clear that we are not dealing in this case with the communication of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously observe events which may generate liability on the part of the corporation." Id. at 401.

27. We conclude that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment. Id. at 491-92.


29. Id. at 609.

30. The attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

law. The court applied the "control group" test as a precondition of the "subject matter" test.32

The foregoing is in no way comprehensive of all cases dealing with the application of the tests used to determine attorney-client privilege in the corporate setting. It is presented to show the possibilities available to the Upjohn court and the need of the Supreme Court to create uniformity among the circuits.33

THE SUPREME COURT'S REASONING

In Upjohn Co. v. United States,34 the Supreme Court first offered a historical analysis, citing the original purpose of the attorney-client privilege: full and frank communications between the attorney and his client. Additionally, the Court assumed that the privilege encouraged the "observance of the law and the administration of justice."35 A purpose-oriented rather than a result-oriented approach is indicated by the criminal case cited in Upjohn.36 The focus shifts from the client and a specific legal problem to the attorney's job and the requirements of representation.

Still focusing on the attorney's role in litigation, the Court cited the American Bar Association's Code of Professional Responsibility, Ethical Consideration 4-1, which admonishes the lawyer to be fully informed. EC 4-1 falls under the general canon, "A Lawyer Should Preserve the Confidences and Secrets of a Client." Discipline is called for when the attorney discloses confidences imparted to him by his client and not when the attorney fails to elicit all the facts.37 Thus, the basis of Upjohn, at least in part, is the aspirational guidelines of the Ethical Considerations which recognize the "fiduciary relationship existing between lawyer and client," and that attorney-client relations are a two-way street: "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system."38 The Court described the relationship as a reciprocal

32. Id. at 1165.
34. 101 S. Ct. at 682.
35. Id.
37. ABA CANONS OF PROFESSIONAL ETHICS No. 4, Disciplinary Rule 4.101.
38. Id. Ethical Consideration 4-1.
trade of information. Therefore, City of Philadelphia was criticized for protecting only the communications from the attorney to the corporation. The Court found the same flaw in the Sixth Circuit’s reasoning. Its criticism would probably extend to any “control group” rationale.

As in all of the cases dealing with the attorney-client privilege in the corporate setting, the Court revealed its own peculiar understanding of the inner workings of a corporation. The Court used the facts of Duplan Corporation to paint a corporate mise en scène wherein advice to the corporation comes not from the chairman of the board but from those employees who must perform duties and, thereby, may subject the corporation to liability. In actuality, policy control seldom exposes the corporation to liability because the liability arising from a statute like the Foreign Corrupt Practices Act is triggered by a specific act that is often only one of many possible means to implement a broad range of policies.

The last part of the Court’s rationale focused on the attorney’s role in representing his client. Since some communication will be available for discovery under the civil rules and administrative investigatory powers, the attorney needs to be able to predict when he is crossing the line into the territory of information that is discoverable with a high degree of certainty. Standing in the attorney’s shoes, the Court rejected the “control group” test as a means of determining when the attorney-client privilege will be available.

39. “Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.” 101 S. Ct. at 683.
40. Id.
41. Id. at 684.
42. See text accompanying notes 72-82 infra.
43. 101 S. Ct. at 684.
44. “But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected . . . . The very terms of the test adopted by the court below suggest the unpredictability of its application.” Id.
45. Needless to say we decide only the case before us and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of F.R.E. 501 . . . . While such a “case-by-case” basis may to some slight extent undermine desirable certainty in the boundaries of attorney-client privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrower “control group” test sanctioned by the Court of Appeals in this case cannot, consistent with “the principles of the common law as . . . interpreted . . . in light of reason and experience,” F.R.E. 501, govern the development of the law.
The Court decided not to remand the problem to the Sixth Circuit but chose to apply its decision to the facts in determining which communications were protected and which were not. Applying no specific procedure or test, the Court balanced the facts and decided that the questionnaires and notes reflecting interview answers were protected. It noted the information obtained by Thomas was not available to upper-level management and that, due to the letter from the chairman of the board, the employees were aware that the information was needed for legal advice and that they were to answer at the direction of their superiors. Further, all communications were considered highly confidential and had been kept so. Since the government had a list of all those interviewed, it could interview them for itself.48

The second issue in Upjohn was whether to allow the work product rule to apply to IRS summonses.47 This covered the parts of the “notes and memoranda of interviews” which went “beyond recording responses to [Thomas’] questions.”48 Relying almost entirely on Hickman v. Taylor,49 the Court decided that the work product doctrine did apply to IRS summonses.50 There was really no argument since the government had already conceded the point in its brief.51 Nevertheless, like the attorney-client privilege tests, the work product doctrine has received capriciously illogical treatment among the circuits as applied to administrative summonses.52 Government attorneys argued for a qualified reading of the Hickman rule that would allow “a sufficient showing of necessity” to overcome the protections of the work product doctrine.53 Significantly, the Court found that this qualification of the work product doctrine “did not apply to ‘oral statements made by witnesses . . .

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46. Id.
47. Id.
48. Id.
49. 329 U.S. 495 (1947).
50. 101 S. Ct. at 686.
51. Id.
52. In United States v. Amerada Hess Co., 619 F.2d 980, 987 (3d Cir. 1980) the court said, “There is a split of circuit court authority on whether the work product rule applies to IRS investigations.” See also United States v. Nobles, 422 U.S. 225, 247 n.6 (1975). Compare United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), which held work product inapplicable to section 7602 summonses, with United States v. McKay, 327 F.2d 174, 176 (5th Cir. 1966) holding that work product did apply.
53. 101 S. Ct. at 687.
whether presently in the form of [the attorney's] mental impressions or memoranda." 54

The Hickman work product rule has been traveling two roads for the last thirty-two years. On the one road, a line of cases has interpreted Hickman as enunciating two rules. One rule covers relevant nonprivileged facts buried in counsel's files which may be discovered after a showing of necessity. 55 In re Grand Jury Subpoena 56 typifies the holdings based on this interpretation of Hickman. The cases have required varying degrees of necessity in order to deny the privilege, with inconsistent results. 57 On the other road, courts have applied an absolute protection to all oral statements recorded in attorney-transcribed notes. 58 Part of the problem courts have faced is the newness of the rules of discovery and the lack of any rule governing a Hickman-like situation. 59

In United States v. Upjohn, the Court declined to decide whether Hickman stands for an absolute or qualified work product rule. 60 Indeed, more confusion may exist when the smoke clears and federal courts attempt to coordinate Rule 26 and Hickman in light of the statement in Upjohn that "work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." 61 The Court was not so energetic when faced with applying its rule to the work product issue. It reversed and remanded so that the Sixth Circuit could make the final determination.

CRITICISM OF THE OPINION

The SEC, IRS, and FTC watchdogs have been hot on the trail of the American corporation since their respective births. One new

54. Id.
55. 329 U.S. at 511.
56. 599 F.2d 504 (2d Cir. 1979). Relying on Hickman, the court upheld the validity of a "work product of the lawyer" rule in the circumstances. It left open the question whether, in civil discovery, production might be justified when the witnesses are no longer available or can be reached only with difficulty. Id. at 512.
59. "The courts were therefore confronted with the task of applying the standards of the Hickman case under rules which contained no specific provision for trial preparation materials." C. McCormick, HANDBOOK OF THE LAW OF EVIDENCE 206-09 (2d ed. 1972).
60. 101 S. Ct. at 688.
61. Id.
piece of legislation has struck fear in the hearts of corporate counsel and provided a new trail for the hounds to follow. The Foreign Corrupt Practices Act [hereinafter FCPA or the Act], while seldom specified, is the reason for the corporate heartburn that triggers internal investigations. The investigations produce reports from all levels of the company so that corporate counsel may decide whether the Act has been violated and how to comply with it. The FCPA has produced unprecedented reactions among international corporations. As witness to this phenomenon, many cases in this comment arise from investigations into corporate overseas affairs.

Internal investigations are encouraged by administrative agencies with catch words like “accountability” and “self-regulation.” Equally encouraging to internal investigations is the history of the FCPA and reports to Congress by lobbyists for passage of the Act. Another reason, noted by the Supreme Court and perhaps

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63. See Williams Details Commission Policy on Compliance with FCTA Accounting Provisions, [1981] 586 Sec. Reg. & L. Rep. (BNA) D-1. “The anxieties created by the FCPA—among men and women of utmost good faith—have been, in my experience, without equal,” the SEC chairman stated. “This consternation can be attributed, in significant part, to the spectre which some commentators have raised of exposure to Commission enforcement action and perhaps criminal liability, as a result of technical and insignificant errors in corporate records or weaknesses in corporate internal controls.” Id.

Ending with a theme that has pervaded his chairmanship, Securities and Exchange Commissioner Harold M. Williams urged American Corporations to develop a greater awareness of their accountability to the public to preclude the necessity of expanded government regulation.

Williams contended the SEC’s willingness to rely on self-regulation as a substitute for legislative solutions was confirmed by its response to problems in the accounting profession. The chairman noted many trends, including the disclosure of unreported overseas payments and inaccurate auditor’s reports, had shaken the confidence in the profession. The Commission, . . . encouraged the professions “own response, monitored by the Sec.”

Id. See note 4 supra.
66. The FCPA started in the early seventies when the SEC in conjunction with the Congress launched a campaign to make public corporations accountable. The idea that private groups of people can “escape” some consequences of the law that private citizens cannot bothers government officials. “Recent investigations by the SEC have
the most important one, is the ethical consideration of an attorney's being fully informed. Problems accompanying getting and using information without jeopardizing a client, in the face of SEC reporting requirements and notwithstanding advice to prevent future litigation, are innumerable. Upjohn had the potential to lift in-house corporate counsel out of quicksand and onto solid ground where they could better do their lawyering. Every corporate attorney in America anxiously awaited the Supreme Court's decision. The bar wanted a decision which would establish usable guidelines. Upjohn's facts highlighted the practical benefits of clear guidelines:

If it had been clear that work-product materials would be available for scrutiny by the Service, counsel for Upjohn would likely have conducted their voluntary investigation of questionable foreign payments quite differently. For example, counsel might have limited the number of employees they elected to interview; they might have conducted interviews but not prepared notes of their impressions and conclusions; or they might have made only selective notes, in which they did not record information or impressions that might later be construed as harmful to Upjohn or its employees.

In other words, the corporation would not have made the necessary effort to find out what went on if it had known its own investigation might support its prosecution. As the law presently stands, the recommended practice in handling administrative investiga-

revealed corrupt foreign payments by over 300 U.S. companies involving hundreds of millions of dollars. These revelations have had severe adverse affects . . . . Confidence in the financial integrity of our corporations has been impaired. The efficient functions of our capital markets has been hampered." Later in the hearings regarding the FCPA criminal statutes: "The criminalization of foreign corporate bribery will to a significant extent act as a self-enforcing, preventative mechanism."


67. 101 S. Ct. at 683.
68. For an excellent discussion of most of these problems see Lorne, The Corporate and Securities Advisor, The Public Interest and Professional Ethics, 76 Mich. L. Rev. 425 (1978); Brodsky, The "Zone of Darkness": Special Counsel Investigations and the Attorney-Client Privilege, 8 Sec. Reg. L.J. 123 (1980).
69. Given the dual rejection in Upjohn both of the attorney-client privilege subject matter test and of the availability of the work product rule in response to an administrative summons, it should not be surprising that the organized bar has vigorously sought to overturn the Sixth Circuit decision . . . . Little is to be gained by speculation at this time about the outcome. But assuming the Court rules directly and fully on both issues, the result will undoubtedly be important for all of us.
tions is to "get out and get the information about what is really going on in your company."\(^71\)

The Supreme Court now has tossed the ball back into the federal court system minus one possible game plan. Corporate attorneys now must speculate how the courts that previously devised the "control group" test will react. Chances are the courts will not adopt the "subject matter" test, since the Supreme Court specifically refused endorsement though employing something peculiarly similar. This comment intends to suggest that those courts which impose narrower evidentiary privileges conceptualize the mysterious inner workings of a vast corporation differently from those allowing more extensive privileges. By understanding the underlying assumptions of the restrictive courts' rationales, attorneys may be able to predict how the courts will rule.

Restriction-oriented cases—those employing the "control group" test and/or the qualified work privilege test—see the corporation as an evenly distributed hierarchy where kings are kings, omniscient and omnipotent. *City of Philadelphia* perceived those "in position to control or even take a substantial part in a decision,"\(^72\) as a personification of the corporation. The courts envisioned a person or a group of people who have access to all the information necessary to make any decision. The *Upjohn* court of appeals decision subscribed to this same picture.\(^73\)

A more persuasive argument favoring the "control group" test is that corporations are so inundated by tidal waves of regulations that they have no choice but to surrender themselves to the lawyer

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71. When you talk about an investigation by a government agency, the first advice always given to you is get out and get the information about what is really going on in your company . . . .

We have an idea of what we think the management just below is doing, but when you investigate you find that they are doing something different, and they, in turn, think the management below them is doing something that they are not actually doing.

So you have to peel down through the layers to try to discover—not just what the policy says is happening, not what the reports say is happening—what has actually been going on. The problem, of course, is compounded by the difference between what the employees do and what they will admit to you they are doing. An that, of course, depends a lot upon how serious the charge is . . . .


73. 600 F.2d at 1225.
who swims these currents as his business. One writer has noted that there may be no empirical connection between the degree of privilege associated with a communication and the confidence which the client places in the attorney. Other arguments, not held by the courts, have misapprehended the procedure of an SEC investigation.

