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***397 THE RIGHT TO APPOINTED COUNSEL IN QUASI-CRIMINAL CASES: TOWARDS AN EFFECTIVE ASSISTANCE OF COUNSEL STANDARD [FNd1]**

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Introduction

Despite our outward commitment to “equal justice under law,” [FN1] many litigants are improperly deprived of their liberty because they have no access to an attorney who will assert their rights effectively. In a variety of non-criminal legal actions ranging from civil commitment to divorce, indigent parties are forced to proceed *pro se* because they have been accorded no right to appointed counsel. The illusion that an indigent *pro se* litigant has an equal *opportunity* to present his case crumbles before the reality that his *ability* to make an effective presentation is far inferior to that of a skilled, experienced practitioner. [FN2]

***398** Judicial acknowledgement of the litigant's inability to assert his legal rights without the assistance of an attorney has generated an expansion of the right to appointed counsel. Although initially limited to criminal cases, the constitutional right to ***399** appointed counsel has been extended, albeit erratically, to a variety of cases traditionally considered civil in nature, in which the *pro se* litigant confronts the full weight and power of the state as an adversary and accuser, intricate substantive and procedural requirements, and the potential loss of constitutionally significant individual rights. [FN3] Courts have used the due process clauses to provide indigent litigants the right to appointed counsel in defense of their liberty interests in such “quasi-criminal” matters as juvenile delinquency, [FN4] civil commitment, [FN5] civil ***400** contempt, [FN6] termination of parental rights, [FN7] divorce, [FN8] paternity, [FN9] and deportation. [FN10]

A right to appointed counsel is meaningless without a guarantee of effective assistance of counsel. This Article addresses the standard of competence that should be required of counsel appointed in quasi-criminal cases and the remedies that should be available when counsel fails to meet this standard.

Part I of this Article reviews the leading Supreme Court cases which establish the parameters of the right to counsel in criminal cases and which identify significant constitutional liberties at risk when a litigant proceeds *pro se* against the state. Part II examines closely those cases expanding the right to appointed counsel in quasi-criminal contexts. Part III explores the relief afforded civil, criminal, and quasi-criminal litigants unsatisfied with the quality of their counsel's work. It also presents the standards against which courts assess an attorney's performance in these cases.

Finally, Part IV argues that the constitutional rights at stake demand of quasi-criminal counsel a standard of

effectiveness equal to that of criminal defense counsel, and suggests various means to ensure that standard of effectiveness in advance. If counsel fails to provide effective assistance, quasi-criminal litigants must have access to remedies that provide meaningful redress for their serious injuries.

I. Right to Counsel in Criminal Cases

The sixth amendment to the Constitution of the United States guarantees the right to counsel for all federal criminal defendants. [FN11] Beginning in 1932 with *Powell v. Alabama*, [FN12] *401 the Supreme Court began a thirty-year expansion of the right to counsel in state criminal proceedings. Review of this line of cases discloses that the same concerns necessitating the expansion of the right to counsel in the criminal context apply with equal force to quasi-criminal litigation.

A. State Prosecutions for Capital Crimes: *Powell v. Alabama*

Charged with rape, a capital offense, seven black youths appeared without counsel, [FN13] and their ensuing convictions were affirmed by the Supreme Court of Alabama. [FN14] The Supreme Court of the United States reversed the conviction on the basis of the due process clause of the fourteenth amendment, holding:

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law. [FN15]

The Court was careful, however, not to impose the sixth amendment right to counsel upon the states by incorporating it into the fourteenth amendment. Instead, the Court deemed the right to counsel fundamental, independent of the Bill of Rights. [FN16]

*402 The Court premised the guarantee of appointed counsel on two factors: the severity of the threatened deprivation and the imbalance of the parties. Noting repeatedly that the young men were in peril of their lives, [FN17] Justice Sutherland, writing for the Court, also emphasized their relative powerlessness [FN18] and suggested that any criminal defendant requires the assistance of counsel to safeguard his rights. [FN19] Furthermore, the appointment of counsel must be more than cosmetic; it must be “effective.” The judge may not assign counsel “at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.” [FN20]

B. State Prosecutions for Non-Capital Felonies: *Betts v. Brady*

Ten years later, when confronted with the question of whether due process demands the appointment of counsel for *403 every indigent criminal defendant, the Court again declined to hold that the due process clause of the fourteenth amendment incorporates the sixth amendment. [FN21] Instead, relying upon a flexible concept of due process, the Court declared that each judicial refusal to appoint counsel was to be “tested by an appraisal of the totality of facts.” [FN22] Thus, while concluding that the appointment of counsel was not an absolute and fundamental right essential to a fair trial, [FN23] the Court held that special circumstances would require the provision of counsel. [FN24]

C. *The Aftermath of Betts: Gideon v. Wainwright*

The twenty years following *Betts* witnessed the erosion of the special circumstances standard as the Court held more and more fact situations to present special circumstances necessitating the appointment of counsel. [FN25] In order to review the question raised in *Betts*, the Supreme Court granted certiorari to Clarence Earl Gideon, an indigent convicted felon, who had been unable to obtain representation in a non-capital felony *404 prosecution brought by the state of Florida. [FN26] The facts of *Gideon v. Wainwright* were legally indistinguishable from those of *Betts*. [FN27]

Emphasizing the vulnerability of *any* defendant against the resources of the state, the Court asserted the “obvious truth” that, “[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” [FN28] The decision thus overruled *Betts* and fully incorporated the sixth amendment guarantee of counsel in criminal proceedings into the fourteenth amendment.

Gideon, however, did not determine whether the right to counsel attaches to all criminal cases or only to prosecutions for serious crimes. [FN29] Concurring in the result, Justice Clark addressed this question, concluding, “That the Sixth Amendment requires appointment of counsel in ‘all criminal prosecutions’ is clear, both from the language of the amendment and from this Court’s interpretation.” [FN30] Justice Harlan’s concurrence, however, drew a clear distinction between less serious crimes and those carrying a lengthy prison sentence, noting that, “The Court has come to recognize that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial.” [FN31] Nonetheless, he indicated no opposition to further extension of the right to appointed counsel, merely preferring to reserve the issue. [FN32]

D. *Argersinger v. Hamlin and Scott v. Illinois*

During the next several years, the Court clarified the holding of *Gideon*. In *Patterson v. Warden*, [FN33] *Gideon*’s requirement *405 of appointed counsel was extended to misdemeanors punishable by a felony-length sentence. After *Patterson*, however, the Court refused to grant the right to counsel to misdemeanants generally. [FN34] At the same time, all of the lower federal courts presented with the issue of appointment of counsel after *Gideon* extended the right to misdemeanor proceedings. Moreover, most state courts did the same. [FN35]

The Supreme Court responded in 1972, in *Argersinger v. Hamlin*. [FN36] Charged in Florida with carrying a concealed weapon, a crime punishable by up to six months imprisonment, a \$1,000 fine, or both, *Argersinger* was tried, convicted, and sentenced to serve ninety days in jail. Upon these facts, the Court held that a defendant threatened with imprisonment, no matter how brief the sentence, is entitled to the assistance of counsel. Furthermore, a defendant is entitled to appointed counsel when he cannot afford to obtain his own attorney.

In *Argersinger*, the Court made plain that the right to counsel in a criminal case depends not upon the character of the charge, but upon the character of the possible punishment: loss of liberty. “[N]o person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.” [FN37] The Court premised this extension of the protections of the sixth and fourteenth amendments on the inability of one who is unrepresented to stand on an equal footing with the state that prosecutes him. Significantly, in view of later developments limiting the scope of the requirement to appoint counsel, the *Argersinger* opinion recounted studies and reports which disclose that, perhaps even more than felony defendants, those accused of misdemeanors are likely to become victims of the administrative apparatus of the ju-

dicial system. The studies dramatically demonstrate the necessity of counsel to ensure a fair trial. [FN38]

*406 The Court deviated from this reasoning in *Scott v. Illinois*, [FN39] holding that misdemeanants are not entitled to counsel unless they are actually sentenced to prison; those who are merely fined are deemed not to have been entitled to appointed counsel at trial. In *Scott*, the Court altered its criteria for determining when counsel is required in criminal proceedings. Whereas the Court had previously focused on the disparate power of the state over an individual threatened with loss of liberty, *Scott* conditioned the constitutional mandate of representation upon the nature of the criminal charge, the fiscal burden incurred by the state in providing counsel, and the actual consequences to the defendant of confronting the state without benefit of counsel. By the Court's assessment of these criteria, there is no right to receive appointed counsel in misdemeanor cases unless the defendant is actually deprived of physical liberty. [FN40]

Yet *Scott* leaves undisturbed the underlying premise of *Argersinger* that, when the state uses its vast resources to deprive an accused of his liberty, the due process clause of the fourteenth amendment requires that the accused be represented by counsel in order to ensure a fair trial. Since *Gideon*, the focus in determining the right to appointed counsel remains on the deprivation of liberty--an element inextricably linked to the concept of fundamental fairness.

II. The Developing Right to Counsel in Quasi-Criminal Cases

Although traditionally, appointed counsel is unavailable in a civil case, [FN41] many courts have begun to recognize the need to *407 expand the right to counsel to quasi-criminal matters. As courts focus increasingly on the liberty interest at stake and the *pro se* litigant's inability to represent herself effectively, more quasi-*408 criminal parties gain the right to appointed counsel as an essential adjunct to the right to an opportunity to be heard. [FN42]

In cases involving a criminal defendant's right to appointed counsel, the Supreme Court has focused on the imminent deprivation of physical liberty. [FN43] In other contexts, however, the Court has long recognized that one's liberty interests extend beyond mere freedom from physical restraint. Thus, in *Meyer v. Nebraska* [FN44] the Court interpreted "liberty," as used in the due process clause, to mean

not merely the freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [FN45]

In recent years, the Court has reaffirmed this broad conception of the scope of liberty interests. [FN46]

The extension of the right to counsel beyond the parameters of criminal prosecutions stems from constitutionally mandated protection of the litigant's liberty interests. Courts have found the appointment of counsel in a quasi-criminal proceeding mandated by the due process clause when fundamental liberty interests of the individual are threatened, when the proceeding resembles a criminal prosecution, or when there is an extreme imbalance of power between the litigants. Courts have held the fourteenth amendment [FN47] to require the appointment of counsel *409 in a variety of situations which implicate the physical liberty of the individual, including juvenile delinquency, [FN48] civil commitment, [FN49] and civil contempt [FN50] proceedings. In addition, the appointment of counsel is required where other liberty interests are in jeopardy, such as in proceedings for ter-

mination of parental rights, [FN51] divorce, [FN52] paternity, [FN53] and deportation. [FN54]

A. Deprivation of Physical Liberty

As the history of the right to counsel in criminal cases reveals, the Supreme Court is most solicitous of an indigent defendant confronted with the threat of incarceration. [FN55] Indeed, it is the deprivation of physical liberty, and not the characterization of the alleged offense as felony or misdemeanor, that entitles a defendant to appointed counsel. [FN56] It is but a short step from this to the proposition that the characterization of a proceeding as “civil” should not frustrate the constitutional mandate*410 of appointed counsel where an indigent litigant is threatened with confinement. The Court took this step in *Lassiter v. Department of Social Services*, [FN57] erecting a presumption of a right to appointed counsel “where the litigant may lose his physical liberty if he loses the litigation.” [FN58] Where physical liberty is not at stake, the Court held, no such presumption exists. [FN59] The potential loss of “physical liberty” therefore becomes the critical factor determining the right to counsel; *Lassiter* made clear that the labels “civil” and “criminal” are no longer important.

1. Juvenile Delinquency Proceedings: In re *Gault*

Even before 1972, when the *Argersinger* Court guaranteed the right to counsel to all indigent criminal defendants threatened with incarceration, the Supreme Court had extended the right to counsel to juvenile delinquency proceedings. *In re Gault* [FN60] was the first instance in which the Court expanded the constitutional right to appointed counsel beyond the parameters of criminal prosecutions.

In *Gault*, the Court emphasized that the characteristics of the legal proceeding, rather than its label, trigger fourteenth amendment due process protections, including the right to representation by appointed counsel. *Gault* involved a juvenile delinquency proceeding which, though labeled “civil,” had many of the characteristics of a criminal prosecution. The Court “confront[ed] the reality” that a juvenile committed to a state institution is facing nothing less than the deprivation of his liberty: “The essential difference between [a juvenile delinquency] case and a normal criminal case is that safeguards available to adults [are] discarded in [a juvenile's] case.” [FN61]

Although historically the juvenile courts were designed to provide a non-adversarial alternative to criminal proceedings in which the state, acting in its parental posture, focused on child welfare rather than on retribution, the Court found that, “The *411 juvenile needs the assistance of counsel to cope with the problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings and to ascertain whether he has a defense and to prepare and submit it.” [FN62] The due process clause of the fourteenth amendment “requires the guiding hand of counsel at every step in the proceedings.” [FN63]

2. Civil Commitment

Although the right to counsel in civil commitment proceedings exists by statute in virtually every state, the right is precarious, since statutory protection is subject to statutory repeal. Because civil commitment is a loss of physical liberty resulting from a judicial proceeding, the constitutional right to appointed counsel should attach. Thus, in *Heryford v. Parker*, [FN64] the Tenth Circuit held that a youth committed, without benefit of counsel, to a state institution for the mentally deficient was denied his liberty without due process of law. Involuntary incarceration triggered his constitutional right.