Indeed, if the view held by the aforementioned writers comported with reality, the argument for a restricted privilege would be stronger. When a company has offices in 125 countries, or 136 countries as in Upjohn, the likelihood of a small group of people knowing all that is necessary to inform an advising attorney is slight. Equally as doubtful is the situation in which the subject matter is technical and complex, as in patent problems. With those fact patterns in mind, the "subject matter" test appears to be the most acceptable devised to date. Diversified Industries, Inc. v. Meredith discarded the fiction of a corporate persona based precisely on this picture of a corporation: "The principal criticism is that the 'control group' test attempts to equate corporate clients with individual clients . . . . In practice, this results in protecting any communication to top level executives which fails to take into account the realities of corporate life."

74. "Some courts and commentators have suggested that the control-group test discourages corporations from conducting internal investigations . . . . [T]he short answer to this argument is that they have little choice." 599 F.2d at 1236-37. See also comment, The Attorney-Client Privilege: Fixed Rules, Balancing, or Constitutional Entitlement, 91 Harv. L. Rev. 464, 473 (1977).

There are firstly, several reasons to suspect that certainty plays a less substantial role in the corporate client's decisions. Unlike most individual clients, corporations often have ongoing dealings with attorneys or law firms because of regular needs for legal advice. The institution of in-house counsel, for example, reflects the day to day immediacy that legal issues have for discrete corporate actions and the unavoidable reliance that corporations place on legal advisers.

Id.

75. Whether and to what degree the privilege actually does promote lawyer-client relations remains a subject of academic dispute. The literature in the field has consistently acknowledged the tenuousness of the correlations, even as it defends the "principle" of privilege at stake. In fact, the only serious empirical study of the matter suggests that the asserted correlation may not exist.

Id. at 470 (citations omitted).

76. Hubbell, Discovery of Internal Corporate Investigations, 62 Stan. L. Rev. 1165 (1980) (suggesting, somewhat ambiguously, that outside counsel was employed by the SEC because the SEC lacked sufficient manpower to investigate Upjohn company).


78. 599 F.2d 504 (2d Cir. 1979).

79. 572 F.2d at 608. See text accompanying notes 28-30 supra.
The *Diversified* court noted, too, that the more appropriate approach is to examine why the attorney was being consulted rather than who was involved in the communication.\(^8\) Both of the foregoing rationales were adopted by *Diversified* and indicate a presupposition that corporations are oligarchies which set policy and delegate authority to dukes, earls, and sheriffs. The critical point for any attorney advising a client is to get the information: "Thus the main consideration is whether the particular representative of the client, to whom or from whom the communication is made, is involved in rendering information necessary to the decision making process concerning a problem on which legal advice is sought."\(^8\)

The point is the interviewees are there because of, not in spite of, the corporation, and, hence, are not "bystander witnesses" as one court observed.\(^8\)

Wigmore's 1940 formulation is commonly cited\(^8\) as the proper statement of the attorney-client privilege. The problem most courts have had in the corporate setting is satisfying the "by the client" requirement. Defining "client" becomes problematic when the client is a corporation. Who pays for and receives services? The answer is probably the stockholders, but there may be one stockholder or an infinite number and, obviously, that infinite number cannot speak with a single voice. Responsibility for actions taken is a nebulous concept, though careful examination of the facts with an eye toward practicality would help resolve a question concerning who needs to be contacted. Most people know the duties required by the job they are assigned. The night watchman at gate three is the man that watches gate three all night. Hence, if you wished to know whether there had been a delivery at gate three during the night, you would ask him and not the assistant vice president in charge of receiving. The Supreme Court stood in the shoes of the attorney and analyzed his responsibilities and expectations. This approach facilitates finding a broader privilege, both for attorney-client communications, and work product documents, since this approach forces the court to confront the difficulties of

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80. "The Harper & Row test provides a more reasoned approach to the problem by focusing upon why an attorney was consulted, rather than with whom an attorney communicated." *Id.* at 609.
81. 397 F. Supp. at 1165.
82. 423 F.2d at 491.
83. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 544 (McNaughton rev. ed. 1961).
internal investigation in a multinational or multistate corporation. The attorney has to obtain all facts, wherever they may be found, whether from the assistant vice president or the watchmen.

Keith A. Trumbo
NOTES


Given a libel suit involving a media defendant, how should a court determine the status of the plaintiff so that the appropriate standard of fault can be applied to the defendant? If the plaintiff is a private individual, a negligence standard can be used. If the plaintiff is a public figure, the stricter actual malice standard enunciated in the case of New York Times Co. v. Sullivan must be met for recovery to be possible. Second, once a person becomes a public figure in connection with a particular controversy, does that person remain a public figure for purposes of later media discussion of the controversy, even after decades of personal obscurity? The Sixth Circuit Court of Appeals was presented with these issues in the case of Street v. National Broadcasting Company.

Street had sued NBC for libel allegedly arising from its 1976 broadcast of “Judge Horton and the Scottsboro Boys,” a docudrama based upon the 1933 trial of Heywood Patterson, one of the Scottsboro Boys. In the film, Street, the prosecutrix and alleged victim, was portrayed as a perjurer, a whore and a racist who sought to send nine innocent black men to the electric chair for a gang rape they never committed. In its decision rendered March 13, 1981, the court found that Street had been a public figure in the 1930’s because she had played a prominent role in a critically

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1. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). States are allowed to set their own standards of liability for defamation (libel being one type of defamation), “so long as they do not impose liability without fault.” Id. at 347. Many states apply a negligence standard, including Tennessee, the state whose law would apply to the case to be discussed. Memphis Publishing Co. v. Nichols, 569 S.W.2d 412, 418 (Tenn. 1978).
2. 376 U.S. 254 (1964). Under New York Times, the public figure must prove that the defamatory statement “was made with ‘actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” Id. at 279-80.
3. 645 F.2d 1227 (6th Cir. 1981).
4. Id. at 1230.
5. Id. at 1232.
important and well-known controversy, she had enjoyed considerable access to the media in order to state her views, and she had voluntarily sought to influence opinion on the matter through her press conferences and pre-trial activity.

A majority of the court (consisting of Judges Merritt and Martin, with Judge Merritt writing the opinion) also held that Street continues to be a public figure today, even though she has lived in complete obscurity for the past forty years, because "once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of that controversy." In support of that statement, the majority found that Street still enjoys sufficient access to the media to rebut any negative commentary which may arise as a result of the historian's discussion of this ever-important and "living controversy." In addition, it emphasized that historians require the same first amendment breathing space enjoyed by contemporaneous news writers because, even though historians are not constrained by the news writer's deadline, the passage of time takes away or fades the memories of many of the sources of truth about an event still subject to "robust debate." It subsequently denied Street any recovery because she failed to prove that NBC had acted with malice, the required standard of fault first enunciated in the case of *New York Times Co. v. Sullivan*.

In his strong dissent, Judge Peck argued that even if Street had been a public figure in the 1930's, she is not necessarily one today since public figure status must be determined from circumstances as they exist at the time the alleged defamation occurs and should not be based upon a finding that the central controversy is newsworthy. The use of a newsworthiness test to determine the applicability of the *New York Times* standard flies in the face of

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6. *Id.* at 1234.
7. *Id.*
8. *Id.* at 1235.
9. *Id.*
10. *Id.* at 1236.
11. *Id.*
12. *Id.*
13. *Id.* at 1236-37.
14. See note 2 *supra*.
15. 645 F.2d at 1248-49 (Peck, J., dissenting).
16. *Id.* at 1247 (Peck, J., dissenting).
the Supreme Court's repudiation of such judicial decision-making in the case of Gertz v. Robert Welch, Inc., suggested Peck.17 The dissent concluded with the statement that a negligence standard of fault is sufficient and correct in this case.18

The opinions of the majority and the dissent raise important questions and reflect the confusion which still exists in libel litigation involving media defendants and would-be public figures. It is the purpose of this article is to discuss these questions:

1) In light of the most recent Supreme Court decisions in this area, what criteria have been defined for use in determining whether or not an individual plaintiff is a public figure for purposes of application of either the New York Times standard or the less strict standard defined in Gertz? If the controversy which gave rise to the alleged defamation stems from a judicial proceeding, are the parties involved, excepting those who are public officials or all-purpose public figures, presumptively private individuals?

2) Once it has been determined that the individual is a limited-purpose public figure, can it be said that the individual remains a public figure for purposes of later media discussion of the controversy, or must the status of the individual be redetermined from circumstances which exist at the time the alleged defamation occurred?

A TALE OF TWO TRIALS

The story behind this case and its holding is a complex fabric containing many different threads of social, political and constitutional history. The weave began with the sinister strands of rape and racism presented in the Depression-era saga of Street and the Scottsboro Boys. The tragedy served once again to publicize the double standard of justice which existed for blacks and whites in the United States and, more subtly, to reflect society's traditional notions about women who are raped. These threads later became twisted by the conflict existing between first amendment rights and the protection of one's reputation when NBC broadcast its allegedly libelous representation of Street in "Judge Horton and the Scottsboro Boys" in 1976. In attempts to relax the tension between these tangled interests, the Supreme Court had previously handed down a series of opinions beginning with New York Times Co. v. Sullivan and including Gertz v. Robert Welch, Inc.19 The way in

17. Id.
18. Id.
which these cases were interwoven with the threads already men-
tioned determined the outcome of the fabric of this story, and pro-
vided the material for this article.

On March 25, 1931, Victoria Price and a friend hitched a ride on
a freight train traveling from Chattanooga, Tennessee, to Hunts-
ville, Alabama. They were riding on a gondola (a railroad car with-
out a top) which was filled with chert, a flint-like rock with sharp
and jagged edges. Victoria Price claimed that it was at this point
that one dozen young black men jumped into the gondola car and,
at knife point, raped her and her friend. Price claimed specifically
that one of the males had hit her on the head with a pistol, that
the chert cut into her back due to the weight of the males on top of
her, that her vagina and thighs were soaked from the males’ sperm,
that her vagina was bleeding from the rapes, that her clothing had
been torn and was stained, and, finally, that she had fainted as
soon as she alighted from the train. Yet, as only Judge Horton was
to make clear in his opinion following the trial of one of the nine
accused blacks, the evidence in support of Price’s claims was
grossly insufficient. Two doctors who had examined Price within
one hour after she had left the train found no wound from a blow
to the head by a pistol, no lacerations on her back, no bleeding
from her vagina, no torn or stained clothing (before the trials be-
gan, she stated she washed and mended them), and no sperm in
her vagina except a small amount of “dead” sperm which had to
have been there for a day or longer. (There had been some discus-
tion regarding the fact that Price and her friend had slept with
some men in a hobo camp the night before.) In addition, Price’s
friend recanted her own accusations and the testimony of a “wit-
ness” to the entire event contradicted Price’s story, according to
the facts as presented by Judge Horton in his opinion.20

Each reader can come to his or her own conclusions about the
truth of Price’s allegations. The fact remains that five blacks, after
years of trials and retrials,21 were eventually jailed for the alleged
rape of Price. The last defendant was released on parole only as

20. 645 F.2d at 1238-46.
21. Id. at 1229-30.
recently as 1950.\textsuperscript{22} After the Scottsboro trials, Price moved to Tennessee, where she married and shunned any publicity about the controversy. Slowly, the story of the Scottsboro Boys faded into history, and Street's attempts to live a private life were so successful that most thought that she was dead.\textsuperscript{23}

The story of the Scottsboro Boys and Street was discovered by a new generation of Americans in 1976 when NBC broadcast a docudrama entitled "Judge Horton and the Scottsboro Boys." The program was specifically based upon the trial of Heywood Patterson, presented against the background of the entire controversy, as seen through the eyes of Judge James Horton. The script was based upon a chapter in a book by Dr. Daniel Carter entitled \textit{Scottsboro: A Tragedy of the American South},\textsuperscript{24} which in turn had been based upon Judge Horton's findings at the 1933 trial, the transcript, contemporaneous newspaper reports of the trial and interviews with many of the characters. The drama received critical acclaim and won many playwriting and acting awards.

The question of libel arose after NBC's initial broadcast of the program. Street, who had been thought deceased by both the author of the book upon which the program was based and NBC, filed suit in Tennessee district court against NBC for libel and invasion of privacy. Street's primary claims were based upon nine specific scenes in the movie in which, plaintiff alleged, there were either inaccurate representations of events, or representations of events which never occurred, or portrayals of characters making defamatory remarks about the character Victoria Price which had never been made at the time. In addition, NBC rebroadcast the program even after learning of the suit.

NBC replied to plaintiff's claims with a series of alternative claims and defenses: 1) The published material was not defamatory. 2) The published material was true. 3) NBC was protected by the common law privilege of fair report on a judicial proceeding. 4) It was protected by the common law privilege of fair comment. 5) Street was a public figure at the time and thus recovery must be based upon a showing of malice. 6) Even if Street was not a public

\textsuperscript{22} Id. at 1230.

\textsuperscript{23} Dr. Daniel Carter, the historian whose book inspired NBC's docu-drama about the Scottsboro Boys, wrote, "In 1961 . . . Victoria Price died." In addition, he seemed to know exactly where she was located when she passed away. D. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 415-16 (1969) (footnote omitted).

\textsuperscript{24} See note 23 supra.
figure, recovery must be based upon a showing of negligence. The
district court directed a verdict for NBC because, even though the
plaintiff was not a public figure at the time of publication, the
defamatory matter was not negligently published. Street appealed.

As previously stated, the majority affirmed but based its decision
on its determination that Street was and is a public figure and thus
could have recovered "only on a clear and convincing proof that
the defamatory falsehood was made with knowledge of its falsity or
with reckless disregard for the truth." It found that NBC had not
acted with malice, thus Street could not recover. Before discussing
the process by which the court found Street to be a public figure, it
is necessary to examine the origins of the concept of the public
figure in the context of libel suits involving media defendants.

LIBEL AND THE PUBLIC FIGURE

Prior to 1964, a publisher of matter which was libelous per se was
subject to the strict liability of the common law of libel. General
damages were presumed unless the defendant could prove that
the statement was true or that it was otherwise privileged. The
states' interest in protecting the reputations of their citizens was
given extraordinary emphasis, and the door leading to constitu-
tional protection of media speech against the pitfalls of traditional
strict liability remained unopened for decades.

Finally, in 1964, the Supreme Court examined the adverse effect
that libel actions could have on the media and first amendment
freedoms. Theoretically, the fear of publishing defamatory matter
served to restrain the media from publishing any matter which
might be libelous, and thus the media's exercise of its first amend-
ment rights was "chilled." In addition, the fact situation of New

26. For a general discussion, see W. Prosser, Handbook of the Law of Torts § 112 at
Robert Welch, Inc. and Beyond, 61 VA. L. REV. 1349 (1975).
27. W. Prosser, supra note 26, § 113 at 772-74.
29. Id. at 1363-64. When the door was finally opened in 1964 with the Supreme Court's
decision in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the effect was earth-shak-
ing. For the reaction to this enormously important case, see Kalven, The New York Times
W. Prosser, supra note 27, § 118 at 819; L. Tribe, American Constitutional Law 631-35
(1978).
30. 376 U.S. at 279.
York Times Co. v. Sullivan,, raised other worries for the Court. Since the defendant was a southern police commissioner who sought damages for the Times’ publication of an advertisement supporting the civil rights activities of Dr. Martin Luther King (and publicizing the abuse of civil rights activists in the South), the Court was concerned with the possibility that the South could use its libel laws to inhibit reports of civil rights violations. Second, because the defendant was a public official, punishment for the criticism of the defendant, even through the payment of damages, would have been similar to the enforcement of the Sedition Act of 1798 and would have given him “an unjustified preference over the public [he serves]” since the utterances of public officials had been held privileged when made within the outer perimeter of their official duties. As a result the Court held that

the constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to this official conduct unless he proves that the statement was made with ‘actual malice’-that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

This stiff standard was applied in 1967 to public figures as well in the cases of Curtis Publishing Co. v. Butts and Associated Press v. Walker. Since it was important that the media be constitutionally protected when reporting information about public figures, and those figures had presumably accepted the risks of fame and were able to use the media for their own vindication, the extension of the malice standard to libel suits involving public figures seemed logical and justified.

Finally, in 1971, the ultimate question arose: Should a private

31. Id. at 256-60.
32. In upholding the jury’s verdict against defendants and its award of damages for injury to the commissioner’s reputation, the Alabama courts had not departed from familiar rules of libel law, but the inescapable conclusion was that Alabama’s ‘white establishment’ had taken the opportunity to punish the New York Times for its support of civil rights activists: the South was prepared to use the law of libel to stifle black opposition to racial segregation.
33. 376 U.S. at 276-78.
34. Id. at 282.
36. See note 2 supra.
37. 388 U.S. 130 (1967).
38. Id. at 164.
individual be required to comply with the New York Times standard when the allegedly libelous commentary arose from the reporting of a matter of public interest? A plurality in Rosenbloom v. Metromedia answered affirmatively. Rejecting the Court's prior focus on the status of the plaintiff and adopting a test which emphasized the public interest quotient of the subject matter, a plurality consisting of Chief Justice Burger and Justices Brennan and Blackmun opined that a private individual suing a media defendant for libel allegedly arising from the reporting of a matter of public interest must meet the stringent New York Times actual malice standard of liability. The practical effect of the plurality decision was to accord a nearly absolute immunity to the media since few plaintiffs would be able to meet such rigorous standards. Indeed, the Court appeared to be leaning more closely toward the absolutist reading of the First Amendment supported so ardently by Justices Douglas and Black.

Justices Harlan, Marshall and Stewart dissented because, as Justice Marshall enunciated most clearly, the use of a newsworthiness test to determine the applicability of the Times malice standard failed to properly accommodate either the federal interest in first amendment freedom or the state's interest in protection of reputation. On the one hand, the courts would be placed in the position of deciding whether or not an event was of legitimate public interest, and the "danger such a doctrine portend[ed] for freedom of the press seem[ed] apparent." The media would be placed at the mercy of the court which determined whether an event was newsworthy and thus whether the reporting of the event was deserving of constitutional protection. On the other hand, most plaintiffs would not be able to meet the stringent requirements of the Times standard, and damages for a real injury to reputation most likely could not be recovered. Since it is arguable that any event could be newsworthy, the danger would exist that any individual could be "thrust into the public eye by the distorting light of defamation" and subsequently be unable to recover damages. In addition, if a newsworthiness test were used, the possibility would exist whereby a public figure could recover damages for libel without complying

40. Id. at 43-44.
41. Id. at 78-79 (Marshall, J., dissenting).
42. Id. at 79 (Marshall, J., dissenting).
43. Id.
with the malice standard because the subject matter of the publication was not of public interest, while a private individual might be required to comply with the malice standard because the subject matter from which the defamation arose was considered newsworthy. In sum, the court would be required to exercise an "ad hoc balancing" of these competing interests "at a substantial cost in predictability and certainty," while inadequately serving either interest.

Between 1971 and 1974, the composition of the Supreme Court changed. It was once again offered the opportunity to "define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment" in the case of *Gertz v. Robert Welch, Inc.* On this occasion, however, the majority zealously supported the rationale expressed in Justices Harlan's and Marshall's *Rosenbloom* dissents, and adopted the "generally applicable resolution" suggested by Justice Harlan. A private individual who had not accepted the risk of publicity, and was not able to rebut defamatory comments through media access, was more vulnerable to injury by defamation and also more deserving of recovery. The state's interest in protecting the reputation of the private individual was therefore greater. This rationale, coupled with the Court's feeling that a newsworthiness doctrine failed to adequately accommodate either of the competing interests defined above, compelled the Court to repudiate the public interest test so passionately supported by a plurality of the Burger Court in *Rosenbloom*. Instead of basing the applicability of the *Times* standard upon the newsworthiness of the subject matter from which the defamation arose, the determining factor would be the status of the plaintiff. If the plaintiff were a public figure, the actual malice standard would be used. If the plaintiff were merely a private individual, the states were free "to define for themselves an appropriate standard of liability" for the media defendant, "as long as they do not impose liability without

45. *Id.*
46. *Id.*
48. *Id.*
50. 418 U.S. at 344-45.
51. *Id.*
fault. This meant that a simple negligence standard could be used. By requiring a private individual to prove mere fault on the part of the media defendant in its publication of the defamatory falsehood (as opposed to having to prove actual malice on the part of the defendant), the state’s interest in protecting the reputation of the individual was given the appropriate weight in relation to the importance of first amendment freedoms.

If the courts were now supposed to consider the status of the plaintiff instead of the newsworthiness of the subject matter, what criteria applied? Gertz and its progeny provided the courts with clear guidelines. Beginning with Gertz, the Court defined three kinds of public figures. Public figure number one was the all-purpose public figure, an all-around, forever-famous celebrity whose pervasive involvement in a multitude of public affairs makes him a public personality in all aspects of his life. Public figure number two was the limited purpose public figure who has been a bit more difficult to define. This person is perhaps well-known in one particular area and although he has great influence in that one field, all facets of his life should not be so easily “thrust into the public eye by the distorting light of defamation.” Victoria Street would fall into this category if she truly is a public figure. Finally, there is the involuntary public figure, one who is forced into the spotlight against his will. As will be seen, it would seem highly improbable for such a public figure to exist, since the key ingredient in the making of a public figure is voluntary involvement. Since Gertz, the Court rarely discusses the latter category.

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52. See note 1 supra.
53. Id.
55. See note 19 supra.
56. 418 U.S. at 351.
57. 403 U.S. at 79.
58. "More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." 418 U.S. at 345.
59. "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare . . . ." 418 U.S. at 345. There are some commentators who strongly doubt whether, in light of the Court's subsequent emphasis upon the individual's voluntary involvement in the controversy, an involuntary public figure may exist at all: "The concept of one involuntary public figure may have been effectively superseded by Firestone with its preeminent focus on the voluntariness-assumption of risk rationale." Elder, The Law of Defamation and Constitutional Privilege: A Contextual Analysis of Oklahoma Law in
In determining whether an individual is a limited-purpose public figure, the Gertz opinion directed courts to consider the “nature and extent of an individual’s participation in the particular controversy.” In Gertz and subsequent cases, the Court stated that there are two factors which should be evaluated: the voluntariness of involvement by the individual in the controversy for the purpose of influencing its result, and, whether the individual had regular and continuing access to the media before and after the alleged defamation occurred.

In applying these twin factors to plaintiffs in Gertz and subsequent cases, the Court has displayed a distinct preference for finding the plaintiff a private individual as opposed to a public figure. Plaintiff Elmer Gertz, a well-known Chicago attorney who represented the family of a young man shot by a Chicago police officer, was not considered a public figure by the Court and thus was not required to show actual malice on the part of American Opinion Magazine in its libelous portrayal of Gertz in an article. The Court found that Gertz “did not thrust himself into the vortex of this controversy” through Hutchinson v. Proxmire, 4 Okla. City U.L. Rev. 17, 34 n.79 (1979). Even an involuntary figure who has access to the media probably would not be considered a public figure: “By expressly acknowledging that ‘the self-help remedy of rebuttal, standing alone, is inadequate to its task,’ it would seem that mere access to the media, standing alone, is inadequate to classify one as a public figure.” Eaton, supra note 28, at 1423. See also Robertson, Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc., 54 Tex. L. Rev. 199, 222 (1976).

Both Gertz and Butts-Walker identify two major characteristics of public figures: they ordinarily can gain access to communications media in order to rebut defamatory charges, and they have voluntarily exposed themselves in a meaningful sense to an enhanced risk of defamation. The second Gertz criterion—voluntary involvement in a public issue—injects the important new question whether the individual intentionally engaged the attention of the media in an attempt to influence the outcome of the event with which he is involved. The addition emphasized the importance of the plaintiff’s intentional pursuit of media exposure rather than the mere likelihood of media interest in the event.
public issue, nor did he engage the public's attention in an attempt to influence its outcome." In the subsequent case of *Time, Inc. v. Firestone*, the respondent in a very messy and well-publicized divorce proceeding against the tire company heir was held to be a private individual, even though she had originally initiated the action, was frequently written about in society pages and had held several press conferences to discuss the divorce. The Court stated that the voluntariness factor is not fulfilled merely because the individual initiated the court action and thus, in a way, initiated the controversy: "[R]esort to the judicial process . . . is not more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." Nor were Firestone's press conferences an indication that she was attempting to use the media to influence the controversy's resolution. She was merely attempting to satisfy inquiring reporters. It was this opinion which first led some commentators to believe that the Court presumed most parties to a judicial proceeding to be overwhelming private individuals unless, of course, they were public officials or all-purpose public figures.

In 1979, two more important decisions were rendered by the Court which more clearly defined the characteristics of a public

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62. 418 U.S. at 352.
65. 424 U.S. at 454 n.3.
66. One commentator would go even further:
   In many ways, however, the most crucial aspect of the Court's decision in *Firestone* was not its refusal to classify Mrs. Firestone as a public figure, but its insistence that a divorce proceeding is not a matter of 'public controversy' . . . . The suggestion is very clear: Even a public figure might be able to use the divorce courts without becoming subject to the *Sullivan* standards should he bring an action for defamation for the erroneous reporting of what transpired in those divorce proceedings. Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 Mich. L. Rev. 43, 55 (1976) (footnotes omitted). In fact, this author goes too far. While the existence of a public controversy is the prerequisite to the finding that an individual has voluntarily injected himself into the controversy and thus could be a limited-purpose public figure, the opposite is not true: An all-purpose public figure does not become a private individual under the doctrine of *Gertz* merely because the subject matter of the defamation is not in the public interest. To follow such thinking would only serve to re-institute the newsworthiness doctrine of *Rosenbloom*. See *Wolston v. Readers' Digest Ass'n*, 443 U.S. 157, 167-68 (1979). The basis of the presumption that litigants in a judicial proceeding are private individuals (unless they are already public officials or all-purpose public figures) stems from the Court's observation that most litigants are "compelled" to go to court to obtain legal redress or release from a legal obligation, and thus their actions cannot be truly voluntary in the *Gertz* meaning of the term. *See Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976); 443 U.S. at 166-69.
figure. In *Hutchinson v. Proxmire*, the plaintiff was a recipient of Senator Proxmire's infamous Golden Fleece award for the federally funded research he had undertaken with monkeys. Even though Hutchinson had previously received federal funding for his projects and enjoyed substantial access to the media after the Golden Fleece award was given to him, the Court said that these circumstances did not make Hutchinson a public figure. First, it emphasized that Hutchinson's work became a matter of controversy as a result of the Golden Fleece award and not as a result of Hutchinson voluntarily seeking publicity. Defendants charged with defamation cannot, through their own post-event publicity about the plaintiff, "create their own defense by making the claimant a public figure." Second, Hutchinson's subsequent access to the media was not sufficient: "[His] access was limited to responding to the announcement of the Golden Fleece award. He did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure." Thus, it appears that a plaintiff must have had access to the media before, during and after the time of the publication of allegedly defamatory matter.