[T]he liberty of an individual is at stake, and we think the reason in *Gault* emphatically applies. It matters not whether the proceedings be labeled “civil” or “criminal” or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration--whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency [*Gault*], or treatment and training as a feebleminded or mental incompetent--which commands observance of the constitutional safeguards of due process. [FN65]

In direct analogy to *Gault*, [FN66] the *Heryford* court found that the state must safeguard due process by providing appointed counsel to those subject to civil commitment.

*412 Other courts have employed the same reasoning in recognizing a due process right to appointed counsel in commitment proceedings. In *Lessard v. Schmidt*, [FN67] the court emphatically stated that a person detained on ground of mental illness has a right to counsel, and a right to appointed counsel if he is indigent. The court in *Dixon v. Pennsylvania*, [FN68] reached a similar result.

The Supreme Court's decision in *Lassiter* [FN69] will have a tremendous impact on the right to appointed counsel in civil commitment cases. The presumption requiring the appointment of counsel when a respondent faces a loss of physical liberty applies directly to these proceedings, and should play a vital role in them. The right seems ensured in theory by *Lassiter*, although state budgetary constraints may frustrate its implementation.

3. Civil Contempt

Civil contempt hearings are examples of proceedings which are civil in form but which can nevertheless result in incarceration. The Supreme Court in *Lassiter* was unequivocal that an indigent civil litigant has a right to appointed counsel if he may be incarcerated as a result of an adverse outcome. It is the defendant's interest in personal freedom and not the sixth amendment right to counsel in criminal cases which triggers the right to appointed counsel. Thus, *Lassiter* provides the standard by which the right to counsel in civil contempt cases is to be determined.

In *United States v. Bobart Travel Agency, Inc.*, [FN70] the Court of Appeals for the Second Circuit, citing *Lassiter*, declared that an indigent defendant is entitled to appointed counsel in a civil contempt proceeding. [FN71] The defendant was held in civil contempt for repeatedly invoking the fifth amendment improperly *413 to shield certain documents and records pertaining to his corporation's tax liability. At the show cause hearing, the defendant requested counsel, claiming that he was indigent and had previously been found so by the same judge in another case. On appeal, the court recognized that the defendant “should not have been denied the assistance of counsel: To guide a client between the Scylla of contempt and the Charybdis of waiving his Fifth Amendment privilege requires not only a lawyer but an astute one.” [FN72] The court further recognized that “contempt is an area of law in which counsel's advice is often indispensable.” [FN73] Other courts have sustained this reasoning and conclusion. [FN74]

Although the *Lassiter* presumption of a right to appointed counsel in cases threatening incarceration suggests strongly that counsel must be guaranteed in all civil contempt cases, at least one court has held otherwise. In *Andrews v. Walton*, [FN75] a father was sentenced to thirty days in jail for contempt because of his inability to pay the court-ordered fifteen dollars a week in child support. The court distinguished civil contempt from criminal contempt despite the Supreme Court's unequivocal rejection of this distinction in *Lassiter*. The Florida Supreme Court referred *414 to its previous decision in *Faircloth v. Faircloth*, [FN76] in which it held that due process requires that a parent not be incarcerated for failure to pay child support unless the trial court finds that he has

the ability to pay but willfully refuses to do so. The combined effect of these two cases is that counsel need never be appointed in a civil contempt case for nonsupport:

[T]here are no circumstances in which a parent is entitled to court-appointed counsel in a civil contempt proceeding for failure to pay child support because if the parent has the ability to pay, there is no indigency, and if the parent is indigent, there is no threat of imprisonment. [FN77]

A recent case in the Fifth Circuit indicates, however, that the “catch-22” logic of *Andrews* does not withstand the express mandate of *Lassiter*. In *Ridgway v. Baker*, [FN78] an indigent father who had failed to comply with a Texas state court judgment ordering him to pay child support was imprisoned for contempt without having had the benefit of counsel. In granting his writ of habeas corpus on the ground of denial of due process, the Fifth Circuit emphasized that the right to counsel turns on whether deprivation of liberty *may* result from a proceeding, not upon its characterization as “criminal” or “civil.”

Interestingly enough, the court observed that even if the label were important, the Texas courts have long considered *415 contempt proceedings growing out of civil actions criminal or quasi-criminal in nature. [FN79] In fact, since civil contempt covers situations in which the court finds that the defendant has the ability to comply with the order and since the confinement can be indefinite until the defendant pays, the accuracy of the indigency determination, which appointed counsel can ensure, becomes all the more important. The *Ridgway* court recognized that, viewed in this light, a civil contempt proceeding may pose an even greater threat to liberty than a proceeding labeled “criminal”; accordingly, the need for appointed counsel is greater. [FN80]

B. Other Kinds of Liberty Deprivations

Because the right to counsel developed in the context of criminal litigation, analysis naturally focused on the potential deprivation of physical liberty. The growing recognition that liberty extends beyond freedom from physical restraint has sparked an expansion of the right to counsel in cases involving deprivations other than incarceration.

Nonetheless, courts have been reluctant to afford non-physical liberty interests, such as those enumerated in *Meyer v. Nebraska*, [FN81] the same degree of protection accorded the freedom from physical restraint. By creating a hierarchy of liberty interests, courts have suggested that the distinction between physical liberty and other personal liberty interests is one of degree. In fact, the interests are so different conceptually that the hierarchy leads to preposterous results. Under the preference currently accorded physical liberty interests, a drunk driver merits the aid of counsel in a trial that may incarcerate him for a few days while an indigent parent may be deprived of her child permanently without the assistance of an attorney. Still, indigent litigants have had the benefit of appointed counsel in proceedings for the termination of parental rights, [FN82] divorce, [FN83] paternity, [FN84] and deportation. [FN85]

*416 1. Termination of Parental Rights: *Lassiter v. Department of Social Services*

Lassiter v. Department of Social Services [FN86] presented the Supreme Court with the question of whether the due process clause of the fourteenth amendment requires counsel to be appointed for indigent parents in proceedings to terminate parental rights. [FN87] In its analysis, the Court referred to *Mathews v. Eldridge*, [FN88] which set forth three factors employed in determining the scope of due process protection in any particular case:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [FN89]

*417 The Court explained that these three factors must be balanced against each other and against the presumption it established that an indigent has a right to appointed counsel only when physical liberty is at stake. [FN90]

Emphasizing that the goal of fourteenth amendment due process is to ensure fundamental fairness in a particular situation, the Court reviewed the development of the right to appointed counsel, and concluded that “it is the defendant's interest in personal freedom,” rather than the characterization of the proceeding as civil or criminal that determines whether appointed counsel is required. [FN91] The Court noted that, “[A]s a litigant's interest in personal liberty diminishes, so does his right to appointed counsel.” [FN92] Thus, the right to counsel does not automatically inhere in cases where liberty interests other than freedom from physical restraint are at stake; the right is to be granted on a case-by-case consideration of individual circumstances under the *Eldridge* analysis. [FN93]

*418 Having established the general framework of its analysis, the Court proceeded to consider the private interests at stake in the immediate case. The Court emphasized that its

decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to *419 “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.” If the State prevails, it will have worked a unique kind of deprivation. A parent's interest in the accuracy and injustice of the decision to terminate his or her parental status is, therefore, a commanding one. [FN94]

The Court also recognized that the unrepresented parent's disadvantage against the state is so extreme that “courts have generally held that the State must appoint counsel for indigent parents at termination proceedings,” [FN95] and that

[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well. Most significantly, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases. [FN96]

Thus, the Court deemed the private interest in an accurate decision a commanding one. [FN97]

*420 Second, the Court found the state's interest in accuracy just as commanding because of its obligation to protect the best interests of the child. The Court recognized that since the adversary system results in fair and accurate outcomes when both parties are represented by counsel, the state's interests are potentially maximized by providing counsel to indigent parents.

The Court gave little weight to the state's budgetary interest in keeping termination proceedings economical, for “the State's pecuniary interest is hardly significant enough to overcome private interests as important as [[preservation of parental status].” [FN98]

Third, the Court pointed out that the risk of an erroneous decision varies with the type of proceeding under review. In parental rights termination proceedings, “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.” [FN99] On the other hand, the Court said such a hearing does not require intense preparation and does not present difficult procedural or substantive legal issues.

Despite this assessment of the *Eldridge* factors, the Court declined to hold that the due process clause requires counsel to be provided for indigent parents in all termination proceedings, asserting that there may be “easy” cases in which the facts demonstrate that the parent's need for counsel is insignificant against the presumption that counsel is required to be appointed only where personal liberty is at stake.

The Court apparently considered *Lassiter* just such an “easy” case, saying it “presented no specially troublesome points of law.” [FN100] Even if she had been represented, Ms. Lassiter *421 could have offered little evidence to support her parental interest in the child. Counsel might have argued that the maternal grandmother should have been awarded custody, [FN101] but since the evidence showed the grandmother unable to care for the child, the Court found the absence of counsel inconsequential.

In sum, the Court left the question of whether there is a due process right to appointed counsel in a termination of parental rights proceeding to be determined on a case-by-case basis, “to be answered in the first instance by the trial court, subject, of course, to appellate review.” [FN102]

*422 Speaking for three of four dissenters, Justice Blackmun pointed out that *Gideon v. Wainwright* [FN103] had discredited the case-by-case approach. Justice Blackmun's analysis of the *Eldridge* factors endorsed by the majority yielded a balance tipped overwhelmingly in favor of the right to appointed counsel. Finding the “problem of inadequate representation painfully clear in the present case,” [FN104] he believed that counsel could have provided meaningful and necessary legal arguments in Ms. Lassiter's defense. [FN105]

*423 Justice Blackmun concluded that where

the threatened loss of liberty is severe and absolute, the State's role is so clearly adversarial and punitive, and the cost involved [to the state] is relatively slight, there is no sound basis for refusing to recognize the right to counsel as a requisite of due process in a proceeding initiated by the State to terminate parental rights. [FN106]

The split of opinion among the *Lassiter* Justices applying the same step-by-step *Eldridge* analysis exposes the nonviability of the case-by-case approach. Justice Blackmun's fear that the decision might transform the Supreme Court into a “super family court” [FN107] is not unfounded. [FN108]

Moreover, the case-by-case approach does not ensure predictability. The majority opinion endorsed a retrospective study of the trial record, an imaginative reconstruction on appeal of “what might have been” if the parent had been represented by counsel. At trial, it requires the judge to anticipate the complexity of all potential legal issues and to gauge the ability of a *pro se* litigant to protect her rights as effectively as would professional counsel. The *ad hoc* approach adopted by the majority is impractical and unworkable, especially given the lack of guidelines*424 for the lower courts. The majority opinion assumed that the risk of error is minimal and that the record will reflect the full flavor of the termination proceeding. Yet the very statistics that were before the Court indicated that the presence of counsel for parents at termination hearings results in a higher rate of dismissals and a lower rate of neglect adjudications. [FN109]

Justice Blackmun found irony in the Court's decision of *Little v. Streater*, [FN110] decided the same day. In *Little*, the Court held that due process requires that blood tests be provided for indigent putative fathers in order

to accord them a meaningful opportunity to disprove paternity. The Court stressed the need for “procedural fairness,” the “compelling interest in the accuracy of [the] determination,” the “not inconsiderable” risk of error, the indigent’s “facing the State as an adversary,” and “fundamental fairness.” [FN111]

Moreover, the private interests at stake in both cases were the parents’ interests in accuracy. [FN112] In effect, the two decisions interweave *Eldridge*’s private interest factor and risk of erroneous result factor, with the result that the private interests are diminished according to the accuracy of the decision. If the outcome is accurate, then the parental interests are satisfied.

Application of the two-tiered due process analysis [FN113] reveals the difficulties with this reasoning. The first tier requires selection of the proper fundamental interest at stake. The *Lassiter* majority thought the private interest at stake was accuracy in *425 outcome. Justice Blackmun believed the parent’s interest in the management of her children to be the primary interest. The majority’s conclusion that counsel would not have made a determinative difference in Ms. Lassiter’s case may be consistent with the interest in accuracy, but it is not consistent with Ms. Lassiter’s interest in caring for her child. The latter interest should be the relevant inquiry in termination cases, directing judges to focus on the real issues: fundamental fairness and the right to a meaningful opportunity to be heard. Thus, in *Little*, the right to a blood test relates directly to accuracy, and accuracy of determination of parentage is exactly what the parties are attempting to establish; the issue is perfectly objective. In termination proceedings, however, the issues are not nearly so clear-cut and amenable to scientific evidence. Whereas blood tests are practically absolute, termination issues involve soft variables--complexities and ambiguities which are unknown to the *pro se* litigant but may be obvious to the attorney. [FN114]

Furthermore, the *Eldridge* factors are not well adapted to the intangible interests inherent in parental rights. [FN115] In *Eldridge*, “[T]he Court balanced the costs and benefits of different procedural mechanisms for allocating a finite quantity of material resources among competing claimants.” [FN116] This may be an appropriate method of determining what process is due in a deprivation of property case, but when a liberty interest is at stake, “weighing the pecuniary costs against the societal benefits” [FN117] distorts issues of fundamental fairness which are not amenable to quantification.

The only post-*Lassiter* statement of the right to counsel in a parental rights termination proceeding occurred in *Rhoades v. Penfold*. [FN118] The state of Texas had petitioned to terminate a mother’s parental rights. The trial judge informed the defendant of her right to counsel, but not of her right to court-appointed *426 counsel. Ms. Rhoades retained the aid of the Dallas Legal Aid Society, but asked that it withdraw from the case prior to the hearing. The trial court permanently terminated her parental rights.

Ms. Rhoades thereafter filed a class action suit in federal district court requesting injunctive and declaratory relief, claiming that she and other indigents similarly situated were denied due process of law and equal protection because of the state’s failure to provide court-appointed counsel. In response to plaintiff Rhoades’ motion for summary judgment, the federal district court certified the class, vacated the state court’s judgment, and enjoined the state from attempting to enforce it. The district court further concluded that indigent parents whose children “were, are, or will” be the subject of termination proceedings should be granted a hearing “to determine indigency and the need for appointed counsel.” [FN119]

On appeal Ms. Rhoades argued that the equal protection clause creates an absolute right to the appointment of counsel in parental rights termination proceedings. The state maintained that the granting of summary judgment was improper because the factual issue of plaintiff’s indigency was in dispute, and that certification of the

class was unnecessary. The Fifth Circuit agreed. [FN120]

The appellate court pointed out that in *Lassiter*, the Supreme Court, proceeding under the due process clause, refused to hold that there exists an absolute right to counsel in termination proceedings. The court stated that “*Lassiter* does not create a classwide right, it merely gives each indigent parent the right to have a determination made as to the need for counsel under the balancing test set forth in *Eldridge*.” [FN121] The class certification was unnecessary because the right to counsel exists on an individual basis and “is not susceptible to an across-the-board classwide determination. The infinite variation of facts possible in each case requires adherence to the case-by-case analysis announced in *Lassiter*.” [FN122] The court of appeals reversed*427 the district court's judgment and remanded the case for an evidentiary hearing to determine Ms. Rhoades' need for counsel under the *Lassiter* standard.

The Fifth Circuit virtually ignored Ms. Rhoades' equal protection claim. *Lassiter*'s due process logic paradoxically excludes equal protection safeguards: If the right to counsel is to be determined for every parent individually, then it is difficult for courts to recognize a class for the purposes of equal protection analysis.

The *Lassiter* Court transformed physical liberty into the only protected interest which mandates the appointment of counsel in every case. This decision creates a new standard of due process in appointment of counsel cases and will restrict its further development. Although due process is a flexible concept meant to give effect to various other interests, the Court nevertheless refused to give these other fundamental interests equal recognition to the interest in physical liberty.

2. Divorce Proceedings

Because marriage is one of the “basic civil rights of man,” fundamental to our “existence and survival,” [FN123] judicial policy has striven to ensure access to the courts for those who wish to marry or to divorce. Thus, in the 1971 decision of *Boddie v. Connecticut*, [FN124] the Supreme Court held that indigents were entitled to a waiver of court fees and costs for service of process in divorce actions. Since the state controls the divorce process, the Court reasoned, due process prohibits the state from denying court access to a litigant because of his indigence. [FN125]

*428 Three years later, the New York Court of Appeals applied the *Boddie* decision in *Deason v. Deason*, [FN126] in which an indigent claimed entitlement to a waiver of the cost of service of summons by publication in a divorce action. The court held that such fees were auxiliary costs, and were payable by the county since their imposition would otherwise bar access to the courts. A lower New York court then attempted in *Vanderpool v. Vanderpool* [FN127] to extend *Deason* to provide a right to counsel for indigent divorce litigants. In that suit, the supreme court held that an indigent wife may not be denied counsel in a divorce action due to a lack of funds, because attorney's fees were deemed “auxiliary costs” which barred access to the courts, and therefore, had to be removed. [FN128] *Jacox v. Jacox* overruled *Vanderpool* a year later; the court held that absent statutory authority, it could not require a municipality to pay the lawyer's fees of an indigent in divorce proceedings. [FN129]

Finally, *In re Smiley* [FN130] appeared to settle the issue of whether counsel must be provided to indigents in divorce proceedings. The New York Court of Appeals denied an absolute right to appointed counsel, but admitted the court's discretionary power to assign counsel where appropriate. The court distinguished *Boddie* and *Deason*, noting that unlike filing fees and service costs which actually preclude access to the courts, lack of

counsel does not bar divorce litigants from being heard. In addition, private litigation poses a less compelling case for representation*429 than does the plight of an indigent defendant who must face the state as the opposing party.

While the courts have recognized no more than a discretionary power to appoint counsel for indigent divorce litigants, [FN131] they have sometimes treated the combination of divorce and child custody proceedings more favorably. In *Flores v. Flores*, [FN132] for instance, the court held that, under the due process clause of the Alaska Constitution, an indigent mother in a divorce and custody proceeding, in which the father was represented by counsel supplied by the county welfare agency, was entitled to have private counsel appointed to represent her at public expense. [FN133]

*430 3. Paternity

Prior to *Lassiter*, courts were sharply divided on the question of whether an indigent defendant in a paternity action was entitled to the assistance of counsel at state expense. Some courts provided assistance, reasoning that paternity determinations affect the right to rear one's children, a fundamental right protected by the Constitution. Furthermore, because the state as adversary uses its vast resources to establish the parent-child relationship and to create obligations enforceable through contempt proceedings (which can result in imprisonment), and because the complex legal and scientific issues may require expertise and familiarity with the litigation process, some pre-*Lassiter* courts held putative fathers constitutionally entitled to court-appointed counsel. [FN134]

Other courts found no right to counsel in paternity proceedings*431 on the grounds that an adjudication of paternity does not involve threats to the defendant's liberty or property serious enough to trigger a constitutional mandate. [FN135]

Noteworthy decisions since *Lassiter* indicate a trend away from recognition of the right to counsel in paternity proceedings. Two state courts have recognized the right while three have refused to extend it to putative fathers.

Most recently, the Superior Court of Pennsylvania in *Corra v. Coll* [FN136] held that the risk of error in determining paternity, coupled with the importance of the private interests involved, mandated the appointment of counsel in paternity proceedings. Noting that a present finding of paternity might result in future incarceration if a defendant willfully failed to comply with court-ordered support payments, the court found the threatened deprivation of liberty sufficiently proximate to justify the appointment of counsel. The court practically ignored the *Lassiter* analysis by assuming that court-appointed counsel is constitutionally required for indigent defendants in a paternity proceeding. Against this presumption the *Corra* court balanced the three *Eldridge* factors.

First, the court found that a parent's right to care for and manage his children is a protected liberty interest, the imposition on which requires procedural fairness. [FN137] The need for procedural safeguards is especially important because once paternity is established, that finding is *res judicata*. A finding of parenthood without benefit of counsel may result in a defendant being sent to jail for subsequent non-support, without his ever having had a meaningful opportunity to be heard [FN138] on the issue of paternity. Private property interests were also involved; under state law an illegitimate child has rights to an adjudged father's *432 estate, and workmen's compensation benefits, wages, salary, or commissions can be attached to meet support payments. Thus, the *Corra* court recognized three distinct private interests which alone justify the appointment of counsel: family, property, and physical liberty interests.

Second, the court found that the risk of an erroneous determination of parentage weighed in favor of appointment of counsel. The right to counsel was found necessary to prevent emasculating of the right to blood grouping tests granted by the Supreme Court in *Little v. Streater* [FN139] and provided by statute. Since paternity proceedings are often adversarial contests against the state, the likelihood that the obligations of fatherhood will be imposed on the wrong person increases when the defendant, because of indigence, is unable to offer a legally viable defense.

Third, the *Corra* court found that the government had an interest in a correct determination of paternity. Although the state would bear the expense of court-appointed counsel, the court thought that the benefits to the state of having counsel represent the putative father outweigh this expense.

The court therefore held that the three *Eldridge* factors, balanced against the presumption that counsel is required for indigent defendants facing a potential loss of physical liberty as a result of an adjudication of their paternity, mandate appointment of counsel in paternity proceedings.

The *Corra* decision is important in a number of respects. Instead of deciding on the particular facts of the case, the court made clear that *all* indigent putative fathers have a due process right to court-appointed counsel; the *Lassiter* case-by-case approach had specifically ruled out this broad procedural protection. Moreover, the *Corra* court inverted the *Lassiter* presumption against counsel to create a presumption for counsel. Nevertheless, given the court's finding that paternity proceedings implicate the putative father's interest in physical liberty, [FN140] the presumption in favor of counsel may have been correct, and consideration of the *Eldridge* factors would have been unnecessary under a strict reading of *Lassiter*. On the other hand, the *433 finding that putative fathers may lose their physical freedom if fatherhood is established invites scrutiny, since that conclusion runs counter to judicial consensus.

The Indiana Court of Appeals in *Kennedy v. Wood* [FN141] applied the "traditional" *Lassiter* analysis but arrived at the same conclusion as the *Corra* court. The familial, property, and liberty interests of the defendant recognized by the court were similar to those acknowledged in *Corra*. [FN142] The government's interest, on the other hand, was deemed primarily financial, [FN143] and thus relatively weak compared to the private interests of the putative father and child. Finally, the risk of an erroneous result increases "if, because the putative father is unable to afford counsel, he offers a legally inept or no defense." [FN144] Since blood grouping tests are constitutionally mandated, counsel is needed to inform the putative father of his right to a blood test and of its significance. Noting that an Indiana statute provides that counsel must be appointed for indigent parents in a parental rights termination hearing, [FN145] the *Kennedy* court concluded that the same considerations underlie the statute governing paternity proceedings as well. The court therefore held that to ensure a fair opportunity to be heard, the indigent putative father must be provided counsel whenever a paternity suit is instituted under the federal acts and statutes involved in this case. [FN146]

*434 Both the *Kennedy* and *Corra* courts examined the nature of paternity proceedings and granted broad extensions of the right to counsel. Their decisions did not turn on the respective records in the particular cases before them, but on the general necessity of counsel in paternity actions.

In *State ex rel. Adult and Family Services v. Stout*, [FN147] on the other hand, the Oregon Court of Appeals evaluated the record to conclude that the indigent putative father was not entitled to court-appointed counsel. The court distinguished the procedural and substantive facts from those in *Little v. Streater*, [FN148] in which the Supreme Court held that a putative father was constitutionally guaranteed a blood grouping test. The *Stout*

court noted that the cost of providing court-appointed counsel would be substantially greater than the cost of providing blood tests, and that in Oregon, the mother's accusation does not create a presumption of paternity as was the case in Connecticut, the location of *Little*. [FN149] The court also observed that the record did not indicate complex issues of fact or law.

While it tipped its hat to the *Lassiter* analysis, the court in *Stoutt* did not apply that approach. Instead, the court evaluated the complexity of the relevant issues in the particular paternity action. Impressed by the Supreme Court's rejection of Ms. Lassiter's argument that the intricacy of the legal issues required the appointment of counsel, the court declined to appoint counsel.

While the *Stoutt* court addressed neither the *Lassiter* factors nor the potential imprisonment of the putative father, the Supreme Court of North Carolina, in *Wake County ex rel. Carrington v. Townes*, [FN150] considered both. The court wrote that with respect to paternity proceedings, "the necessary menace to personal liberty is clearly absent at the legal stage," [FN151] thereby *435 requiring analysis of the *Eldridge* factors.

The court found that while the private interests are substantial in familial, social, and economic terms, state law provides dual procedural safeguards in such actions: first, the evidentiary standard in such proceedings is proof beyond a reasonable doubt and second, any party may be provided with blood grouping tests upon request. Having thus diminished the seriousness of the private interest involved, the court observed that the government's administrative and pecuniary interests are "quite forceful," to the extent that "additional legalities" should not hinder the state in seeking support for illegitimate children. Furthermore, the court found that paternity proceedings are rarely complex, in that they generally consist of a single issue which can be determined by a simple and inexpensive blood test. With "appropriate guidance" from the trial judge, the rights of putative fathers are protected in all but the most unique circumstances. Thus, the court advised trial judges to determine the actual degree of complexity involved in a particular case, suggesting that counsel need not be appointed if doing so would not make a determinative difference.

The Iowa Supreme Court reached the same factual conclusion in *State ex rel. Hamilton v. Snodgrass*. [FN152] The Iowa court found that a paternity defendant's interests, while substantial, are less substantial than those interests at stake in a termination proceeding, and that his physical liberty is not at stake. Furthermore, a requirement of appointed counsel would open the floodgates, since a paternity finding is constitutionally indistinguishable from other court orders subjecting one to potential contempt penalties. The potential cost to the state of providing counsel is vast, and imposition of this financial burden was left to the state legislature. In light of the split among state legislatures regarding the adoption of section 19(a) of the Uniform Parentage Act, [FN153] the court decided that appointed counsel should not be required. Finally, since the issue in a paternity suit case is one of biology, the presence or absence of counsel does not affect the risk of error.