In the companion case, *Wolston v. Readers' Digest Association*, the Court held that the plaintiff, a suspected but unconvicted spy who pled guilty to contempt charges in 1958 for his failure to appear before a federal grand jury, was not a public figure in 1958 and thus it did not need to consider whether he was a public figure in 1974, when the defendant published the allegedly libelous matter about the plaintiff. Even though it was argued that the plaintiff in 1958 brought the controversy upon himself by choosing not to appear before the grand jury, the Court held that this did not mean that Wolston had "voluntarily thrust or injected himself into the forefront of the public controversy." Furthermore, the Court stated that even though a plaintiff may associate himself with a case "that [is] certain to receive extensive media exposure" it cannot be concluded that the plaintiff is a public figure who is voluntarily seeking to affect the outcome of the controversy.

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68. *Id.* at 135.
69. *Id.* at 136.
71. *Id.* at 166-67.
72. *Id.* at 167.
through his access to the media. The Court concluded by reiterating its suggestion that litigants in a judicial proceeding who are subsequently involved in a libel action stemming from that judicial proceeding are presumptively private individuals:

While participants in some litigation may be legitimate public figures, either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation otherwise affords them simply by virtue of their being drawn into the courtroom. 73

The Court did not have to decide whether or when an individual who was once a public figure may lose that status by the passage of time. Justice Blackmun's concurring opinion provided insight into the question, but it, unfortunately, carried little weight. 74

As these last few decisions have shown, the Court has clearly chosen a more conservative path than that taken by Chief Justice Burger and Justices Blackmun and Brennan in the plurality opinion in Rosenbloom v. Metromedia Inc. 75 The vigor of the constitutional protection of the media in this area has greatly subsided since the early 1970's, in great part due to the change in the make-up of the Court. The result has been the evolution of a general but strictly applied test for determining the status of the plaintiff involved in libel actions against the media as a prerequisite to the application of the malice standard of fault enunciated in New York Times Co. v. Sullivan. 76 The test is two-fold: it requires a purposeful, voluntary "mounting the rostrum" involvement by the plaintiff in a public controversy for the purpose of influencing the outcome, and regular and continuing access to the media.

**Victoria Price Street: The Once and Future Public Figure**

Applying the test that has evolved from the Supreme Court decisions to the *Street* case, it must be initially questioned whether Street was ever a public figure in 1931. The majority, in finding that she had been a public figure then, relied primarily upon her

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73. *Id.* at 168-69.
74. *Id.* at 170-71 (Blackmun, J., concurring).
75. 403 U.S. 29 (1971).
77. 443 U.S. at 169 (Blackmun, J., concurring).
prominent role as prosecutrix in the trials and her subsequent access to the media as determining factors supporting her status as a public figure. The majority was hesitant to discuss the issue of voluntariness, since it stated that the determination of voluntariness rested upon the initial determination of the truth, that is, whether she was really raped. The majority stated that the news media should not have to guess about the truth in a litigation before it can decide whether or not the voluntariness factor of the public figure “test” is fulfilled, and thus whether a story can be published. The Supreme Court has given the courts guidance in this area, however, which the majority (and even the dissent) did not seem to consider seriously. The Court inferred in *Time, Inc. v. Firestone* and *Wolston v. Readers' Digest Association* that a participant in a judicial proceeding was presumptively a private individual. The initiation of or involvement in a litigation which attracts public attention to the individual who is subsequently libeled as a result of such involvement does not necessarily indicate that the voluntariness requirement has been fulfilled and the individual is a public figure. Resort to the judicial process is a fundamental right and “is no more voluntary in a realistic sense than [the actions] of the defendant called upon to defend his interests in court.”

For some reason, Victoria Price felt it necessary to be the state’s witness in the Scottsboro trials from 1931 to 1937. As stated in *Wolston*, the controversial nature of the litigation should not be relevant to the determination of her public figure status. Emphasis upon the public interest factor of the controversy would serve to reintroduce the plurality's newsworthiness doctrine in *Rosenbloom* which was repudiated in *Gertz*. Indeed, when one compares Street with Mrs. Firestone, it becomes very questionable whether Street was a public figure in 1931. Firestone, who had been very well known in society prior to bringing the divorce action, initiated the proceeding and brought forth scandalous and questionable evidence against her husband. She also held several press conferences. Yet her actions were not found to be voluntary.

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78. 424 U.S. at 456.
79. 443 U.S. at 167-68.
80. 424 U.S. 454.
81. 443 U.S. at 167-68.
82. See text accompanying notes 39-46.
83. See text accompanying notes 48-54.
and she was not deemed a public figure.84 Prior to the Scottsboro Boys controversy, Price (Street) had literally no access to the media since she was unknown. With undoubtedly questionable motives, she was the main witness in a state’s prosecution for rape. She held press conferences about the trials. And the courts (for whatever reason) supported her side of the story. Immediately after the trials were over, she moved away and never once used her fame to influence thought about the trials or any other controversy. Based upon the circumstances her history presents, it is difficult to be sure that Street’s actions had been voluntary in the sense that she injected herself into the controversy and “mounted a rostrum” in order to influence the controversy’s result, and, second, that she had “regular and continuing” access to the media before, during, and after the controversy. Finally, based upon the Court’s statements in Wolston,85 it seems doubtful that litigants (who are not public officials or all-purpose public figures) in judicial proceedings may ever be considered public figures when a subsequent libel action calls them to court again. In sum, the Sixth Circuit panel would have been correct in finding that Street had been a public figure in 1931, in light of the aforementioned Supreme Court decisions, only if it had found that she had voluntarily injected herself into the controversy in order to influence the result, and that she had enjoyed regular and continuing access to the media, as so clearly required by Hutchinson.86

Even if Street were a public figure in 1931, she is not one now. While it is necessary for the court to refer back to the activities which originally brought Street notoriety (since obviously a public controversy must be determined to exist before the extent of the individual’s involvement in the controversy can be evaluated), a blanket statement which makes a one-time public figure always a public figure does not comport with the Supreme Court’s emphasis upon the need for greater protection for the individual who has not accepted the risk of publicity and is unable to use the media to reply to negative commentary. In Gertz, the Court framed the conflict as one between the states’ interest in protecting an individual’s reputation and the federal interest in first amendment freedoms. Because a private individual cannot rebut negative

84. 424 U.S. at 454-56.
85. 443 U.S. at 166-69.
86. 443 U.S. at 136.
commentary as effectively as a public figure and has not accepted
the risks of fame, the individual is more vulnerable to injury by
defamation and thus the states' interest in protecting that individ-
ual is greater. If an individual accepted that risk and had that ac-
cess at one time, it does not necessarily follow that those same cir-
cumstances exist today. Thus, a person who at one time might
have been less deserving of state protection of his reputation,
could, by the passage of time and a change of circumstances, be
more deserving of the states' protection at a later time. Clearly, in
1976, Street was no longer in a position to rebut the negative com-
mentary about herself, and her enjoyment of an intensely private
life after the Scottsboro trials implies that she certainly did not
wish to continue accepting the risks of public life. In order to
fairly accommodate the states' interests, Street's status must be re-
considered according to circumstances existing in 1976 and must
not be based upon her past activities or the importance of the con-
trovery to the American people today. Only if it were shown that
she had maintained her voluntary involvement in the central con-
troversy surrounding the Scottsboro trials, or related controversies,
for the purpose of influencing their outcomes, supported by the
fact that she still enjoyed regular and continuing access to the me-
dia, would the majority's determination that she is a public figure
be correct in light of the recent Supreme Court decisions. The ma-
jority's emphasis upon the repudiated newsworthiness doctrine in
its resurrection of Street as a public figure was misplaced and re-
sulted in the application of the actual malice standard of liability.
As Judge Peck stated in his dissent, "A negligence standard is
enough."

CYNTHIA MILLEN

87. "Today [Street's] voice cannot rebut network 'docudramas,' which literally reach the
entire nation in 'gripping' displays." 645 F.2d at 1248 (Peck, J., dissenting).
88. When Street notified NBC that she had filed suit after its initial broadcast of "Judge
Horton and the Scottsboro Boys," NBC insisted on proof of Street's true identity. If she
were not dead, at least she was not very well known. Id. at 1249 (Peck, J., dissenting).
89. Id. at 1247 (Peck, J., dissenting).

INTRODUCTION

The extent to which the Administrator of the Environmental Protection Agency (EPA) may require a state to participate in administration and enforcement of a State Implementation Plan (hereinafter SIP) to achieve National Ambient Air Quality Standards (hereinafter NAAQS) promulgated by the Administrator under section 110(c)(1) of the Clean Air Act (hereinafter the Act) has been considered by the United States Courts of Appeal for the Third, Fourth, Ninth and District of Columbia Circuits. In United States v. Ohio Department of Highway Safety, the Sixth Circuit considered this question in the narrow context of “whether the State of Ohio is subject to the Act’s enforcement provisions for its failure to deny registration to vehicles which have not passed inspection and maintenance emission tests required by an EPA-promulgated provision of the state implementation plan.”

In 1973, the State of Ohio adopted a SIP as required by section 110(a)(1) of the Act. The Administrator found the plan to be

7. 635 F.2d 1195 (6th Cir. 1980).
8. Id. at 1197.
Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or
"marginally inadequate" to achieve the primary NAAQS for the Cincinnati Air Quality Control Region (hereinafter AQCR). On November 8, 1973, the Administrator, pursuant to section 110(c)(1), published a regulation to supplement the Ohio SIP. The Cincinnati regulation requires the City of Cincinnati and Hamilton County to set up facilities to test automobile emissions and requires the State of Ohio to withhold registration from autos which have not passed the inspection. The city and the county established inspection facilities, but the state refused to withhold registration from noncomplying autos. Acting under section 113(a)(1) of the Act, the Administrator issued the state a notice separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

11. 42 U.S.C. § 7410(c)(1) (Supp. III 1979) states:
   The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—
   (A) the State fails to submit an implementation plan which meets the requirements of this section,
   (B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or
   (C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.
12. 40 C.F.R. § 52.1878 (1980) provides in pertinent part:
   (c) The County of Hamilton and the City of Cincinnati shall establish an inspection and maintenance program applicable to all light-duty motor vehicles owned and operated within their respective geographic jurisdictions on streets, roads, and highways over which they have ownership or control.
   (e) After December 31, 1975, no program in the County of Hamilton, the City of Cincinnati, the State of Ohio shall allow the registration of title, or allow the operation on streets, roads, or highways under its control of any light-duty spark-ignition-powered motor vehicle subject to the inspection program(s) established pursuant to this section that does not comply with the applicable standards and procedures, as defined in paragraph (d)(2) of this section. This shall not apply to the initial registration of new vehicles.
13. 42 U.S.C. § 7413 (Supp. III 1979) states:
   (a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.
of violation on March 15, 1976, an order to comply on June 22, 1976. On November 18, 1976, the Administrator brought a civil action in the United States District Court for the Southern District of Ohio seeking an injunction ordering the state to comply with the Cincinnati regulation.

BACKGROUND

The Clean Air Act Amendments of 1970\(^\text{14}\) required the Administrator of the Environmental Protection Agency to promulgate National Ambient Air Quality Standards.\(^\text{15}\) In 1971, the Administrator promulgated standards for six common air pollutants.\(^\text{16}\) Because three of these pollutants are traceable to automobile emissions, many states included transportation control plans\(^\text{17}\) as part of the implementation plans submitted to the Administrator pursuant to section 110(a)(1). The Administrator found several of these transportation control plans to be inadequate under section 110(a)(2)\(^\text{18}\) and promulgated transportation control regulations to supplement them, pursuant to his authority under section 110(c)(1). These regulations\(^\text{19}\) required the states to implement a broad range of transportation control strategies including purchase of additional buses, establishment of computer carpool matching systems, establishment of special highway express lanes for use of buses, carpools and bicycles, and establishment of automobile in-

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inspection, maintenance and retrofit programs. These regulations were challenged by several states as an unconstitutional invasion of state sovereignty. The congressional finding, that regulation of air pollution is within the power granted to Congress by the Commerce Clause,^{20} was not challenged in any of the reviewing courts. Each court considered first whether the Administrator has statutory authority to force the states to administer EPA-promulgated regulations, and, second, whether, if the Administrator has such statutory authority, it is an unconstitutional invasion of state sovereignty.

**Statutory Authority**

The Third Circuit Court of Appeals was the first appellate court to consider the transportation control regulations. In *Pennsylvania v. EPA*,^{21} the court looked first to the plain language of the Act. Section 113 provides for enforcement against "any person" in violation of "any requirement" of an applicable SIP. Section 302(e) defines person as including a "state, municipality, [or] political subdivision of a state."^{22} The question then became whether Congress contemplated that a SIP might require a state to enforce substantive transportation controls promulgated by the EPA. The court afforded "great deference"^{23} to the Administrator's pronouncement in the preamble to the transportation regulations that Congress did intend to grant him such power.^{24} The court also found that the legislative history of the Act "shows a clear expectation that the states would have to implement significant portions of their transportation control plans and indicates an underlying assumption that they could be required to do so."^{25}

The Ninth Circuit Court of Appeals reached the opposite result in *Brown v. EPA* (hereinafter *Brown*).^{26} The court first stated its belief that Congress would not have intended to take this step in the delicate area of federal-state relations in such an obscure man-

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20. U.S. Const. art. 1, § 8, cl. 3.
21. 500 F.2d 246 (3d Cir. 1974).
22. 42 U.S.C. § 7602(e) (Supp. III 1979) states:
   The term "person" includes an individual, corporation, partnership, association, State, Municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.
23. 500 F.2d at 257, accord, Udall v. Tallman, 380 U.S. 1, 16 (1965).
25. 500 F.2d at 258.
26. 521 F.2d 827 (9th Cir. 1975).
ner. It noted the canon of statutory construction according to which, if a case can be decided on either of two grounds, one of which involves a constitutional question, the case should be decided on the ground that avoids the constitutional question. The court felt that, if the Administrator has statutory authority to make the regulation, it must be found in section 113(a)(2). According to the court, while it is true the section 302(e) definition of "person" includes a state, "state" is used in section 113 in a manner which distinguishes it from the term "person." Section 113(a)(1) requires the Administrator to give notice both to the "person" in violation and to the "state" in which the violation occurs. Section 113(a)(2) provides that if a "state" fails to enforce the SIP, the Administrator can enforce it against "any person."