*436 Federal courts have had only one opportunity since *Lassiter* to consider the paternity issue, in a case presenting a unique set of facts. In *Nordgren v. Mitchell*, [FN154] the plaintiffs were all indigent inmates at the Utah State Prison, and had been defendants in paternity actions. Nordgren had been unable to obtain counsel through Legal Aid and argued for appointed counsel on grounds of due process, equal protection, [FN155] and privilege against self-incrimination.

The Tenth Circuit divided its analysis of the right to counsel into two time periods correlated with the availability and accuracy of blood tests to determine paternity. Prior to the time of the blood tests in the proceedings, there is no reason for appointment of counsel. If the blood test fails to rule out the accused man, however, he

may wish to challenge the testing procedure or the validity of the results. Since the challenge may involve expert testimony and sophisticated cross-examination, legal services become necessary for the defendant. The court of appeals thus concluded that the *Eldridge* factors weigh in favor of providing counsel for indigent inmates in paternity cases that proceed after completion of blood tests. [FN156]

The opinion then alters abruptly in tone. The next phase of the analysis posits that an indigent prosecuted in a paternity action, even with its quasi-criminal overtones, does not face the potential loss of liberty that weakens the presumption against counsel. [FN157] Upon balancing that presumption against the weight of the *Eldridge* factors, the court concluded that due process *437 did not require Utah to appoint counsel for all indigent prisoners who are defendants in paternity cases.

4. Deportation Proceedings [FN158]

Deportation hearings are civil administrative proceedings. As the Supreme Court explained in *Fong Haw Tan v. Phelan*, “[D]eportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. [T]he stakes are considerable for the individual.” [FN159] A statutory right to counsel exists, but “at no expense to the Government.” [FN160]

The issue of the right to appointed counsel in deportation proceedings was addressed squarely in *Aguilera-Enriquez v. Immigration and Naturalization Service*. [FN161] The court applied the test of *Gagnon v. Scarpelli*, [FN162] a parole revocation case: “Whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness--the touchstone of due process.’” [FN163] The court discarded the civil-criminal distinction as determinative of the right to counsel, but held that under the particular facts, an attorney would not have made a determinative difference at the deportation hearing.

A vehement dissent distinguished *Scarpelli* on the ground that parole revocation hearings are non-adversarial, whereas deportation hearings are always adversarial. [FN164] The *Aguilera-Enriquez* dissent would adopt a *per se* right to appointed counsel. Moreover, even the majority noted that while the outcome *438 of *Aguilera-Enriquez*'s hearing would not have been different with an attorney, in those cases “where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise ‘fundamental fairness’ would be violated.” [FN165] This is broad language, especially in light of prior case law adopting a more restrictive approach. [FN166]

C. The Future of the Right to Counsel in Quasi-Criminal Proceedings

Decisions such as *Scott v. Illinois* in the criminal field and *Lassiter v. Department of Social Services* in the quasi-criminal field suggest that the right to appointed counsel will expand much more slowly in the future than it has in the past. The “cutting edge” of the field has shifted to the enforcement of the existing expanded right. [FN167]

*439 Nevertheless, even when determined on a case-by-case basis, an indigent's right to appointed counsel is of constitutional significance when it attaches. The same constitutional bases for the guarantee of counsel in

criminal cases--to restore weight in the balance when the individual is unwillingly placed against the adversary state, to ensure the regularity of complex procedures, and to provide vindication or protection of fundamental liberty interests in the only available forum--also support the right to appointed counsel in quasi-criminal contexts. A *pro se* litigant in a quasi-criminal case who is deprived of the assistance of counsel to which he is entitled suffers an injury of constitutional magnitude. Recognition of this notion should compel courts and legislatures to give content to the right to appointed counsel by providing meaningful and operable remedies for constitutional injuries.

III. The Corollary Right to Effective Counsel

Individuals dissatisfied with the performance of their attorneys can seek redress through a variety of legal actions. The course of such litigation, however, is significantly constrained by the nature of the underlying claim. Whether the attorney originally represented the dissatisfied individual in a civil or criminal matter dictates to a great degree the standard of competence to which the attorney can be held accountable, the nature of the remedy available to enforce that standard, and the extent to which the remedy adequately compensates the aggrieved individual for harm resulting from the attorney's negligence.

The problem for the "quasi-criminal" litigant who has received poor legal assistance is that the remedial mechanisms in the law have not yet recognized the special nature of the injuries involved when a party loses in, for instance, a parental rights termination or paternity proceeding. In other words, although the labels "civil" and "criminal" are no longer relevant for purposes of assigning the right to appointed counsel, they remain important at the remedial phase when an individual who has been a party in a quasi-criminal action seeks to challenge the quality of counsel's performance in that action. "Civil" litigants are primarily limited to legal malpractice actions in which they *440 receive money damages, on the theory that the kind of injury caused by incompetent civil counsel is neither unique nor personal and so can be adequately compensated by money. "Criminal" defendants who did not have competent counsel to represent them, however, suffer unique, personal, and uncompensable injuries of constitutional significance. As a result, among the approaches available to criminal defendants are habeas corpus actions and direct appeals which would reverse the conviction and provide for retrial with constitutionally effective counsel.

Quasi-criminal litigants dissatisfied with their counsel's performance suffer under this dichotomy between the civil and criminal spheres. In some quasi-criminal settings, of course, the litigant is limited to the remedies available to litigants who have lost in traditional types of civil litigation. However, even in those settings in which courts have decided that counsel is constitutionally mandated, the quasi-criminal litigant does not benefit from all of the substantive and procedural protections of criminal proceedings. A quasi-criminal defendant is not generally entitled to the same quality or standard of assistance of counsel as the criminal defendant.

This Part of the Article presents a general discussion of both the standard of competence demanded of attorneys in civil and criminal litigation and the means by which parties may raise their challenges in court. Although these are conceptually distinct issues, they are inextricably linked because the label of the underlying litigation as "criminal" or "civil" often determines the procedural posture by which a party may bring his challenge to counsel's performance, which, in turn, defines the substantive standard to be applied. Section C addresses the unsuccessful attempts made by quasi-criminal litigants to get courts to recognize procedural mechanisms and substantive standards which would adequately remedy the special nature of the litigants' injuries when they have received inadequate assistance of counsel. [FN168]

**441 A. Malpractice Actions by Civil Litigants*

In civil actions, attorneys must abide by common law standards of conduct enforceable in a variety of actions such as contract, conversion, and negligence. Regardless of the form of action, “common to all [is] that there [[is] a duty which, when breached, causes damage. [T]he essential tort is legal malpractice, since any of the theories share the same facts and usually reach the same result.” [FN169] The negligence standard of legal competence is variously articulated, but is in general consistently*442 applied in all states to determine whether an attorney has “exercis[ed] the skill and knowledge ordinarily possessed by attorneys under similar circumstances.” [FN170]

The burden of proof in a negligence action lies with the plaintiff, who must demonstrate that there was a duty owed which was breached by the lawyer, and that this breach was the proximate cause of plaintiff's damage. The proximate cause element presents the greatest problems of proof, because the plaintiff must show that he would have prevailed in the underlying action. In this sense, the civil legal malpractice suit is a trial within a trial. [FN171] The plaintiff must convince the jury not only that the lawyer acted improperly, but also that had the lawyer's conduct been proper, plaintiff would have won the underlying case. [FN172] Considerations of the appropriate degree of proof to be applied to both the malpractice and underlying claims, [FN173] as well as numerous evidentiary and procedural requirements, compound the complexities of the legal malpractice trial.

Even if the plaintiff overcomes these obstacles, the remedial adequacy of a civil malpractice action depends heavily upon whether the plaintiff believes that money damages can adequately compensate for the loss caused by the negligent performance of counsel. Since a monetary award is the only form of relief traditionally available, there is little value in pursuing a malpractice action if the lawyer has no insurance, or no money, or if money cannot compensate for the loss. The obvious truth is that money is no substitute for some of the harms suffered *443 by a quasi-criminal litigant such as permanent loss of the custody of her child.

Moreover, malpractice actions may not be accessible to an indigent plaintiff. Because there is no general constitutional right to counsel in a civil case, an indigent plaintiff will frequently find it difficult to retain malpractice counsel even on a contingency basis, unless the malpractice claim is very strong. As a result, the efficacy of the civil malpractice remedy is dubious. [FN174]

B. Actions by Criminal Defendants

1. Procedural Routes to Obtain Redress

The most numerous challenges to the competence of criminal defense counsel are framed in terms of “ineffective assistance of counsel.” Although criminal defendants occasionally raise the effectiveness of defense counsel argument on direct appeal, in some instances this may not be an appealable issue because evidence of ineffectiveness may not appear on the record to which criminal appellate review is limited. [FN175] Therefore, criminal defendants most frequently raise this issue in collateral proceedings by an application for a writ of habeas corpus. In these cases, the writ alleges that because counsel failed to provide effective assistance, the accused was deprived of his constitutional right to counsel and his conviction was therefore obtained without due process of law.

*444 Habeas corpus actions challenging the adequacy of counsel's performance are not frequently success-

ful, in part because they are procedurally intricate and jurisdictionally limited, and in part because of the sheer litigiousness of incarcerated individuals. [FN176] Additionally, although the requirement that counsel must be effective is constitutionally mandated, [FN177] the standard by which effectiveness is measured is not. As a result, precisely what is required for constitutionally adequate representation varies from jurisdiction to jurisdiction.

Nevertheless, the relief available for successful challenges based on claims of ineffectiveness of counsel--reversal of the conviction and release from custody or retrial--most fully remedies the harm done to criminal defendants who have been subjected to ineffective counsel.

2. "Effective" Assistance of Counsel

a. Source and History of the Standard

Powell v. Alabama [FN178] is the root of the requirement that criminal defense counsel must be effective. The Supreme Court was unequivocal that the need for counsel is not merely symbolic or formal. The fact that the *Powell* trial court had vaguely appointed the entire bar to represent the defendants was insufficient for due process purposes because "such designation of counsel as was attempted was either so indefinite or so close upon trial as to amount to a denial of effective and substantial *445 aid in that regard." [FN179] Instead, the appointment of counsel must be "effective"; that is, a reasonable time must be allowed for counsel to consult with the defendant and to investigate and prepare a defense. The Court held:

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense it is the duty of the court to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. [FN180]

Thus, fourteenth amendment due process requirements are the source of the right to effective assistance of criminal defense counsel. *Powell* applied to defendants in state court capital cases. Federal defendants, entitled by the sixth amendment to appointed counsel in all felony cases, derived their right to effective assistance of counsel primarily from the due process clause of the fifth amendment. *Diggs v. Welch* [FN181] reflects the early view on the part of the District of Columbia Court of Appeals that the due process clauses were the only sources of effective assistance guarantees.

It is clear that once competent counsel is appointed his subsequent negligence does not deprive the accused of any right under the Sixth Amendment. All that amendment requires is that the accused shall have the assistance of counsel. The petitioner here [asserting that he was coerced by his appointed counsel to enter a guilty plea] must, therefore, rely on the due process clause of the [fifth amendment] which guarantees him a fair trial. [FN182]

*446 *Diggs* is also notable as the first case in which a court attempted to articulate qualities beyond those of "fair trial" by which effective assistance of counsel could be measured. The "farce and mockery" standard set forth by the *Diggs* court rested on an evaluation of the procedural fairness of the trial as a whole. According to this standard, a showing of incompetence and negligence in representation of a criminal defendant by appointed counsel is not enough to constitute a violation of the fifth amendment due process guarantees to a fair trial. Instead, an "extreme case must be disclosed," [FN183] which shows that the "circumstances surrounding the trial shocked the conscience and made the proceedings a farce and a mockery of justice." [FN184]

When *Gideon v. Wainwright* was decided, the theoretical root of the right to the assistance of counsel shifted, accordingly shifting the focus of the effectiveness inquiry. *Gideon* extended the sixth amendment right to counsel in all felony proceedings to state court defendants through the fourteenth amendment due process clause. [FN185] As one commentator noted,

In placing appointment of counsel claims on a sixth amendment foundation, and thereby eschewing due process as the appropriate standard, the Supreme Court established a new theoretical and constitutional basis for a defendant's right to counsel in state criminal cases. Under the *Betts* due process standard the defendant was required to show a causal relationship between the lack of counsel and the denial of a fair trial. Under the *Gideon* sixth amendment standard, this relationship was presumed once the defendant showed a denial of his right to counsel. [A] fair reading of *Gideon* suggested an [effectiveness] inquiry based on the sixth amendment rather than the more stringent standard required under due process. [FN186]

***447 b. Current Standard by Which Effective Assistance of Counsel Is Measured**

The Supreme Court has not yet defined the standard by which effective assistance of counsel should be measured, [FN187] although dicta in recent cases hint at a constitutionally appropriate standard. In *McMann v. Richardson*, [FN188] the Court said,

In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter on whether [counsel's] advice was *within the range of competence demanded of attorneys in criminal cases*. [W]e think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts. [FN189]

In a later case, the Court reiterated that habeas corpus petitions must demonstrate that the advice of counsel was not within the “range of competence demanded of attorneys in criminal cases.” [FN190]

This vague language, set forth in dicta in cases involving extremely narrow questions of law, is clearly not intended to *448 be the definitive standard for measuring the effectiveness of counsel. It does suggest, however, a standard more stringent than that of “farce and mockery.” In fact, every federal circuit and a majority of state courts have rejected the “farce and mockery” approach in favor of some version of a reasonableness test. [FN191] Several cases are illustrative.