The court concluded that section 113 gives the Administrator authority to enforce an SIP against an individual polluter if the state fails to do so. To allow the Administrator to require a state to enforce a plan against individual polluters would be incompatible with the "elaborate form of cooperative federalism" set up by the Act as a whole. The court acknowledged that its interpretation is not unambiguously supported by the legislative history, but argued that there is nothing in the legislative history which marks it as clearly erroneous.

In Maryland v. EPA, the Fourth Circuit Court of Appeals relied on two canons of statutory construction: given a valid and an invalid construction, courts should construe a statute as valid; courts should avoid constitutional issues if possible. Reluctantly assuming that the Administrator has authority to promulgate regulations to supplement an inadequate SIP submitted by a state under section 110(c)(1), the court, in a very brief discussion, found "nothing in the statute which authorizes the Administrator to direct the state to supply 'legal authority' or 'statutory proposals' or the like." The Administrator might adopt regulations to be applied within the state, but could not direct the state to adopt its own statutes and regulations.

The statutory construction issue was next considered by the Court of Appeals for the District of Columbia Circuit in District of

27. Id. at 835.
28. Id.
29. 530 F.2d at 215.
30. Id. at 227.
31. Id.
Columbia v. Train. The court began its analysis of the Act with section 110. Because the Act provides no direct means of forcing the states to comply, the court found that the language in section 110(a)(1), which mandates that each state “shall” submit an implementation plan, is directory rather than mandatory. Thus, if the state failed to submit an adequate plan, the Administrator was required to promulgate actual substantive regulations under section 110(c)(1) rather than order the state to adopt such regulations.

The court adopted the Ninth Circuit’s reasoning with regard to the enforcement provisions. It determined that section 113(a)(1) draws a clear distinction between “the person in violation” and the “state in which the plan applies.” The language of section 113(a)(2), which contemplates that widespread violations may “result from” a state’s failure to enforce a plan “strongly suggests that Congress did not believe that inadequate state enforcement was, by itself, a ‘violation.’” Further, it asserted that the Administrator could not compel the states to adopt statutes and regulations to fill in the details of regulations promulgated under section 110(c)(1). The court, however, specifically upheld a ban on state registration of autos which fail to pass an emission inspection, stating that “nowhere in the Act is the Administrator specifically told that he lacks authority to force the states to administer the plans he has promulgated when the plan is directed to a traditional state function such as registering and licensing motor vehicles.” The language of the Act and the legislative history was said to clearly demonstrate that Congress intended the states to cooperate in administering inspection and maintenance programs.

Against this background, the Sixth Circuit Court of Appeals confronted the statutory construction issue in United States v. Ohio...
Department of Highway Safety. The district court\textsuperscript{38} had held that, when confronted with a noncomplying state, the Administrator's only recourse was to initiate federal enforcement against individual polluters under section 113(a)(2). The Administrator could not include "specific state enforcement avenues" in regulations promulgated under section 110(c)(1) and then issue enforcement orders against the state under section 113(a)(1).\textsuperscript{39} On appeal, the EPA took the position that the highways themselves are sources of pollution and, therefore, the state, as owner and operator of its highways, must comply with a valid federal regulation prohibiting registration of noncomplying vehicles. EPA contended that highways are treated the same under the Act as state owned automobiles and power plants, and the state is liable for enforcement under section 113(a)(1). Ohio, on the other hand, contended that it was not an "operator of highways." Moreover, while section 113 contained authority for direct action against an individual polluter (automobile owner), it contained no authority for action against a state which failed to enforce a plan.\textsuperscript{40}

The Sixth Circuit, looking first to the plain language of the Act, adopted Ohio's view. Although section 110 was seen as plainly authorizing the Administrator to promulgate a SIP to replace an inadequate state plan, it was found to contain nothing which allowed the Administrator to require the state to enforce the plan or to treat the state as a polluter because it owns streets and highways.\textsuperscript{41} Sections 113(a)(1) and (a)(2) were held to provide identical remedies. In the event of either individual violations or failure of a state to enforce the plan, the Administrator could proceed only against individual polluters.\textsuperscript{42}

The Sixth Circuit, however, was the first reviewing court to have the benefit of the legislative history of the 1977 Amendments to the Act.\textsuperscript{43} The report of the House Committee on Interstate and Foreign Commerce\textsuperscript{44} dealt specifically with the question whether a
state may be required to withhold registration from noncomplying vehicles. Lamenting the legal uncertainties which still continued to exist seven years after adoption of the 1970 Amendments, the Committee reviewed the diverse results in Pennsylvania, Maryland, District of Columbia and Friends of the Earth v. Carey.\textsuperscript{46} The report quoted the language of the District of Columbia Circuit’s approval of the automobile registration plan: “nowhere in the Act is the Administrator specifically told that he lacks the authority to force the states to administer the plans he has promulgated when the plan is directed to a traditional state function such as registering and licensing motor vehicles.”\textsuperscript{46} The Committee expressed agreement with the court: “in accordance with the decision of the court in District of Columbia v. Train, the Committee has concluded that the effective enforcement of this section (110) requires a prohibition on the state registration (including licensing) of any noncomplying motor vehicle.”\textsuperscript{47} In a footnote, the Committee explained that “[s]uch a prohibition is to be included in each ‘applicable implementation plan’ to which this section applies and may be enforced under section 113 of the Act against the State.”\textsuperscript{48} Senator Muskie’s remarks during the Senate debate are equally explicit:

EPA’s authority to promulgate transportation control measures requiring the states to take action, \textit{and to compel compliance} with such requirements, where necessary, is clear in sections 110 and 113 of the existing law. Although this is a delicate area of Federal-State relations, it is appropriate to require affirmative state action in the field of transportation controls where this proves necessary to protect the public health.\textsuperscript{49}

The Sixth Circuit concluded that, when a state fails to perform a duty imposed upon it by an applicable implementation plan, the Administrator may proceed under either section 113(a)(1) or

\textsuperscript{45} 552 F.2d 25 (2d Cir. 1977), \textit{cert. denied}, 434 U.S. 902 (1977). The Sixth Circuit distinguished this case in a footnote (635 F.2d at 1200 n.5) on grounds that it was a citizen suit rather than an EPA enforcement action, and that the SIP in question was formulated by the state rather than by the EPA. This seems dubious. The transportation control plan is part of an “applicable implementation plan” under section 113, regardless of whether it was promulgated under section 110(a) or section 110(c)(1). The fact that enforcement is sought by a citizen group seems irrelevant.

\textsuperscript{46} House Report, \textit{supra} note 45, at 1366 (\textit{accord} 521 F.2d at 987).

\textsuperscript{47} \textit{Id.} at 1369-70.

\textsuperscript{48} \textit{Id.} at 1370 n.26 (emphasis added).

\textsuperscript{49} 123 \textit{CONG. REC.} 18020 (1977) (emphasis added).
The court made clear that its conclusion that EPA may proceed under section 113(a)(1) is based on the theory that "[o]wnership and control of streets and highways along with the historic practice of licensing vehicles . . . combine to provide a completely rational basis for placing upon the State the obligation to prevent use of these facilities by noncomplying vehicles." This appears to be in harmony with the Third Circuit's statement in Pennsylvania that "when dealing with the commerce power, 'we are guided by practical considerations.'" The Sixth Circuit specifically rejected EPA's contention that the state itself is a polluter by reason of ownership of streets and highways.

**Constitutional Issues**

In determining whether the transportation control regulation constituted an unconstitutional invasion of state sovereignty, the courts in Pennsylvania, Brown I, Maryland and District of Columbia each relied on Maryland v. Wirtz, which was expressly overruled by the Supreme Court in National League of Cities v. Usery. The Third Circuit held that Wirtz had eliminated the distinction between governmental and proprietary functions of the states previously used in determining the constitutionality of federal regulation of state activities. Under the commerce clause, "the constitutionality of federal regulation of state activities is subject to the same analysis as that of private activities; viz. the determinative factor is simply whether they have an impact on interstate commerce."

The Ninth Circuit, in dicta, read Wirtz as maintaining the governmental-proprietary dichotomy. The EPA, with its transportation control regulations, seeks to regulate the states' power to govern commerce. The power to govern commerce is not the same as commerce itself. Both the states and the federal government derive their power to regulate commerce from the Constitution. EPA's attempt to require the state to use its police power to enforce a federal regulation "cannot be equated to the 'unobtrusive' regulation

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50. 635 F.2d at 1203-04.
51. Id. at 1204.
53. 635 F.2d at 1204.
56. 500 F.2d at 261.
57. 521 F.2d at 839.
of economic activities of the states upheld in *Maryland v. Wirtz.*\(^{58}\) The Fourth Circuit did not reach the constitutional question, but did note its agreement with the Ninth Circuit's analysis.\(^{59}\)

The District of Columbia Circuit upheld some of the transportation control regulations and, therefore, did reach the constitutional issues. The court found the state-owned transportation system to be analogous to the state-operated public railroad in *United States v. California,*\(^{60}\) and, as such, subject to regulation under the commerce power. In *District of Columbia v. Train,* the District of Columbia Circuit drew a thin line, finding the regulations requiring construction of exclusive bus lanes and purchase of additional buses permissible as regulation of an existing state-owned transportation system, but the regulations requiring construction of bicycle lanes, which would require construction of a new and separate transportation system, impermissible.\(^{61}\) The court viewed the inspection, maintenance and retrofit regulations as a different matter. Those portions which required the state to enact legislation and regulations to require its citizens to conform to the federal regulation were held invalid. The regulation prohibiting the state from registering noncomplying vehicles, since it is a modification of an existing state transportation control program, was held valid.\(^{62}\)

The Supreme Court decided *National League of Cities v. Usery*\(^{63}\) in 1976. The plurality opinion, written by Justice Rehnquist, was joined by Justices Burger, Stewart\(^{64}\) and Powell. The issue in the case was whether Congress could extend the minimum wage and hour provisions of the Fair Labor Standards Act to state employees. The plurality, limiting the commerce power for the first time since the New Deal, held that Congress could not regulate interstate commerce in a way which "will impermissibly interfere with the integral governmental functions" of the states.\(^{65}\) Justice Blackmun supplied the fifth vote, stating in his concurrence, "I

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58. Id.
59. 530 F.2d at 227.
60. 297 U.S. 175 (1936).
61. 521 F.2d at 988-90.
62. Id. at 990-91.
64. Justice Stewart resigned from the Court, effective July 1, 1981. Sandra Day O'Connor was sworn in as his successor on September 25, 1981. The possible effect of this personnel change is mitigated by the Court's strong holding in Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 49 U.S.L.W. 4654 (1981). See note 70 and accompanying text infra.
65. 426 U.S. at 851.
may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.\textsuperscript{66} The lower federal courts have split in interpreting \textit{National League of Cities}. Some have searched for Justice Rehnquist's talismanic interference with integral government functions,\textsuperscript{67} while others have sought Justice Blackmun's balance of federal and state interests.\textsuperscript{68}

In \textit{Ohio Department of Highway Safety}, the Sixth Circuit responded to both of the lower federal court interpretations of \textit{National League of Cities}. The court first stated that the critical question is "whether the federal action 'will impermissibly interfere with the integral governmental functions . . .' of the state."\textsuperscript{69} The court affirmed the vitality of the tenth amendment,\textsuperscript{70} but held that it may be limited when it confronts a competing national interest: "[A] scheme which seeks to enforce state cooperation in an effort to deal with a national problem will not fall under the prescription of the Tenth Amendment if it leaves the states free to make choices which are essential to their functions as states."\textsuperscript{71}

The state interest was found to be slight. Further, the registration ban would not require Ohio to adopt legislation, establish new agencies, change its method of registering autos, or take any other affirmative action. Compliance would not require the expenditure of substantial amounts of state money. The balance was struck: "The federal interest in controlling air pollution far outweighs any state interest in permitting noncomplying vehicles to use public

\textsuperscript{66} Id. at 856.
\textsuperscript{69} 635 F.2d at 1205.
\textsuperscript{70} The court cited the oft-quoted footnote in \textit{Fry v. United States}, 421 U.S. 542, 547 n.7 (1975):

While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity of their ability to function effectively in a federal system.

\textit{Id.}
\textsuperscript{71} \textit{Id.}
streets and highways."\textsuperscript{72}

In a later development, the Supreme Court, upholding the constitutionality of the Surface Mining Control and Reclamation Act of 1977 in \textit{Hodel v. Virginia Surface Mining and Reclamation Association},\textsuperscript{73} sought to clarify its \textit{National League of Cities} position: "[N]othing in \textit{National League of Cities} suggests that the Tenth Amendment shields the states from preemptive federal regulation of \textit{private} activities affecting interstate commerce."\textsuperscript{74} The court found that, when regulating private activities, Congress may prohibit not only inconsistent state regulation, but all state regulation.

The court established that a claim that congressional commerce power legislation is invalid under \textit{National League of Cities} must meet three requirements in order to succeed. The first of these is "a showing that the challenged statute regulates the 'states as states.'"\textsuperscript{75} The Clean Air Act regulation challenged in \textit{Ohio Department of Highway Safety} does not meet this requirement. It seeks to regulate the pollution-causing activities of private individuals. The state is required only to withhold registration from autos which fail to met the minimum federal standard. As the Supreme Court asserted in \textit{Hodel}, "the Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police power."\textsuperscript{76}

The second finding required by \textit{Hodel} to invalidate legislation under the commerce power is that the "federal regulation . . . address[es] matters that are indisputably 'attributes of state sovereignty.'"\textsuperscript{77} The power to determine the wages and hours of its employees was found to be an attribute of state sovereignty in \textit{National League of Cities},\textsuperscript{78} as was the power to locate its own seat of government in \textit{Coyle v. Oklahoma}.\textsuperscript{79} The authority of a state to use its police power to regulate the use of automobiles on its streets and highways is not such an attribute. The tenth amendment does not limit "congressional power to pre-empt or

\textsuperscript{72}  Id.
\textsuperscript{73}  49 U.S.L.W. 4654 (1981).
\textsuperscript{74}  Id. at 4660.
\textsuperscript{75}  Id.
\textsuperscript{76}  Id. at 4661.
\textsuperscript{77}  Id. at 4660.
\textsuperscript{78}  426 U.S. at 845.
\textsuperscript{79}  221 U.S. 559, 565 (1911).
displace state regulation of private activities affecting interstate commerce.\textsuperscript{80}

The third finding required by \textit{Hodel} is that the state's "compliance with the federal law would directly impair [its] ability 'to structure integral operations in areas of traditional functions.'"\textsuperscript{81} There was no such finding in \textit{Ohio Department of Highway Safety}. The registration and licensing of automobiles is undoubtedly a traditional function of the states. The Cincinnati regulation requires only that Ohio withhold registration from autos which have failed to pass an emission inspection. The state is otherwise free to regulate the use of its highways in any way it chooses, or not to regulate them at all. The regulation does not require the state to allocate funds or personnel, or to structure its internal operations in any particular way. It simply requires that the state not regulate its highways in a manner inconsistent with national policy.

\textbf{CONCLUSION}

The legislative history of the Clean Air Act Amendments of 1977 makes clear that Congress intended the states to cooperate in the formulation and administration of transportation control plans required by the Amendments of 1970 to achieve National Ambient Air Quality Standards. While Congress anticipated voluntary cooperation of the states, it intended that the enforcement procedures in section 113 of the Act be available to require recalcitrant states to administer provisions of regulations, promulgated by the Administrator under section 110(c)(1), which are directed toward traditional state functions, particularly when the alternative of federal enforcement would be impractical, duplicative of state programs and costly.

The Cincinnati regulation does not fall within the prohibition in \textit{National League of Cities} of regulation which impermissibly interferes with integral governmental functions of the states. The federal interest in controlling air pollution far outweighs the state interest in registering noncomplying vehicles. Ohio's claim of invasion of state sovereignty does not meet any of the three re-

\textsuperscript{80} 49 U.S.L.W. at 4660.
\textsuperscript{81} Id.
requirements for such a claim announced by the Supreme Court in

Gregory Alan Gabbard
Law enforcement officials often confront a dilemma when they become aware of the criminal activity of persons involved in a large criminal enterprise. They face the alternatives of either arresting known criminals, thus terminating their particular harm to society, or allowing these individuals to continue violating the law, in hopes that further investigation will cast a larger net, eliminating a much broader range of criminal activity. The choice of either of these alternatives results in the continuing criminality of some members of the enterprise, thus exacerbating the problem.

The government faced this dilemma in its investigation of an interstate burglary ring designated by the government code name “HAMFAT,” an acronym for Hamilton and Middletown Fences and Thieves. The Cincinnati area was the base from which the ring operated. Their activities, however, involved burglaries in Wisconsin, Virginia, Tennessee, Kentucky, and Illinois. Robert Miller, a former burglar himself, agreed to become a paid FBI informant, and infiltrated the criminal organization for the purpose of identifying both the individuals in the burglary ring, and the “fences” who purchased the property stolen by the ring. In addition, Miller’s role included introducing the gang members to an undercover FBI agent who was posing as an out-of-state buyer of stolen property. Miller was involved in the burglary ring for approximately seventeen months from November, 1977, through April, 1979, participating in the commission of forty burglaries of private residences in other states. Miller reported his activities to the FBI on a daily basis throughout the entire period.

On the evening of April 19, 1978, Robert Miller and two other members of the ring, traveled from Ohio and burglarized two homes in Danville, Kentucky, and one in Lancaster, Kentucky, making off with sterling silver and assorted gold jewelry. The trio returned the next day to the Middletown, Ohio, area in Butler County and met with Manuel Snelling, a fence to whom the burglars frequently sold stolen property. The FBI, tipped off by

2. Brief for Appellant at 23, United States v. Brown, 635 F.2d 1207 (6th Cir. 1980) [hereinafter cited as Brief for Appellant].
3. Joint Appendix at 42, United States v. Brown, 635 F.2d 1207 (6th Cir. 1980) [hereinafter cited as Joint Appendix].
Miller, placed Snelling under surveillance. Appellant Brown, who had been observed meeting with Snelling after other burglaries, was also placed under surveillance.

The FBI observed Snelling leave the burglars’ residence with bags and packages and place them in the trunk of his automobile. Later that day, they saw Snelling drive back and forth in front of appellant’s coin shop, and shortly after Snelling’s third passing of the shop, appellant Brown left in his car and drove to Tri-County Shopping Center. At the shopping center, the government observed Snelling get out of his car and into Brown’s automobile. Brown and Snelling then circled the parking lot and came back to the spot where Snelling had parked his car. Brown and Snelling got out of appellant’s car, and Snelling transferred a brown grocery bag to the trunk of Brown’s car.

Brown then drove in rush-hour traffic on heavily traveled Route 4 in the direction of his coin shop. While the car was stopped at a traffic light, an FBI agent entered it on the driver’s side, showed Brown his badge, and drove the car to the parking lot in front of appellant’s store where the agent was joined by other FBI agents. The agents asked, but Brown refused permission to search the car. The FBI unlocked the trunk anyway and seized the grocery bag. Searching the bag and comparing the items in it with an inventory list provided by Miller, the agents realized some jewelry was missing. The agents asked Brown where the items were. Brown told them the jewelry was in his coat pocket, from which the agents recovered it.

Brown was advised of his Miranda⁴ rights, but was not arrested at the time because the government agents wanted to preserve the undercover identity of their informant.⁵ Thereafter, the FBI left with the silver and jewelry. Some months later, Brown was indicted and convicted for receiving stolen goods. Expert witnesses valued the property under $5,000, yet Brown, a first offender, was given a $10,000 fine and a five year sentence.⁶

On appeal, Brown challenged both the validity of the search of his car as violative of his fourth amendment rights, and the legality of the government’s conduct during its investigation of HAMFAT that led to his arrest and conviction arguing that the fifth and

⁵ Brief for Appellant at 3.
⁶ Joint Appendix at 40-42.
ninth amendments come together to provide the vehicle to con-
demn outrageous governmental conduct.\(^7\) The Sixth Circuit Court 
of Appeals affirmed the conviction, stating the FBI did not violate 
due process in its investigation and had probable cause for con-
ducting the warrantless search.

**THE FOURTH AMENDMENT DEFENSE**

At the trial, Brown contended that the items seized from the 
trunk of his car should not be admitted as evidence, arguing the 
search for and seizure of those items violated the fourth amend-
ment.\(^8\) The fourth amendment to the Constitution, applicable to 
the States through the fourteenth amendment, establishes "[t]he 
right of the people to be secure in their persons, houses, papers, 
and effects, against unreasonable search and seizures." In addition, 
a neutral court official must issue a search warrant grounded in 
probable cause as a prerequisite to a lawful search and seizure.\(^9\) A 
central purpose of the fourth amendment is to safeguard a citizen's 
reasonable expectations of privacy. Exceptions to the warrant re-
quirement have been identified by the Supreme Court, but these 
exceptions are "few," "specifically established," and "well-
delineated."\(^10\)

Because of the diminished expectation of privacy accompanying 
use of the automobile as a means of transportation, though not as 
a residence or as a repository of personal effects, and because of its 
inherent mobility, a warrantless search of an automobile may be 
allowed, provided police officers have probable cause to believe 
that an automobile contains evidence of a crime.\(^11\) However, no 
amount of probable cause can justify a warrantless search of an 
automobile in the absence of exigent circumstances.\(^12\) And, as often 
reiterated, the automobile is not a magic "talisman in whose pres-

\(^7\) Reply Brief for Appellant at 2, United States v. Brown, 635 F.2d 1207 (6th Cir. 1980) (the defense of entrapment was not used by the defendant, not because appellant possessed a predisposition to commit the offense, United States v. Russell, 411 U.S. 423, 433 (1973), but because no government agent operated upon appellant's will to overcome his reluctance to break the law).

\(^8\) 635 F.2d at 1209.


\(^12\) Coolidge v. New Hampshire, 403 U.S. 443 (1971).
ence the Fourth Amendment fades away and disappears."13 Such is the automobile exception: probable cause and exigent circumstances excuse the requirement of a warrant in searching an automobile.

Appellant Brown relied primarily on *Arkansas v. Sanders*14 and *United States v. Chadwick.*15 Chadwick and Sanders are similar; each involves the search of a container taken by law enforcement officers from the trunk of an automobile stopped because the officers felt there was probable cause to believe that the car contained contraband. In Chadwick, the container was a locked footlocker and, in Sanders, an unlocked suitcase. In Brown, there was a brown Kroger's grocery bag. In Chadwick, the Court held that a warrant was required to search the footlocker belonging to the defendant. The Court held that once the agents had secured the footlocker in the police station, the fact that it had been taken from an automobile was incidental. A warrant was required to "open" the footlocker, because of the expectation of privacy the defendant had in the contents of the locked footlocker.16

In Sanders, the Supreme Court extended the rule to include an unlocked but closed suitcase which the defendant, Sanders, had carried onto an airplane. As in Chadwick, the Court held that Sanders had an expectation of privacy in his "luggage."17 This expectation of privacy, in "private, personal possessions in a suitcase," outweighed any exigency otherwise associated with the "automobile" exception.18 The Court reasoned that there is no less an expectation of privacy in a closed piece of luggage in a car than in closed luggage elsewhere.

The Supreme Court recently addressed two disputed aspects of the constitutional protection against unreasonable searches of containers in automobiles in *New York v. Belton*19 and *Robbins v. California.*20 Both cases involve the stopping of an automobile upon probable cause, the arrest of the occupants, the search of the automobile, and the search of a personal container found therein.

In Belton, a majority of the Court held that a warrantless search

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16. Id. at 11.
17. 442 U.S. at 762.
18. Id. at 764-65.
20. Id. 4906 (July 1, 1981).
of both the passenger area of an automobile and the contents of open or closed containers found in the passenger-compartment does not violate the fourth amendment, as long as it is a contemporaneous incident of a lawful custodial arrest of the automobile’s occupants. The Court reasoned that in accordance with its rule in *Chimel v. California*, the passenger area of a car is “within the immediate control of the arrestee” and “an arrestee might reach [into it] in order to grab a weapon or evidentiary item.”

The *Chimel* standard protects the safety of the arresting officer, preserves easily concealed or destructible evidence, and excuses the warrant requirement only when the search is incident to a lawful custodial arrest, and is also confined to the immediate vicinity of the arrest. Once the arrest has been consummated, the principles underlying *Chimel’s* exception to the warrant requirement cease to apply, because there is then no possibility that the arrestee could obtain weapons or contraband.

In *Robbins v. California*, a plurality of the Court ruled that during a lawful but warrantless search of an automobile, law enforcement officials should have obtained a warrant to search a closed, opaque package found in the trunk. The Court reasoned that the manner in which the package was wrapped provided a reasonable expectation of privacy with respect to its contents. The fourth amendment was said to protect persons and their effects whether those effects are “personal” or “impersonal.” Five justices reasoned that the “nature” of the container does not diminish its constitutional protection, and, “[o]nce placed within such a container, a diary or a dishpan are equally protected by the Fourth Amendment.”

It is difficult to deny that many of the requirements necessary for the automobile exception to be applicable are not present in *United States v. Brown*. The FBI had no intention of arresting Brown on the day it stopped Brown’s car on Route 4. Therefore, the search of his car was not incident to a lawful arrest. The items sought by the agents were not in plain view, because they were in a bag in the closed trunk of appellant’s car. The car was not removed.

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22. *Id.* at 763.
23. *Id.* at 764.
24. 49 U.S.L.W. at 4908.
25. *Id.* at 4907.
26. *Id.*
by the FBI agents, and the search was not an inventory search of the auto itself. The defendant did not consent to the search and Butler County, Ohio, does not share a border with a foreign nation, so these two exceptions are inapplicable. 27

The search of the bag could easily have been accomplished with a warrant since it was totally in control of the FBI and in no danger of being moved by Brown before a valid search warrant could be obtained. The conclusion is inescapable that the reason the agents did not arrest and take Brown and the grocery bag to their office to await a warrant, or secure Brown's car on the parking lot and wait for a warrant to search the bag, was that the government wanted to preserve the anonymity of its informant. It also seems clear that, while there may have been probable cause to believe Brown was transporting contraband, the exigency was clearly removed, and the FBI's failure to obtain a warrant was inexcusable.