*449 In *Beasley v. United States*, [FN192] the Sixth Circuit rejected the farce and mockery standard as “a meaningful test of the Sixth Amendment right to the effective assistance of counsel except as it may be considered a conclusory description of the objective standard we adopt.” [FN193] The court criticized the farce and mockery test for its subjectivity and instead adopted a reasonableness test, holding that the sixth amendment requires “counsel reasonably likely to render and rendering reasonably effective assistance.” [FN194]

In *Moore v. United States*, [FN195] the Third Circuit rejected the farce and mockery standard, and instead required of counsel “the exercise of customary skill and knowledge which normally prevails at the time and place.” [FN196] Although the court did not consider perfection to be mandatory, [FN197] it emphasized that the

standard of “normal competency” involves “more than the courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to *450 interview essential witnesses or to arrange for their attendance.” [FN198]

The *Moore* standard has several advantages. Although it is a form of “reasonableness” test, the inquiry regarding whether an attorney has exercised customary skill is less subjective than one of whether his actions were reasonable. Because of its similarity to a malpractice standard, the normal range of competency test “provides a standard capable of application by a court, since a court can evaluate a particular attorney’s practice in the light of the normal and customary skill exhibited in a courtroom.” [FN199] Furthermore, “The standard has the virtue of avoid[ing] the overall-fairness overtones of due process that confound other suggested standards.” [FN200] Finally, in contrast to the farce and mockery standard, the *Moore* test does not abandon the accused to the consequences of representation that falls below customary competency.

Recent decisions applying the standard [FN201] have merged the *451 standards of effectiveness and the requirements of non-negligent, careful representation. Thus, the discussion of what remedies a dissatisfied criminal defendant can pursue has come full circle to a consideration of rights and remedies determined by “malpractice” standards. Previously, even if counsel was clearly incompetent or ineffective, there was no constitutional violation unless the entire proceeding was a sham and an affront to the conscience of the court. Now, under the expanded right to counsel initiated in *Gideon* and the growing realization that the requirement of effectiveness is necessary to that sixth amendment right, courts are beginning at least to address serious abuses in the adversary system of justice.

Moreover, if a criminal defendant proves ineffectiveness, the remedy is clearly superior to those available through malpractice actions, for example, because a reversal of the conviction and a release or new trial directly address the injury suffered. The parties involved are returned to approximately the position they were in before the wrong was done. In this way, the constitutional rights of the defendant are vindicated, the public is protected from the fortuitous release of potentially dangerous persons, and the government’s interest in securing a constitutionally sound reconviction is preserved. [FN202]

*452 C. Remedies Available to Quasi-Criminal Litigants

The few cases reported on this topic reveal that courts have given very little thought to the nature of the loss suffered when counsel performs poorly in a quasi-criminal case, and thus have limited the available remedies.

1. Direct Appeal

At first glance, direct appeal would seem to be the most logical and effective way in which to challenge the competence of counsel appointed in a quasi-criminal case. Clearly a criminal defendant may raise the ineffectiveness of his trial counsel on appeal since the validity of the entire truth-finding function of the adversary criminal justice system is in jeopardy if the defendant did not have a competent advocate to ensure a balance between the parties. A civil litigant, however, may not appeal the outcome of his case on the basis of ineffective counsel, even if his lawyer’s lack of effective assistance reduced the trial to a farce and mockery of justice. In *Village of Big Bend v. Anderson*, [FN203] a deed transfer case, it was alleged on appeal that trial counsel had been ineffective. The court rejected the appeal, explaining that “There is no express constitutional guarantee of representation by counsel in a civil matter. [A] civil matter is not penal in nature and the state is generally not directly in-

volved.” [FN204] The court felt that the appropriate remedy was a malpractice action against the attorney, because to hold otherwise “would be visiting the sins of [appellant’s] lawyer upon the [[[appellee].” [FN205]

In quasi-criminal cases, however, it is still theoretically possible to reverse the underlying judgment because of ineffective counsel. As will be discussed in Part IV of this Article, the constitutional basis for a right to counsel in quasi-criminal proceedings implies a concomitant right to effective counsel; this is suggested by the recent case, *Santosky v. Kramer*, [FN206] in which *453 the Supreme Court held that New York’s “fair preponderance of evidence” standard of proof in termination of parental rights proceedings was insufficient under the due process clause of the fourteenth amendment, which requires a “clear and convincing” test in such cases. The Court affirmed the reasoning of *Lassiter v. Department of Social Services* [FN207] that termination proceedings must be conducted in conformity with due process principles, because the family relationship is “a fundamental liberty interest, protected by the Fourteenth Amendment.” [FN208] The Court emphasized that termination proceedings demand more than a civil standard of proof because the nature of the loss suffered is a significant deprivation of liberty far more substantial than the mere loss of money. [FN209]

Santosky clearly lends weight to the argument that counsel, once appointed under the *Lassiter* and *Eldridge* due process considerations, must be effective to the same degree as criminal defense counsel in order to ensure the reliability of the truth-determination process. However, no federal court has yet held that a quasi-criminal defendant is entitled to receive effective counsel on those occasions when appointed counsel is required, and the state courts have been equally silent. Only two cases, both paternity suits, were found in which the effectiveness of counsel in a quasi-criminal case was challenged on direct state-court appeal. Neither appellant persuaded the court that allegations of ineffective assistance of counsel raised a reversible issue. [FN210]

Finally, even assuming the theoretical right to a reversal on direct appeal of ineffectiveness in a quasi-criminal case, there are numerous practical problems limiting the right, such as review limited to the record and short deadlines for filing appeals. [FN211]

*454 2. Post-Judgment Relief Proceedings (Federal Habeas Corpus Review)

The availability of collateral review through federal habeas corpus challenges to state court judgments in quasi-criminal cases is doubtful, as is illustrated by the recent Supreme Court decision in *Lehman v. Lycoming County Children’s Services Agency*. [FN212] In that case, the plaintiff attempted to challenge the constitutionality of the Pennsylvania statute whereby her parental rights were terminated by bringing a habeas corpus action under the federal habeas corpus statute, 28 U.S.C. § 2254. [FN213] The heart of section 2254 habeas corpus relief, of course, is unwarranted custodial restraint, and the Court found that the Lehman children were not in the custody of the state, even though the state had placed, and presumably could revoke the placement of, the children in foster care. [FN214] The children, said the Court, are not

suffer[ing] any restrictions imposed by a state criminal justice system. [[[T]hey are not in the “custody” of the State in the sense in which that term has been used by this Court in determining the availability of the writ of habeas corpus. [T]hey suffer no unusual restraints not imposed on other children. They certainly suffer no restraint on liberty and they suffer no “collateral consequences” sufficient to outweigh the need for finality. [FN215]

This decision effectively withdraws federal court jurisdiction to review state custody decisions in habeas corpus proceedings, denying this form of relief to parents who would challenge in federal courts the procedural sufficiency of a termination order because of the ineffectiveness of their appointed trial counsel. [FN216]

*455 The federal habeas corpus statute still might be available, however, in other quasi-criminal circumstances. For example, one who is involuntarily committed to a state mental institution without the protection of effective counsel overcomes at least the threshold barriers of involuntary state custody and the requirement of a strong federal interest in individual liberty. Similarly, a paternity defendant who is incarcerated for refusing to obey a support order on the ground that it was secured without the protection of effective counsel might not be foreclosed from federal habeas relief by defects in the nature of the state's custody. Yet in both instances, that federal jurisdiction lies to hear the constitutional claims does not necessarily mean that the quasi-criminal parties will be accorded the full measure of the right to "effective" assistance granted to criminal habeas petitioners.

3. Summary: Rights Without Remedies

The picture that emerges from the cases discussed in this Section is that quasi-criminal litigants have due process rights without remedies. The disparity in legal treatment of such litigants is immediately apparent: while cases such as *Lassiter* recognize that quasi-criminal litigants suffer loss of "liberty" interests to some extent similar to those of criminal defendants for purposes of assigning the right to counsel, cases such as *Lehman* treat quasi-criminal litigants like traditional civil parties for purposes of granting relief. Since quasi-criminal litigants do not yet enjoy the benefits of procedural routes such as direct appeal or habeas corpus relief, they are relegated to the malpractice actions employed by ordinary civil litigants. They must remain satisfied with money damage awards, in the event, unlikely as it may be, that they are successful. Moreover, since quasi-criminal litigants have no special procedural mechanisms for challenging the effectiveness of counsel, there is no articulated standard of competency which responds to the specific nature of counsel's performance in quasi-criminal litigation.

The problem is more than one of empty results; the cases *456 demonstrate a failure to apply consistently the broad principles and reasoning underlying the constitutional precedents. *Lassiter* granted the right to appointed counsel in quasi-criminal litigation, albeit on a case-by-case basis, because the Court recognized that many of the same considerations necessitating appointment of counsel for indigent criminal defendants also were present in quasi-criminal contexts. When a quasi-criminal litigant obtains the right to appointed counsel, it is because her potential injuries are of constitutional magnitude--loss of a protected liberty interest. *Santosky* carried this concept a step further by imposing a procedural standard in a quasi-criminal trial that is similar to the stringent regularity demanded in criminal trials. If the reasoning in *Santosky* were carried to its logical and natural conclusion, quasi-criminal litigants would be entitled to the same procedural relief and substantive standards as criminal defendants when appointed counsel has failed to perform adequately.

IV. Proposals for Change

The expansion of the right to counsel to quasi-criminal cases creates a right to effective assistance of counsel that must involve more than a gesture in the direction of conformity to constitutional mandates. The same considerations that require counsel to be appointed and to be effective in criminal cases [FN217] are also present in quasi-criminal cases. [FN218] Unless appointed counsel in quasi-criminal cases is effective, the legitimacy of the entire proceeding is undermined, and the underlying constitutional rights of the defendant may be lost.

This is particularly true in quasi-criminal proceedings in which a liberty interest, rather than individual liberty itself, is at stake. In a criminal case, the roles of the participants are *457 clearly defined in terms of the adversary system. Errors which result, in spite of the constitutional soundness of a given proceeding, are accep-

ted as the price of the adversary system. In a quasi-criminal case, however, a defendant may need more protection, because the roles of those involved in the adjudication are not as clearly understood.

For example, a study of counsel appointed to represent defendants in civil commitment proceedings revealed that frequently, “[t]he attorneys did not in any way regard themselves as advocates.” [FN219] Often, the lawyer's duty as officer of the court or as a responsible member of society can be directly at odds with his obligations as a zealous advocate. “Many lawyers, judges, and social workers regard the adversary procedure as inappropriate in divorce, custody and related family matters.” [FN220] So while an “attorney appropriately fights for the criminal defendant's freedom because of a societal belief that persons facing a complex legal process that may lead to loss of freedom are entitled to an advocate who will articulate their desires and marshal the strongest case to support them,” [FN221] this social, institutional, and professional impetus is often lacking in quasi-criminal proceedings.

This dilution of adversary roles increases the risk of error in quasi-criminal litigation, which, in turn, causes quasi-criminal litigants to suffer grave legal and personal injuries. The problem demands the serious attention of judges and legislators. The remainder of this Article proposes two kinds of solutions. The first is preventative change to ensure in advance of the litigation that appointed counsel will be effective. If the system breaks down, however, the second type of solution is reform in the remedial area--permitting new procedural routes and meaningful substantive standards by which to challenge the effectiveness of counsel's performance.

*458 A. Systemic Change: Ensuring Effective Assistance of Counsel

It is surely too late in the history of the legal profession to deny “that the mere articulation of constitutional rights by the Supreme Court will not necessarily (or even probably) affect the attitudes and behavior of trial judges long accustomed to a different mode of procedure,” [FN222] and to ignore that neither the bar nor the legislatures have leapt unprovoked to the vigorous defense of the constitutional rights of indigents. [FN223] Yet, without affirmative corrective action, important constitutional protection may be lost; [FN224] even the formal adoption of appropriate remedial devices cannot overcome several institutional causes of ineffective counsel.

One way to promote effective assistance of appointed counsel for defendants in quasi-criminal cases is to appoint experienced, well-paid, and committed lawyers. However, the adjectives “experienced” and “well-paid” only rarely accompany “appointed,” and the unfortunate common experience is that appointed attorneys are among the least experienced and least well compensated members of the bar.

For example, Andalman and Chambers' 1974 study of the involuntary mental commitment process in eight jurisdictions concluded in part: “[P]ayment formulas in several observed jurisdictions that rely on court appointments *guarantee ineffective representation*, [because] under such a scheme, the only way an attorney can break even is to do nearly nothing and do it in volume.” [FN225] Naturally, it follows that, “you get what you pay for. Worse, in civil commitment cases, the attorneys the state can obtain through the private bar will probably know almost nothing about mental health matters.” [FN226] These conclusions*459 and sentiments are consistent with the consensus of commentary on the criminal appointment process. [FN227]

In theory, legislative action on the model of federally funded services or state public defender agencies could remedy many of the shortcomings of counsel appointed in quasi-criminal cases. Realistically, however, there is little hope that legislators will adopt this suggestion. The Reagan Administration's recent dramatic and nearly successful attempts to extinguish federally funded legal services, the air of fiscal crisis that permeates state gov-

ernments, and the failure of many state legislatures to demonstrate any real commitment to the provision of quality legal assistance to constitutionally-entitled indigents in quasi-criminal cases, make reliance on legislative intervention unrealistic at this time. [FN228]

A viable alternative to the creation of a state-wide agency is the enactment of a statute designed to regulate appointment and compensation of counsel. Such a statute, if modeled on the attorney appointment provisions of the federal Criminal Justice Act, [FN229] would help to promote provision of competent counsel in quasi-criminal cases. In order to provide appointed counsel with reasonable access to the tools necessary for the preparation of an adequate defense, the Criminal Justice Act provides for reimbursement for reasonable expenses, [FN230] and sets forth a procedure by which funds can be obtained to pay for “investigative, expert, or other services necessary for an adequate defense.” [FN231] *460 Additional payments can be recovered for “extended or complex representation.” [FN232]

In a real sense, state legislators have an affirmative obligation to enact legislation and to appropriate funds to compensate appointed counsel. Failure to do so is the state's refusal to provide its indigent constituents with a means by which they may assert their constitutional rights. When the legislature fails to appropriate funds for counsel fees and for the expenses of litigation, it effectively deprives indigent individuals of their constitutional right to effective counsel, as is clear in those jurisdictions where, absent legislative appropriations, the courts have refused to appoint counsel to serve without compensation. [FN233]

The first step, then, to the provision of effective counsel in quasi-criminal cases is the appointment of competent, fairly compensated counsel.

The second step is to recognize the adversary character of the proceedings. The intervention of the state into these quasi-criminal cases leads to the inescapable conclusion that these proceedings are adversary in nature, regardless of the actual tone of the proceedings, and thus require defense counsel who is totally independent of the presiding judge. Therefore, the method by which individual attorneys are selected for appointment must be non-partisan and independent, as far removed from the discretion of the trial judge as possible. The counsel appointed must clearly understand her role as a responsible and vigorous advocate and not that of an independent arbiter or social worker responsible for the interests of anyone except her client.

Acknowledging the adversarial character of these suits would not prevent their proceeding with dignity and compassion. For example, it may be fully appropriate in pretrial conferences to attempt to reach a negotiated agreement without formal adjudication in order to avoid what Andalman and Chambers call “‘over-judicialization’--the situation in which judicial proceedings become empty and perfunctory rituals, even for difficult cases, because the court is forced to deal repeatedly *461 with cases whose dispositions seem obvious.” [FN234] When friendly disposition fails, however, the veneer of an informal, non-adversarial posture demeans the seriousness of the constitutional interests involved and robs the defendant of a vigorous and complete defense.

B. Providing Meaningful Remedies for Ineffective Assistance of Counsel in Quasi-Criminal Proceedings

If the right to effective counsel is to be meaningful, the remedies for ineffectiveness must also be meaningful. This, in turn, signifies that there must be an articulated standard for determining “effectiveness” and adequate access to remedies.

1. Adopting the *Moore v. United States* Standard of Effectiveness

The *Moore* standard of constitutional effectiveness of counsel, requiring “the exercise of the customary skill and knowledge which normally prevails at the time and place,” [FN235] is the most appropriate for quasi-criminal proceedings. First, although *Moore* is a sixth amendment test, its application to a fourteenth amendment right to counsel could be accomplished in the same manner as was used with the right to counsel in criminal cases--by incorporation through the due process clause of the fourteenth amendment. [FN236] Second, the *Moore* test provides for examination of aspects of counsel's assistance that appear outside the trial record. Counsel's preparation, investigation, research, and knowledge of the law are all relevant to a determination of constitutional effectiveness. Third, the standard is less subjective than others such as “reasonableness” or “overall fairness.”

2. Direct Appeal

Recognition that effectiveness is an unseverable element of the due process right to be represented by counsel should open *462 up the availability of review of effective assistance on direct appeal. Furthermore, because of the constitutional nature of the requirement of effective assistance of counsel, an appellate court presented with the case for review on other grounds should be willing to grant a new trial if ineffectiveness is recognized on the record.

The broadening of the availability of appellate review for ineffectiveness of counsel should cause no welfare concerns in certain protective proceedings. For example, allowing the issue of effectiveness to be reviewed on appeal in an abuse case need not endanger the child. Notice of appeal commonly does not stay the order of the trial court unless a stay pending appeal is applied for and granted. Should the appellate court require a new trial on the ground that counsel had not provided effective assistance, the appellate court can order a return to the status quo before the initial hearing. Usually in such cases, the child has been in temporary emergency custody of the state since before the dependency proceeding was initiated. Similarly, the state has usually already secured a protective order of temporary custody (for example, through an earlier adjudication that the child is dependent or in need of protection and care) before the state initiated termination of parental rights proceedings. The parent's notice of appeal from an order of termination would not, absent a separate petition and application for mandatory relief, return the child to the custody of the parent. Instead, it would delay the consequences of final termination such as adoption of the child by a third party. Should the parent whose rights have been terminated successfully demonstrate ineffectiveness of counsel, the status quo to which a vacation of the termination order would return the parties would be one in which the child is in the temporary custody of the state. Moreover, there can be no question that the state, in any case, may exercise its authority to secure the safety and welfare of its infant citizens by issuing legitimate protective orders pending a final adjudication of custody.

Thus, the only dramatic consequence of allowing thorough direct appellate review of an ineffectiveness claim in a quasi-criminal case is that the question will be aired, and therefore resolved, sooner than if the dissatisfied defendant were required to cast about for another meaningful way in which to present *463 his complaint. There are, of course, limitations to appellate review in these cases similar to those which arise in other types of cases. [FN237]

3. Relief from Judgment

The best means of obtaining relief, considering the problems with a habeas corpus writ for quasi-criminal defendants, [FN238] is modeled on the relief available under [Rule 60\(b\) of the Federal Rules of Civil Procedure](#). [FN239] [Rule 60\(b\)\(1\)](#) allows a party to be relieved from judgment on grounds of mistake, inadvertence, surprise, or excusable neglect. [Rule 60\(b\)\(6\)](#) allows a court in its discretion to relieve a party from judgment for any reason justifying relief, though this section has been applied primarily to cases in which there has been improper conduct or excusable neglect. [FN240] While a [Rule 60\(b\)\(1\)](#) petition must be submitted to the court within one year from the judgment, there is only a “reasonable” time limit on a [Rule 60\(b\)\(6\)](#) petitioner.

Federal courts have granted relief under both sections (1) and (6) of [Rule 60\(b\)](#) to parties whose counsel have failed to perform their professional duties. [FN241] The large majority of the *464 cases in which courts have granted relief for error of counsel, however, involved default judgments entered when defense counsel failed to take any action or failed to take appropriate defensive measures. Nevertheless, the broad discretion the trial court has to return the parties to the pre-judgment status quo [FN242] provides a meaningful remedy to the quasi-criminal defendant.

[Rule 60\(b\)](#) relief has several advantages that make it valuable in review of quasi-criminal cases. First, the motion for relief from judgment is addressed to the trial court. The question of whether the moving party has made a credible claim of ineffective assistance is thus placed before the same judge who presided in the initial proceedings. This is an advantageous situation, because the trial judge is in the best position to evaluate the performance and effectiveness of counsel in light of the actual progress of the trial.

Second, [Rule 60\(b\)](#) motions are not confined to the record. Indeed, the movant should set forth the reasons he seeks relief from judgment with particularity, and may submit, for example, affidavits in support of his motion. [FN243] While “[t]he parties should not be allowed to develop or inject matters or claims that are not germane to the issue of relief properly raised by the 60(b) motion [t]hey should be accorded adequate opportunity to raise all relevant issues and to be heard thereon.” [FN244]

This opportunity for a hearing is the third strength of a [Rule 60\(b\)](#) proceeding. Without disturbing the underlying judgment, except as equity dictates, the court may order a full evidentiary hearing on the ineffectiveness allegation. At the evidentiary hearing, testimony can be presented and trial counsel examined about the extent of preparation and the quality of representation. Trial courts could readily apply the *Moore* standard of effectiveness since they have ample experience with what is within the range of normal competence of trial lawyers.

*465 The fourth advantage of using [Rule 60\(b\)](#) actions as a means to review effectiveness of counsel in quasi-criminal proceedings is that the denial of a new trial under the rule is appealable. This mitigates the danger of a biased trial judge's review of the actions in his own court.

Finally, because many states already have a rule similar to Federal [Rule 60\(b\)](#), implementation of this form of review would not necessarily require additional legislative reform.

If this post-judgment remedy for challenges to effectiveness of counsel were combined with the *Moore* malpractice-like normal range of competence standard of review, it would be reasonable, if a [Rule 60](#) motion failed, to raise a collateral bar to subsequent actions in malpractice because the same issue would have already been fully and fairly reviewed.

The implementation of a [Rule 60\(b\)](#) form of review would, of course, require the assistance of counsel. This is its greatest shortcoming because, unlike appeals, [Rule 60\(b\)](#) motions are not familiar to laypersons. Trial

courts may balk at advising a quasi-criminal defendant that he has a right, lasting for a “reasonable” time, to challenge the court's order on grounds of ineffective assistance of counsel, and thus may resist appointing counsel for that purpose, because advising the defendant of his right could upset a judgment that might otherwise have been left undisturbed.

Enforced ignorance, however, should not be allowed to dilute constitutionally protected interests. Considerations of finality do not outweigh the possibility of constitutional error. Therefore, courts should act upon the [Rule 60\(b\)](#) proposal, and make appointed counsel available for that purpose, even though the finality of some decisions may be in jeopardy. In any case, a promptly conducted new trial would be less disruptive than one ordered by an appellate court on ordinary direct appeal.

Considerations of finality and stability may, however, weigh in favor of requiring a higher standard of proof, in order to secure a new trial, than that normally required in a [Rule 60\(b\)](#) proceeding. For example, petitioner could be required to show that the ineffectiveness of his trial counsel was prejudicial to the outcome of the initial proceeding. This higher standard of proof, when coupled with the “reasonable time” requirement, would eliminate the use of 60(b) motions to prosecute late appeals, [FN245] *466 and prevent their use as a means of placing new circumstances before the court. Furthermore, a higher standard of proof would encourage the use of available appellate procedures and discourage deleterious delay.

[Rule 60\(b\)](#) provides a discretionary remedy, and allows the judge a range of options on the extent of retrial to be ordered on a successful petition. Yet because it also provides a remedy that directly addresses the loss involved, it is far superior to a malpractice action, for example, as a means of seeking redress after the time for appeal has lapsed.

Conclusion

The notion that constitutional “guarantees” are meaningless without appropriate and effective ways of enforcing them underlies the proposals set forth in this Article. Now that the Supreme Court has established the foundation for a right to appointed counsel in quasi-criminal cases, courts must build upon the content of the right by allowing remedies which adequately redress the injury of ineffective assistance of counsel. The reform must take shape through an articulated standard against which a lawyer's performance is measured, systemic changes to ensure the lawyer's performance is effective in the first place, and procedural routes which provide meaningful access to remedies and which redress the nature of the harm involved in the event that the system breaks down.

Because the reasons for granting the right to appointed counsel are the same in both criminal and quasi-criminal cases, quasi-criminal defense counsel must be held to the same standard of effective assistance to which criminal defense counsel are held. Until the Supreme Court defines the precise contours of constitutional effectiveness, the *Moore v. United States* normal competency test best suits the quasi-criminal setting.

Articulating a standard of effectiveness for quasi-criminal counsel is not, by itself, a sufficient solution to the problems facing quasi-criminal defendants. Legislators and courts must *467 take steps to ensure that appointed counsel are committed, experienced, and fairly paid. Moreover, counsel must have access to the tools of investigation and litigation.

Finally, when counsel has failed to perform in quasi-criminal litigation, the inadequacy of a malpractice ac-

tion as a remedy, with its difficulties of proof and its limitation to money damages, is manifest. Therefore, an appropriate alternative would be to return the parties to the pretrial status quo, as is done in criminal cases. The effectiveness of quasi-criminal counsel would then be reviewable on direct appeal. To accommodate those who realize too late that they may have lacked effective counsel, relief from judgment should be available under [Rule 60\(b\)](#) and its state counterparts.