Nonetheless, the Sixth Circuit Court of Appeals upheld the district court's rule that the FBI's warrantless search of Brown's car was authorized under the automobile exception, because the agents had probable cause to believe the vehicle contained contraband, and the search was conducted under exigency. 28 The court reasoned that if an effective search was to be made, it had to be made before the automobile eluded the police, since there was a very real danger that any stolen goods that might have been transferred into Brown's car would be secreted and melted down. 29

The FBI knew that Manual Snelling was a "first-level fence of stolen property," 30 and they had previously observed Brown and Snelling doing business in parking lots in a clandestine manner. 31 From the information supplied by Miller, the FBI also knew that Snelling would be receiving stolen property. He had been observed carrying bags, boxes, and pillow cases from the designated location given by Miller, and then putting these articles in the trunk of his car. Later, Snelling was seen transferring a large paper bag from his trunk to Brown's trunk.

The court found the agents had authority to seize the grocery bag filled with silver and jewelry located in the trunk, because Brown did not have a legitimate expectation of privacy in the un-

27. Brief for Appellant at 33-34.
28. 635 F.2d at 1210.
29. Id.
30. Joint Appendix at 78.
31. 635 F.2d at 1210.
sealed paper bag. The fourth amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy."\(^{32}\) Brown did not satisfy the two elements necessary to justify an expectation of privacy in the paper bag: first, Brown was required to have a subjective expectation of privacy, and second, Brown's expectation had to be, as an objective matter, one that society is prepared to recognize as reasonable.\(^{33}\)

Brown did not meet these requirements. He was not carrying a locked footlocker, closed suitcase, or similar container. He was carrying a Kroger's grocery bag which one would not expect to contain private, personal possessions. He would, therefore, not have the same expectation of privacy as Chadwick and Sanders. Brown had received the grocery bag only a half hour before the agents stopped his car.\(^{34}\) He testified that he had not even seen the contents and did not know exactly what was in the grocery bag.\(^{35}\) The grocery bag was unsealed, and the contents were in "plain view."\(^{36}\)

The court rejected the fourth amendment argument, because if the government did not invade a place in which Brown held a legitimate expectation of privacy, there was no "search" for purposes of the fourth amendment, and its provisions are inapplicable.\(^{37}\) Clearly, this holding does not square with Robbins or Belton. First, it has no basis in the language or meaning of the fourth amendment. The fourth amendment protection does not relate to the nature of the objects. The contents of the grocery bag could be protected from unreasonable searches regardless of whether the items found therein were "personal" in nature. Second, the bag was found in the trunk of Brown's automobile, not in the passenger compartment, and the search was not a contemporaneous incident to a lawful custodial arrest. Additionally, the contents were not in plain view. The container was opaque and its contents could not be inferred from the bulky outward appearance of the grocery bag. Placing the bag in the trunk of his car, Brown could reasonably expect that the contents would remain safe from public scrutiny.

\(^{32}\) 433 U.S. at 7.

\(^{33}\) 442 U.S. at 764 n.13.

\(^{34}\) Joint Appendix at 90-92.

\(^{35}\) Id. at 61.

\(^{36}\) 442 U.S. at 765 n.13 ("in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant"); accord, United States v. Ross, 27 Crim. L. Rep. 2169 (D.C. Cir. 1980) (a warrant was not required to open and seize the contents of a closed, but unsealed "lunch type" bag).

The Sixth Circuit agreed with the government’s claim that the “least” intrusion on the defendant was the seizure of the contents of the grocery bag at the scene.38 This would appear to mean, then, that the “least” intrusion is now an additional standard by which to measure a warrantless search.

**THE DUE PROCESS VIOLATION**

Besides the fourth amendment violation, Brown also claimed that his due process rights were violated during the investigation that eventually led to his arrest and conviction.39 For half a century since its decision in *Hurtado v. Louisiana*,40 the Supreme Court has struggled with the problem of a criminal prosecution being incurably damaged by gross and outrageous law enforcement conduct that is totally inconsistent with the “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,”41 not infrequently designated as the “law of the land.”42 Forty-two years after *Hurtado*, in *Hebert v. Louisiana*,43 the Court used the exact language of *Hurtado* in deciding that the due process clause would protect an accused against conviction. Similarly, the Court later held that the due process clause protects those liberties that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,”44 and that those liberties are “found to be implicit in the concept of ordered liberty.”45

In a civilized society, founded on the premise of ordered liberty, certain fundamental rights of each individual are protected from governmental intrusion. There is an expectation of decency and fair play, that citizens will not be harmed by unlawful governmental conduct. Frequently, the struggle may involve a compromise which accommodates opposing interests of citizens, who are to be safeguarded from unreasonable interference with their property and privacy, and of officers, who are charged with enforcing the law. But paramount to the concept of due process is the idea that governmental conduct must be consistent with the constitutional

38. 635 F.2d at 1210.
40. 110 U.S. 516 (1884).
41. *Id.* at 535.
42. *Id.*
43. 272 U.S. 312, 316 (1926).
44. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
principles of justice and liberty.

In *Rochin v. California*, the Supreme Court voided a conviction based upon evidence law enforcement officers had pumped from the stomach of the defendant. The Court stated that evidence extracted by such force and brutality "shocks the conscience of the court" and should be excluded. Neither public interest nor general public welfare could in good conscience demand or justify this type of excessive investigative technique. It was said to violate the values which give strength to a free society. Even those who are charged with crimes are guaranteed freedom from governmental lawlessness. In *Rochin*, Justice Frankfurter identified the criterion for use of due process violation as a defense in criminal cases: "Due process of law is a summarized constitutional guarantee of respect for . . . personal immunities . . . but that does not make due process of law a matter of judicial caprice. In each case due process of law requires an evaluation based on a disinterested inquiry. . . ."

Similarly, due process of law was found not a matter of "personal distaste," but rather an assessment of "the whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct." Decency and fair play prohibit methods of investigating crime which offend our sense of justice, and to sanction such methods would afford government lawlessness the cloak of law.

In claiming the due process defense in *United States v. Brown*, the defendant relied on *United States v. Russell*. He claimed the government's conduct during the HAMFAT investigation was so outrageous in its excessiveness as to be "shocking to the universal sense of justice," that due process barred his conviction for receiving stolen goods. Under those principles, the articles taken from his trunk could not be used as evidence. The evidence demonstrated that the government permitted its informant to join with other gang members in committing forty burglaries which involved the forcible breaking and entering of the homes of private

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46. 342 U.S. 165 (1952).
47. Id. at 172.
48. Id.
49. United States v. Leja, 563 F.2d 244, 246 (6th Cir. 1977).
52. Id. at 432.
citizens at night for a period of seventeen months. Clearly, the concept of ordered liberty does not condone the government's continued, active, and direct involvement in burglarizing homes, nor the eventual prosecution of the other gang members as playing "a fair game according to the rules, free of 'cheap shots.'"53

In *Russell*, the Court rejected the claim of government impropriety in supplying a necessary ingredient for the illegal manufacture of a controlled substance, but Justice Rehnquist observed: "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."54

*Brown*, like *Russell*, raises a significant question: by what standards do we judge governmental conduct? Is supplying the necessary ingredient for the illegal manufacture of a controlled substance less shocking than pumping a man's stomach to obtain evidence? Is it consistent with our concept of ordered liberty to permit government agents to participate in crimes merely to gather evidence to convict other lawbreakers? It may be argued that society's interest in convicting criminals cannot outweigh a citizen's right to be free from acts of crime by his government.

Following *Russell*, the struggle between safeguarding individual rights and enforcing the law was again demonstrated in *Hampton v. United States*.55 In a decision in which no clear majority emerged, the Court rejected the defendant's due process claims even though "the drug which the Government informant allegedly supplied to petitioner both was illegal and constituted the corpus dilecti for the sale of which the petitioner was convicted."56

Five justices supported the idea that where government conduct is so grossly out of line with acceptable notions of fair play and justice as to offend the society in whose name the prosecutions are brought, due process prevents a conviction or mandates a reversal. However, Justice Powell cautioned that "[p]olice overinvolvement in crime would have to reach a demonstrable level of outrageousness before it would bar conviction."57 Nevertheless, Justice Powell failed to offer standards by which governmental lawbreaking can

54. 411 U.S. at 432.
56. *Id.* at 489.
57. *Id.* at 495 n.7.
be deemed to reach a "demonstrable level of outrageousness." Fair play and justice along with decency, security, and liberty require law enforcement officials as well as private citizens be subject to the same rules of conduct. The continued existence of ordered liberty seems to demand that a government of laws itself obeys the laws.

The struggle between police overinvolvement and due process are the reoccurring tangled threads woven throughout the fabric of the Supreme Court decisions. Excessive investigative techniques constitute government lawlessness and offend the fundamental principles of liberty and justice inherent in a free society. The due process clause, therefore, provides the necessary authority to void any conviction obtained by such outrageous conduct.

United States v. Brown

In United States v. Brown, the trial court based its decision on the proposition that the use of paid informants to infiltrate criminal enterprises is a "recognized and permissible means of investigation." Miller, the paid government informant, supplied the information to the government concerning the April 19, 1978, burglary which led to the placing of Snelling and Brown under surveillance on April 20, 1978, and the eventual seizure of the proceeds of those burglaries. On appeal, the Sixth Circuit reinforced the trial court's assumption, finding the conduct of Robert Miller did not amount to a violation of the "shocking conduct" test, established by the Supreme Court in Rochin which provides for the exclusion of evidence obtained in a way that "shocks the conscience." The Sixth Circuit held that the informant or government agent must be allowed to further the interests of the criminal enterprise in some manner in order to gain the confidence of the criminals with whom he must deal. Although the individual burglars and fences might have been detected without government infiltration, the use of this investigative technique facilitated a more expeditious and thorough investigation. Infiltrating the burglary ring without the use of a paid informant would have been extremely

59. 635 F.2d at 1212.
60. Id. at 1209.
61. 342 U.S. at 172.
62. 635 F.2d at 1212.
63. Id. at 1213.
difficult.

The Sixth Circuit Court of Appeals further asserted that it must look at the totality of the government's alleged outrageous misconduct before finding a violation of due process existed based on such conduct. Many factors had to be considered in evaluating the government's conduct. First, the court considered the need to use paid informants to infiltrate criminal enterprises and whether the type of criminal activity under investigation was relevant to the scope of permissible government conduct. For example, the investigation of drug-related crimes usually necessitates using paid informants to infiltrate the drug ring. Here, the criminal enterprise was established when Miller joined the burglary ring. The crimes probably would have transpired with or without Miller's participation. Because of his involvement, however, evidence of those crimes was gathered and many members of the organization were apprehended and convicted.

Additionally, in evaluating the government's conduct for due process purposes, the court asked whether the government instigated the criminal activity or whether it infiltrated a preexisting criminal enterprise. A related consideration was whether the government directed or controlled the activities of the criminal enterprise or whether it merely acquiesced in its criminality. Here, the government claimed its informant did not instigate, organize, or plan the burglaries, but merely pretended to acquiesce in the plans of other gang members.

Another factor the court considered is the relationship between challenged government conduct and the commission of the acts for which the defendant stood convicted. The Sixth Circuit agreed with the Tenth Circuit that "the more immediate the impact of the government's conduct upon a particular defendant, the more vigorously would be applied Russell's test for constitutional impropriety." Here, Brown was twice removed from Miller's participation in the forty burglaries, though the burglaries which yielded the goods formed the basis of Brown's conviction.

64. Id. at 1212-13.
65. Brief for Appellee at 21-22, United States v. Brown, 635 F.2d 1207 (6th Cir. 1980) [hereinafter cited as Brief for Appellee].
66. 635 F.2d at 1213.
67. Id.
68. Brief for Appellee at 22.
The Sixth Circuit Court of Appeals affirmed the district court's decision, observing that Miller's participation in the criminal ring was not so outrageous as to rise to the level of a due process violation, even though the government actually supplied a link in the chain of criminal activity.

The fundamental question in Brown, which the Sixth Circuit did not answer, relates to the acceptable boundaries of government lawlessness which a government of laws can tolerate in its administration of criminal justice. Does the end justify the means when the government must participate in criminal activity to make it easier or more expeditious for its agents to investigate and gather evidence in order to convict members of a criminal enterprise? Here, the government was involved continuously and directly in the commission of forty burglaries for a period of almost two years. Perhaps it now takes more to "shock the conscience" of the court than it did at the time of the Supreme Court's decision in Rochin thirty years ago.

AN ALTERNATIVE THEORY: THE NINTH AMENDMENT

On appeal, the defendant argued that the ninth amendment to the Constitution provides an alternate approach to the due process argument because it gives life to other fundamental rights which are not specifically mentioned in the Constitution. The Supreme Court noted in Griswold v. Connecticut that "specific guarantees in the Bill of Rights have penumbras, formed from emanations from those guarantees that help give them life and substance." Although the ninth amendment has been used by the Court primarily as a vehicle to guarantee the right of privacy, it also includes "rights not specifically enumerated but easily perceived in the broad concept of liberty and so numerous and so obvious as to preclude listing them." It follows that one fundamental right which the ninth amendment should protect is the right of every citizen to expect and demand that his government obey the law and act in accordance with the Constitution. For example, Article II, Section 3 requires the President to "take care that the laws be faith-

70. 635 F.2d at 1214.
71. Brief for Appellant at 7.
72. 381 U.S. 479 (1965).
73. Id. at 484.
74. 3 W. Story, Commentaries on the Constitution of the United States 715-16 (1883).
75. Brief for Appellant at 8.
fully executed,” and Article I, Section 8 gives Congress the power to “lay and collect taxes” and to spend them to “provide for the general welfare of the United States.”