Considering that the public and the bar are now closely scrutinizing the general competence of lawyers, and that the emphasis in the right to counsel field has shifted from expansion to enforcement of existing rights, it is likely that ineffectiveness of counsel claims will soon be common in quasi-criminal cases. The adoption of an objective standard of constitutionally effective assistance of counsel and access to direct and post-judgment review of counsel's effectiveness will provide fair and efficient methods of evaluating these claims.

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[FN2]. From the start of the litigation process, the *pro se* litigant confronts often insurmountable barriers which prevent equal access to the judicial system. Because the *pro se* litigant is typically indigent, unfamiliar with the law, and illiterate, he is incapable of understanding substantive legal principles and procedural rules which can confound even the most experienced attorney at every stage of the proceeding. *See generally* Ziegler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. Rev. 157 (1972).

Civil litigants commence suits by filing a complaint with the court. They must pay various fees, however, before a complaint will be accepted for filing. This is a real problem for the *pro se* litigant, whose indigency effectively stops him at this first barrier: access to the courts. Although the Supreme Court has held that filing and service of process fees need not be paid by an indigent complainant as a prerequisite to the maintenance of a divorce action, *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court has also held that universal access to the courts is not a fundamental right.

Even if the *pro se* litigant is able to pay filing fees, the continuing costs assessed during litigation place relatively greater burdens on him than on the affluent civil litigant. Goodpaster, *The Integration of Equal Protection, Due Process Standards and the Indigent's Right of Free Access to the Courts*, 56 Iowa L. Rev. 223, 234 (1970). Furthermore, the relative return for the *pro se* litigant is likely to be less since his claim tends to be smaller than that of other litigants. *Id.*

Federal courts and some state courts permit the indigent litigant to proceed *in forma pauperis*. For instance, a federal litigant may apply under 28 U.S.C. § 1915 (1976) for leave to proceed *in forma pauperis* to be relieved from paying filing fees. A two-pronged test has been developed to determine eligibility to proceed *in forma pauperis*. First, the applicant must be deemed indigent. The standards for indigency are generous. *See Adkins v. Dupont Co.*, 335 U.S. 331, 339-40 (1948); Catz & Guyer, *Federal In Forma Pauperis Litigation: In Search of Judicial Standards*, 31 Rutgers L. Rev. 655 (1979); Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 Geo. L.J. 253, 257 (1968-69); Note, *Aid for Indigents*, 58 Colum. L. Rev. 832, 839-42 (1958). Indigency is established if the affidavit of poverty which must accompany the application is sufficient on its face.

See Robbins & Herman, *Litigating Without Counsel: Faretta or for Worse*, 42 Brooklyn L. Rev. 629, 664-65 (1976); Ziegler & Hermann, *supra*, at 188 n.117. Second, the court must assess the merits of the case the indigent wishes to pursue. *Kinney v. Plymouth Rock Squab Co.*, 236 U.S. 43 (1915). The statute itself speaks of the applicant's "good faith." This requirement has been interpreted as an objective standard, "committing the existence of some nonfrivolous issue for review on appeal." Robbins & Herman, *supra*, at 665; *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

If a *pro se* litigant is successful in obtaining access to the court, he must then file a complaint. The actual drafting of the complaint is a second barrier to litigation for it can present tremendous problems. The *pro se* litigant's ignorance of his legal rights and his lack of writing skills and education limit the likely effectiveness of his complaint, which may become a rambling indictment of some civil wrong interspersed with subjective rhetoric and conclusory statements. Yet the *pro se* litigant may not understand why his complaint is summarily dismissed when all that was required of him was a "short and plain statement" of his claim. See Ziegler & Hermann, *supra*, at 181-82.

Because the *pro se* litigant proceeds without counsel, he continues to encounter procedural technicalities and barriers even after he files the complaint. He fails to comprehend the nature of a civil suit and does not realize he must move the case along or face dismissal for failure to prosecute. Failure to prosecute is perhaps the greatest threat to a *pro se* litigant's success. Confronted by an attorney who is armed with knowledge of procedural law and who would like nothing more than to delay for as long as possible the adjudication of the case (ideally obtaining a dismissal of the case in its entirety), the *pro se* litigant is in most cases the losing party. See Ziegler & Hermann, *supra*, at 201-02.

There are other barriers unique to the *pro se* litigant which arise throughout the litigation process. For example, the *pro se* litigant is usually unaware of the availability and usefulness of pretrial discovery. Even if he is aware of the discovery process, the *pro se* litigant is unable to conduct meaningful discovery because he lacks the funds to do so. Those who are permitted to proceed *in forma pauperis* under 28 U.S.C. § 1915 are in no better position since the federal statute does not provide for the costs of discovery. Ziegler & Hermann, *supra*, at 181, 204.

Finally, even if he overcomes all these barriers to litigation, a *pro se* litigant is simply incapable of arguing and presenting his case effectively. In general, the *pro se* litigant is no match for the professional who has spent three years in law school and many years in practice. See Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U. L. Rev. 595, 617-19 (1973).

Additionally, an examination of cases involving *pro se* litigants reveals a judicial attitude toward the procedural problems confronted by the *pro se* litigant that often ranges, at least at the trial court level, from lack of concern to open ridicule. See, e.g., *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944)(court belittled an Italian immigrant for his feeble attempt to state a claim).

[FN3]. See *infra* text accompanying notes 41-54.

[FN4]. See *infra* text accompanying notes 60-63.

[FN5]. See *infra* text accompanying notes 64-69.

[FN6]. See *infra* text accompanying notes 70-80.

[FN7]. See *infra* text accompanying notes 86-122.

[FN8]. *See infra* text accompanying notes 123-33.

[FN9]. *See infra* text accompanying notes 134-57.

[FN10]. *See infra* text accompanying notes 158-66.

[FN11]. The sixth amendment states: “In all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense.”

There was little question that the sixth amendment requires counsel to be appointed for felony defendants prosecuted by the United States, but it was not until *Johnson v. Zerbst*, 304 U.S. 458 (1938), that it was firmly established that federal courts lack the power to deprive an accused of life or liberty unless he has competently and intelligently waived his sixth amendment right to the assistance of counsel. The Court based its holding in part upon the inability of an unrepresented individual to have a fair opportunity to overcome the real power of the government. *Id.* at 463.

[FN12]. 287 U.S. 45 (1932).

[FN13]. The trial judge stated that he “had appointed all members of the bar for the purpose of arraigning the defendants and then of course anticipated that the members of the bar would continue to help the defendants if no counsel appeared.” *Id.* at 49, 53-57. While the record recited that the defendants were represented during the arraignment, it does not indicate under what circumstances an appointment was made or who was appointed. *Id.* It appears that no specific lawyer had been named to represent the defendants.

[FN14]. 224 Ala. 524, 141 So. 201 (1932).

[FN15]. 287 U.S. at 71.

[FN16]. *Id.* at 67-68.

[FN17]. *Id.* at 50, 58, 71, 72.

[FN18]. *Id.* at 51-52, 57-58, 69, 71, 72.

[FN19].

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. at 68-69.

[FN20]. *Id.* at 71. In *Avery v. Alabama*, 308 U.S. 444 (1939), the Court soon affirmed the notion that the appointment of counsel must be more than a formality to satisfy due process requirements. For a discussion of the

quality of assistance of counsel that is required in criminal cases, see *infra* text accompanying notes 178-202.

[FN21]. *Betts v. Brady*, 316 U.S. 455 (1942).

[FN22]. *Id.* at 462. The Court then cited *Powell*, stating that the lack of counsel there, under the particular circumstances of the case, amounted to a denial of due process.

[FN23]. *Id.* at 471.

[FN24]. The Court found *Betts* not handicapped by any special factors which might require the appointment of counsel, noting: “[T]he accused was not helpless, but was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court and was not wholly unfamiliar with criminal procedure.” *Id.* at 472.

[FN25]. See *Carnley v. Cochran*, 369 U.S. 506 (1962)(illiteracy); *Chewning v. Cunningham*, 368 U.S. 443 (1962)(habitual criminal); *McNeal v. Culver*, 365 U.S. 109 (1961)(complexity of statute and possible insanity of defendant); *Hudson v. North Carolina*, 363 U.S. 697 (1960)(youth and guilty plea of codefendant); *Moore v. Michigan*, 355 U.S. 155 (1957)(youth, race, and minimal education); *Herman v. Claudy*, 350 U.S. 116 (1956)(number and complexity of charges); *Massey v. Moore*, 348 U.S. 105 (1954)(possible insanity of defendant); *Palmer v. Ashe*, 342 U.S. 134 (1951)(mental abnormality); *Uveges v. Pennsylvania*, 335 U.S. 437 (1948)(youth); *Townsend v. Burke*, 334 U.S. 736 (1948)(misconduct by court officials); *Wade v. Mayo*, 344 U.S. 672 (1948)(inexperienced youth unfamiliar with court procedures); *Gayes v. New York*, 332 U.S. 145 (1947)(youth); *Rice v. Olson*, 324 U.S. 786 (1945)(complex legal questions).

[FN26]. *Gideon v. Cochran*, 370 U.S. 908 (1962), *decided sub nom. Gideon v. Wainwright*, 372 U.S. 335 (1963).

[FN27]. 372 U.S. at 339.

[FN28]. *Id.* at 344.

[FN29]. Since *Gideon* had been convicted of a felony, the Court was not obliged to decide whether the appointment of counsel is constitutionally required in every proceeding.

[FN30]. 372 U.S. at 348 (Clark, J., concurring)(citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)).

[FN31]. 372 U.S. at 351 (Harlan, J., concurring).

[FN32]. *Id.*

[FN33]. 372 U.S. 776 (1963)(per curiam).

[FN34]. In 1966, the Court denied certiorari in two cases in which state courts had refused to apply *Gideon* in misdemeanor cases. *Winters v. Eeck*, 385 U.S. 907 (1966); *DeJoseph v. Connecticut*, 385 U.S. 982 (1966).

[FN35]. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 Wash. L. Rev. 685, 692-93 (1968).

[FN36]. 407 U.S. 25 (1972).

[FN37]. *Id.* at 37.

[FN38]. For example, the Court noted an American Civil Liberties Union study revealing that misdemeanor charges against those represented by counsel were five times more likely to be dismissed than such charges against unrepresented defendants. *Id.* at 36. The Court also emphasized the “assembly-line” character of misdemeanor proceedings. *Id.* at 34-36.

[FN39]. 440 U.S. 367 (1979).

[FN40]. *Id.* at 373-74. See generally Herman & Thompson, Scott v. Illinois and the Right to Counsel: A Decision in Search of a Doctrine?, 17 *Am. Crim. L. Rev.* 71 (1979) (states that alternative analytic approaches to resolving questions of when counsel is required show that Scott was wrongly decided).

[FN41]. There have been arguments that counsel should be appointed in a variety of civil contexts. See, e.g., Botein, *Appointed Counsel for the Indigent Criminal Defendant: A Constitutional Right Without a Judicial Remedy?*, 36 *Brooklyn L. Rev.* 368 (1970); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 *Yale L.J.* 545 (1967).

However, while statutory provisions for the appointment of counsel for a variety of proceedings are not uncommon in the states, in the absence of a statute there is no general constitutional right to counsel in civil cases. *Watson v. Moss*, 619 F.2d 775 (8th Cir. 1980); *SEC v. Alan F. Hughes, Inc.*, 481 F.2d 401 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973); *Peterson v. Nadler*, 452 F.2d 754 (8th Cir. 1971); *Spears v. United States*, 266 F. Supp. 22 (S.D. W. Va. 1967); *Hackin v. Arizona*, 102 *Ariz.* 218, 427 P.2d 910, *cert. denied*, 389 U.S. 1060 (1967); *Archuleta v. Grand Lodge of Int'l Ass'n of Machinists and Aerospace Workers*, 262 *Cal. App. 2d* 202, 68 *Cal. Rptr.* 694 (1968); *Meltzer v. LeCraw & Co.*, 225 *Ga.* 91, 166 S.E.2d 88 (1969), *cert. denied*, 402 U.S. 954 (1971); *Dear v. Locke*, 128 *Ill. App. 2d* 356, 262 N.E.2d 27 (1970); *In re Waite*, 143 *Mont.* 321, 389 P.2d 407 (1964); *In re Romano*, 109 *Misc. 2d* 99, 438 N.Y.S.2d 967 (Sup. Ct. 1981); *Sandoval v. Rattikin*, 395 S.W.2d 889 (Tex. Civ. App. 1965), *cert. denied*, 385 U.S. 901 (1966), *reh'g denied*, 385 U.S. 964 (1966).

While civil litigants have a constitutional right of access to the courts in limited situations, they have no general right to the assistance of counsel once access has been provided.

The reason for the denial of appointed counsel for civil litigants frequently rests upon the competing right of counsel not to be forced to serve without compensation. The denial of the existence of a right to appointed counsel in a divorce action, for example, has been based upon considerations of assigned counsel's own constitutional right not to be required to provide professional services without compensation. In *Menin v. Menin*, 79 *Misc. 2d* 285, 359 N.Y.S.2d 721 (Sup. Ct. 1974), *aff'd*, 48 *A.D.2d* 904, 372 N.Y.S.2d 985 (App. Div. 1975), the court determined that while a local statute allowed a court discretion to appoint counsel in matrimonial cases and that the practice had been to do so, the discretion to appoint counsel was not equivalent to the power to order the state to pay counsel for his services. As a result, unless public assistance lawyers or federally funded lawyers were available, the appointment would fall on a private lawyer who would not be paid for his services.