The question must be asked, then, whether these constitutional mandates can be interpreted to mean it contributes to the general welfare for public money to be spent to finance the burglarizing of forty homes of nonconsenting, innocent, private citizens so that a larger net is cast which results in eliminating a broader range of criminal activity. Or, does the ninth amendment give a citizen the opportunity to enforce his rights and deny the government the fruits of its own illegal acts?76

Miller, along with two other gang members, committed approximately forty burglaries in a seventeen month period, and all of these capers involved the forcible breaking and entering of the homes of private citizens at night.77 Miller reported to the FBI on a daily basis throughout the entire period. The first burglary in which he participated as a paid government informant would have provided adequate evidence to warrant the arrest of the other burglars, thus preventing the series of thirty-nine other burglaries which endangered the lives of private citizens and their property.

The money spent by the FBI was not for purposes of national security, although even that, in some cases, is not a valid justification.78 To quote Benjamin Franklin, “They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”79

The Supreme Court in Hampton and Russell indicated that the due process clause prohibited a criminal conviction where the government’s conduct is so out of line as to offend the principles of liberty and justice in a free society. Justice Goldberg, concurring in Griswold, cited the doctrine of Snyder v. Massachusetts80 in support of his conclusion that the ninth amendment protects those fundamental rights arising not only from specific guarantees, but those rights, not mentioned in the Constitution, which arise from the fundamental principles of ordered liberty as well as those

76. Id. at 10.
77. Id. at 19.
78. Id. at 21 (e.g., the burglary of Daniel Ellsberg’s psychiatrist’s office).
80. 291 U.S. 97 (1933).
rights arising from, the experience of living in a free society.81

CONCLUSION

Almost a century ago the Supreme Court asserted that the limitations imposed by the Constitution upon governmental action "are essential to the preservation of public and private rights," and the "enforcement of these limitations . . . is the device of self-governing communities to protect the rights of individuals . . . as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."82

Professor Black observed that we "must take all the guarantees in the Constitution together, work to fill in the arbitrary and irrational blank spaces between them, and listen carefully for their harmony and overtones. The Ninth Amendment . . . does validate this method—and the method is the means of filling in the content of the Ninth Amendment."83 The fifth and ninth amendments come together to provide the vehicle to condemn outrageous governmental conduct.

The time has come to take a hard look at the trend of recent decisions permitting more and more government involvement in criminal activity in the name of law enforcement. A need exists to balance the necessity for this involvement with the constitutional principles of justice and liberty.

MERCLE STOLAR POLLINS

81. Brief for Appellant at 11.
82. 110 U.S. at 536.
BOOK REVIEW


Reviewed by David A. Elder*

Mr. Lawhorne’s most recent book on the law of libel contains a generally well-organized, chronological synthesis of the Supreme Court decisional law both before and after the landmark decision of New York Times Co. v. Sullivan.2 As such, it constitutes a useful introduction for the untutored person in need of a succinct analysis of the broad contours of the Supreme Court decisions. It is doubtful, however, that this extremely brief volume will be of much assistance to practitioners in the area of liability for media defamation or to legal scholars generally, because of the restriction of the undertaking—to Supreme Court decisions. Unfortunately, the author makes surprisingly superficial use of the wealth of decisional law and scholarly commentary precipitated by the Gertz v. Robert Welch, Inc.3 conservative retrenchment from the expansive doctrine of Rosenbloom v. Metromedia.4

The author’s limited focus, directed principally at high court precedent, results in some noteworthy deficiencies of scope, and, in some cases, of legal scholarship. Following the author’s chronologi-

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3. 418 U.S. 323, 347 (1974). In this decision, the Supreme Court, in essence, adopted a constitutional threshold of negligence in private party versus media defendant cases and limited such plaintiffs to recovery for “actual injury” where only the constitutional minimum is met. Id. at 349-50. The Court intimated that, if the New York Times standard is met, there is no constitutional barrier to awarding punitive or “presumed” damages. Id. at 349. More recently, it has reinforced the latter conclusion, at least in the case of punitive damages. Herbert v. Lando, 441 U.S. 153, 162 n.7 (1979) (Gertz “limited the entitlement to punitive damages, but such damages are still awardable upon a showing of knowing or reckless falsehood”).

4. 403 U.S. 29 (1971). In a fractionated opinion, five members of the Court extended the New York Times standard to matters of “public or general interest,” id. at 43, regardless of the status of the plaintiff. One important effect of the Gertz decision is a rejuvenation of the “status” approach—“private” persons (negligence) or “public” persons (New York Times standard)—and the desuetude of the open-ended “public or general interest” standard.
cal framework, it will perhaps be useful to note a few of the more significant sins of omission or commission. The "Prologue" offers a terse one-page treatment of the British law of libel and the perilous position of the dissenter critical of government \textit{qua} government or its political operatives under the "scandal of Government" doctrine developed by Lord Coke in \textit{de Libellis Famosis}. However, the author makes no attempt to sketch in even skeletal fashion the political-legal-jurisprudential debate current in eighteenth-century England between those espousing conservative "government-as-master" and liberal "government-as-servant" philosophies, the famous Lord Erskine-Lord Mansfield counterpoint, and the implicit adoption of the liberal philosophy in the Fox Libel Act of 1972. The net effect is an immersion of the reader in the American experience, almost without reference to its parallel milieu, eighteenth-century England, which enormously influenced American state and federal constitutional and legal developments.

Following an excellent two-chapter synthesis of the pre-"modern" (pre-1964) common law which was generally unfettered by significant constitutional restraints, the author analyzes in the remaining three-quarters of the book the developments emanating from the pivotal \textit{New York Times} decision. Although the author's synthesis of the decisions is generally comprehensive and legally correct, his interpretation of some of the subtleties of the modern decisions is more than occasionally superficial and, in some cases, undoubtedly incorrect. For example, he characterizes the Supreme Court's 1966 decision to extend the \textit{New York Times} standard to defamation resulting from union disputes as an example of the construction of "further constitutional protections for 'uninhibited, robust, and wide open' debate," clearly not discerning that

the Supreme Court had extended such coverage purely as matter of federal labor law, not as a result of constitutional compulsion. Even more glaring is the author's blythe conclusion that the Gertz decision imposed on the non-public ("private") plaintiff the burden of proving defamatory falsity by minimal fault, i.e., negligence. A careful analysis of Gertz clearly evinces that it did not resolve the burden of proof issue. In fact, not until one of the Supreme Court's most recent triad of decisions did it suggest that the non-public plaintiff has the burden of proving the requisite degree of culpability. Indeed, although there have been some state court suggestions that the non-public plaintiff has such a burden, an excellent 1981 opinion of the Court of Appeals of the Sixth Circuit is the first comprehensive and definitive examination of the issue. The most surprising deficiency in the author's analysis of the Gertz decision, nonetheless, is his cryptic reference to, and apparent failure to fathom the significance of, the extraneous comment in Gertz that "there is no such thing as a false idea," as contra-distinquished from the reference to false statements of fact. This language and abbreviated discussions in two other cases have given rise to a new rule of absolute immunity of the press for statements of "pure" opinion—adopted by the Restatement (Second) of Torts—which has been widely litigated (and trench-

11. C. Lawhorne, supra note 1, at 88, 89, 93, 96, 97.
12. See Herbert v. Lando, 441 U.S. 153, 176 (1979), where the Court noted that "[t]he plaintiff's burden is now considerably expanded. In every or almost every case, the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher."
15. C. Lawhorne, supra note 1, at 83.
18. The Restatement distinguishes an expression of opinion of the "mixed type"—"reasonably understood as implying the assertion of the existence of undisclosed facts about the plaintiff"—which can be the basis for a defamation action from a "simple expression of opinion"—"based on disclosed or assumed nondefamatory facts"—which is "not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." RESTATEMENT (SECOND) OF TORTS § 566, comment C (1977).
antly criticized in a few recent decisions)\textsuperscript{20} in the post-\textit{Gertz} era. Similar questionable assessments of the impact of Supreme Court decisions are found in the author's handling of the progeny of \textit{Gertz}. In interpreting \textit{Times, Inc. v. Firestone},\textsuperscript{21} for example, the author concludes that a court trial was not deemed a "public controversy" for the purpose\textsuperscript{22} of applying the limited purpose "public figure"\textsuperscript{23} status test. It seems clear, however, that the Court was focusing primarily on the nature of the particular issue\textsuperscript{24} litigated, the nonvoluntariness\textsuperscript{25} of plaintiff's participation therein and its refusal to "backdoor" the \textit{Rosenbloom} approach by extending the \textit{New York Times} rule to inaccurate reportage of judicial proceedings,\textsuperscript{26} and was not intimating that court trials are by definition not "public controversies."

Further, in delineating the several pregnant footnote asides in \textit{Hutchinson v. Proxmire},\textsuperscript{27} the author correctly points out that footnote eight\textsuperscript{28} portends reconsideration of the "public official" criteria established in the 1966 decision of \textit{Rosenblatt v. Baer},\textsuperscript{29} a test which the author depicts as having "worked effectively for more than a decade"\textsuperscript{30} in libel litigation. Yet, as any student of state and federal decisional law is aware, the major reason the test

\textsuperscript{20.} See Cianci v. New Times Pub. Co., 639 F.2d 54, 65 (2d Cir. 1980) ("[O]pinions may support a defamation action when they convey false representations of defamatory fact, even though there is no implication that the writer is relying on facts not disclosed . . . .") and cases cited therein.

\textsuperscript{21.} 424 U.S. 448 (1976).

\textsuperscript{22.} LAWHORNE, supra note 1, at 96.


\textsuperscript{24.} The Court noted that a marital dissolution action is "not the sort of 'public controversy'" envisioned by \textit{Gertz}, though marital difficulties of the wealthy "may be of interest to some portion of the reading public." 424 U.S. at 454.

\textsuperscript{25.} \textit{Id.} at 454-55.

\textsuperscript{26.} \textit{Id.} at 455-57.

\textsuperscript{27.} 443 U.S. 111 (1979).

\textsuperscript{28.} "The Court has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees, however." \textit{Id.} at 119, n.8.

\textsuperscript{29.} 383 U.S. 75 (1966).

\textsuperscript{30.} C. LAWHORNE, supra note 1, at 103.
“worked effectively” was the relative dearth of proper applications of the test on its own terms and the resultant consensus of the decisions that a mere “governmental affiliation”31 was sufficient. It would appear that the probable impact of the footnote is to revive, not superecede, the Rosenblatt test, through infusion of the pro-reputation, strict constructionist jurisprudential perspectives32 evidenced in the Supreme Court’s definition and stringent application of its “public figure” counterpart.

The author’s assessment of two other examples of Supreme Court reopening-by-footnote demonstrates a more sophisticated awareness of the ramifications of recent decisions. He appropriately terms as “more ominous”33 the Court’s suggestion that the “so-called” special “rule” for liberal use of summary judgment in libel actions is dubious in cases involving “actual malice” and the defendant’s “state of mind.”34 He also correctly asserts that the Court’s conclusion—that it had never extended the New York Times standard to nonmedia defendants35—is “completely illogi-

31. Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1377 (1975). The Rosenblatt criteria for "public official" applied at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs . . . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . the New York Times malice standards apply.


33. C. Lawhorne, supra note 1, at 104.
34. 443 U.S. at 120 n.9.
35. Id. at 113 n.16.
cal," a view that is indubitably correct. In summary, the reader must make careful use of Mr. Lawhorne's book. It should neither be viewed nor utilized as a definitive and scholarly exegesis of the myriad (and still emerging) issues raised by the Supreme Court's superimposition of constitutional constraints on an expanse of common law universally conceded to abound in archaic and illogical rules. Used with caution, the book serves as helpful introduction to a complex and evolving area of tort law.

36. C. LAWHORNE, supra note 1, at 104.

37. See the following decisions in which the Supreme Court expressly or tacitly applied constitutional constraints to individual, non-media defendants: New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (the named press defendant and four Alabama clergymen were treated interchangeably); Garrison v. Louisiana, 379 U.S. 64 (1964) (a criminal libel conviction of a district attorney); St. Amant v. Thompson, 390 U.S. 727 (1968) (a candidate for public office). See also Rosenblatt v. Baer, 383 U.S. 75 (1966), involving a defendant who was a regular contributor to a newspaper and had only an attenuated claim to treatment as a media defendant. Fortunately, the decisional law, both before and after infamous footnote sixteen, has rejected the media versus non-media defendant distinction. Bussie v. Larson, 501 F. Supp. 1107, 1114 (M.D. La. 1980); Avins v. White, 627 F.2d 637, (3rd Cir. 1980), cert. denied, 10 S. Ct. 398 (1980) ("nonextension of the New York Times privilege to private individuals . . . creates a dangerous disequilibrium" between the first amendment guarantees of speech and press); De Carvalho v. daSilva, 414 A.2d 806, 813 (R.I. 1980) (after noting the inherent difficulties in categorizing members of the media and the potential equal protection problems posed thereby, the court concluded that the first amendment was "designed to apply to the lonely pamphleteer as well as to the (then unknown) syndicated columnist"); Davis v. Schuchat, 510 F.2d 731 (D.C. Cir. 1975).

38. The classic article on the historical development of defamation has concluded that the common law in this area "is, as a whole, absurd in theory, and very often mischievous in its practical application." Veeder, The History and Theory of the Law of Defamation I, 3 COLUM. L. REV. 546 (1903).