The court concludes that, in civil actions, lacking criminal overtones, counsel is not required to serve without compensation and, in fact, has the constitutional right to demand payment or reject the assignment. Civil litigants in such cases have no constitutional right to counsel and the policy of assigning uncompensated counsel to matrimonial litigants must give way to the constitutional rights of counsel.

79 *Misc. 2d* at 293, 359 N.Y.S.2d at 729-30.

[FN42]. *Powell*, 287 U.S. at 68-69.

[FN43]. See *supra* text accompanying notes 17 and 37.

[FN44]. 262 U.S. 390 (1923).

[FN45]. *Id.* at 399.

[FN46]. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), where the Court mentioned that “freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.”

[FN47]. A right to appointed counsel in quasi-criminal proceedings has been held by some courts to be required by the equal protection clause of the fourteenth amendment. For example, where a state provides an appeal of criminal convictions as a matter of right, indigent criminal defendants must be provided counsel to assist them on appeal. See *Mayer v. Chicago*, 404 U.S. 189 (1971); *Douglas v. California*, 372 U.S. 353 (1963).

But see *Nordgren v. Mitchell*, 716 F.2d 1335 (10th Cir. 1980). In *Nordgren*, the Tenth Circuit recently held that Utah's failure to appoint counsel for indigent prisoners who were defendants in state paternity cases does not violate the equal protection clause. The indigent inmates' equal protection argument was that Utah's prosecution of paternity suits against them denied them “fundamental rights to privacy in matters of family life and meaningful access to courts.” *Id.* at 1339-40. They objected that the state aids the mother but does not provide assistance to the alleged father. The court held, however, that “[A]s long as the indigent inmates deny that they are the fathers of the children and seek to avoid responsibility for the children's support and welfare, they cannot complain on equal protection grounds of any interference with a family relationship.” *Id.* at 1340. See also *Rhoades v. Penfold*, 694 F.2d 1043 (5th Cir. 1983), discussed *infra* text accompanying notes 118-22.

[FN48]. See *infra* text accompanying notes 60-63.

[FN49]. See *infra* text accompanying notes 64-69.

[FN50]. See *infra* text accompanying notes 70-80.

[FN51]. See *infra* text accompanying notes 86-122.

[FN52]. See *infra* text accompanying notes 123-33.

[FN53]. See *infra* text accompanying notes 134-57.

[FN54]. See *infra* text accompanying notes 158-66.

[FN55]. See *supra* text accompanying notes 17 and 37.

[FN56]. *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972), both discussed *supra* text accompanying notes 36-40.

[FN57]. 452 U.S. 18 (1981), discussed *infra* text accompanying notes 86-117.

[FN58]. *Id.* at 25.

[FN59]. *Id.* The Court's holding with respect to cases in which physical liberty is not at stake is discussed *infra* text accompanying notes 81-166.

[FN60]. 387 U.S. 1 (1966).

[FN61]. *Id.* at 29.

[FN62]. *Id.* at 36.

[FN63]. *Id.* (quoting *Powell*, 287 U.S. at 69).

[FN64]. 396 F.2d 393 (10th Cir. 1968).

[FN65]. *Id.* at 396.

[FN66]. 387 U.S. 1 (1966).

[FN67]. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded for reconsideration*, 421 U.S. 957 (1975), *judgment reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976).

[FN68]. 325 F. Supp. 966 (M.D. Pa. 1971).

[FN69]. Discussed *infra* text accompanying notes 86-117.

[FN70]. 699 F.2d 618 (2d Cir. 1983).

[FN71]. *Id.* at 620.

[FN72]. *Id.*

[FN73]. *Id.*

[FN74]. *Mastin v. Fellerhoff*, 526 F. Supp. 969 (S.D. Ohio 1981)(absolute right to counsel under *Lassiter*; *Eldridge* factors do not apply where right is absolute); *Young v. Whitworth*, 522 F. Supp. 759 (S.D. Ohio 1981)(appointed counsel required to hold indigent father in contempt for nonsupport based on three *Eldridge* factors, particularly the strong private interest in liberty); *Padilla v. Padilla*, 645 P.2d 1327 (Colo. Ct. App. 1982)(where trial court in contempt proceeding for failure to make support payments did not advise indigent father of right to appointed counsel, did not ascertain father's understanding of charges and penalties, did not warn of pitfalls of proceeding without counsel, and where father's need for legal advice was ignored, constitutional right to counsel was violated); *McNabb v. Osmundson*, 315 N.W.2d 9 (Iowa 1982)(indigent father charged with contempt for nonpayment of child support has fourteenth amendment right to counsel at public expense in hearing leading to possible incarceration and at any subsequent hearing at which physical liberty is threatened); *Rutherford v. Rutherford*, 464 A.2d 228 (Md. 1983)(a defendant in a civil contempt proceeding for failure to make child support payments has a constitutional right to counsel, including government-furnished counsel, if the defendant is indigent and the court actually orders incarceration).

[FN75]. 428 So. 2d 663 (Fla. 1983).

[FN76]. 339 So. 2d 650 (Fla. 1976).

[FN77]. *Andrews*, 428 So. 2d at 666. In *Faircloth*, the father seems to have divested himself of his property to evade the judicial order. The *Faircloth* court held that the defendant could be incarcerated if his insolvency had

resulted from deliberate frustration of the court-ordered child support, 339 So. 2d at 651, and dismissed as without merit his claim that he could not be incarcerated without the appointment of counsel. *Id.* at 652.

[FN78]. 720 F.2d 1409 (5th Cir. 1983). The *Ridgway* court acknowledged the paradox of right-to-counsel issues in the civil/criminal contempt context. If the defendant is so lacking in means that he cannot afford counsel, he is unlikely to be able to pay child support. Under Texas law, if he does not have the means to pay the arrearage, he cannot be committed to jail to coerce him to pay. A defendant can be incarcerated only for failing to pay with his present funds, in which case he is not indigent, and the state will place him in criminal contempt. But if he is not indigent, he has no right to appointed counsel. If the parent is indeed indigent, the state may obviate the need for counsel by announcing that imprisonment will not result from the proceeding. *Id.*

[FN79]. *Id.*

[FN80]. *Id.*

[FN81]. 262 U.S. 390 (1923). Discussed *supra* text accompanying notes 44-45.

[FN82]. See *infra* text accompanying notes 86-122.

[FN83]. See *infra* text accompanying notes 123-33.

[FN84]. See *infra* text accompanying notes 134-57.

[FN85]. See *infra* text accompanying notes 158-66.

[FN86]. 452 U.S. 18 (1981).

[FN87]. Thirty-two states presently have statutes which guarantee an absolute right to counsel in such cases, while two permit the appointment of counsel according to the judge's discretion, now guided by *Lassiter* analysis. The other sixteen states must now also look to *Lassiter* to determine when the right to counsel exists. See generally, Catz & Kuelbs, *The Requirement of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 13 J. Fam. L. 223, 238 n.51 (1974).

[FN88]. 424 U.S. 319 (1976).

[FN89]. *Id.* at 335. Although *Eldridge* dealt only with a property, rather than a liberty, interest, its tripartite standard clearly has been applied in cases in which liberty interests are involved. See, e.g., *Corra v. Coll*, 451 A.2d 480 (Pa. Super. Ct. 1982), discussed *infra* text accompanying notes 136-40.

By their very nature, the *Eldridge* factors are as flexible as the due process standard. Due process “has never been, and perhaps can never be, precisely defined.” *Lassiter*, 452 U.S. at 24. The flexibility of the *Eldridge* factors, in fact, was created precisely because of the need for responsiveness to the shifting needs of due process. Each case must be examined independently by the trial court subject to appellate review.

There is by no means consistency among the state and federal courts in deciding when counsel must be appointed in such cases. For example, recently two states were presented with the issue whether the due process clause of the fourteenth amendment requires counsel to be appointed for indigent defendants in state paternity proceedings. See *State ex rel. Hamilton v. Snodgrass*, 325 N.W.2d 740 (Iowa 1982); *Corra v. Coll*, 451 A.2d 480 (Pa. Super. Ct. 1982). Although both courts applied the *Eldridge* factors to the issue, one court (supported by substantial authority from other jurisdictions) held there is a right to appointed counsel in such cases. The other

court (also supported by substantial authority from other jurisdictions) held no such right exists. Cases discussed *infra* text accompanying notes 136-40 and 152-53. Only once, in *Lassiter*, 452 U.S. 18 (1981), has the United States Supreme Court addressed an existing conflict in this area.

[FN90]. *Lassiter*, 452 U.S. at 25-27.

[FN91]. *Id.*

[FN92]. *Id.* at 26.

[FN93]. The Court relied on the rationale of *Gagnon v. Scarpelli*, 411 U.S. 178 (1973), for the proposition that as a litigant's interest in personal liberty diminishes, so too does his right to appointed counsel. *Lassiter*, 452 U.S. at 26. According to the *Lassiter* majority, *Scarpelli* declined to hold that indigent probationers have a *per se* right to counsel at revocation hearings, and instead left the decision to be made on a case-by-case basis.

Justice Blackmun pointed out in his *Lassiter* dissent that the majority's reliance on *Scarpelli* was misplaced. *Id.* at 42 (Blackmun, J., dissenting). Blackmun felt that *Scarpelli* recognized a distinction between informal proceedings and formal, adversarial, criminal hearings. The *Scarpelli* Court reasoned that parole revocation hearings lack formal procedures and rules of evidence. According to Blackmun, the absence of an adversarial setting was the critical factor in *Scarpelli*. *Id.* Thus, Blackmun implied that *Scarpelli* was not even controlling authority because termination of parental rights proceedings are formal and adversarial. *See also Goss v. Lopez*, 419 U.S. 565, 583 (1975)(informality of student disciplinary proceedings does not require provision of counsel).

Furthermore, Justice Blackmun severely criticized the majority's case-by-case focus on individual circumstances:

[The majority's] conclusion is not only illogical, but it also marks a sharp departure from the due process analysis consistently applied heretofore. The flexibility of due process, the Court has held, requires case-by-case consideration of different decisionmaking *contexts*, not of different *litigants* within a given context. In analyzing the nature of the private and governmental interests at stake, along with the risk of error, the Court in the past has not limited itself to the particular case at hand. Instead, after addressing the three factors as generic elements in the context raised by the particular case, the Court has then formulated a rule that has general application to similarly situated cases.

Lassiter, 452 U.S. at 49 (Blackmun, J., dissenting)(emphasis in original). The common thread of the cases prior to *Lassiter* was an analytical attention to context as opposed to individual circumstances. *See Note, The Right to Counsel for Indigent Parent in Termination Proceedings: A Critical Analysis of Lassiter*, 21 J. Fam. L. 83 (1982). For instance, in *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970), the Court found that welfare recipients as a class were distinguishable from other recipients of governmental benefits. There it was the nature of the class and not merely the circumstances of an individual member of the class to which the Court addressed itself. Attention to context ensures that rules will be formulated that are applicable to similarly situated cases. *See Lassiter*, 452 U.S. at 49 (Blackmun, J., dissenting).

Furthermore, the presumption recognized by the *Lassiter* majority that loss of physical liberty alone will trigger the right to counsel is not supported by all the cases. In *Scarpelli*, the Court did not find an absolute right to counsel in proceedings to cancel parole or probation, although such proceedings may result in a deprivation of physical liberty. Such a presumption is at odds with the flexible approach to due process outlined in *Eldridge*. The addition of this presumption only muddies the waters; total reliance on the three *Eldridge* factors might have resulted in a finding of an absolute right. *See Note, Constitutional Law--Indigent Parent Has No Absolute Right to Counsel in Parental Rights Termination Proceeding*, 15 Creighton L. Rev. 563 (1982). *See also Lassiter*

er, 452 U.S. at 40-42 (Blackmun, J., dissenting).

[FN94]. 452 U.S. at 27 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)) (citations omitted).

[FN95]. 452 U.S. at 30. The Court was familiar with the recurring procedural hurdles of these hearings:

[T]he ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be. Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented. The parents are likely to be people with little education, who 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.

Id.

[FN96]. *Id.* at 33-34 (citations omitted).

[FN97]. *See Stanley v. Illinois*, 405 U.S. 645, 650 (1972)(special interest of the parental relationship); *May v. Anderson*, 345 U.S. 528, 533 (1953)(previous rights cut off by custody award); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)(the right to bring up children is essential to liberty).

[FN98]. 452 U.S. at 28.

[FN99]. *Id.* at 30.

[FN100]. *Id.* at 32. No expert witnesses were called, and no allegations of neglect or abuse were made.

The facts of this proceeding are interesting. In 1975, Ms. Lassiter had lost custody of her son after a neglect hearing at which she “did not have the benefit of [a] ‘clear, cogent, and convincing’ evidentiary standard, nor did she have counsel at the hearing.” *Id.* at 29 n.4. In 1976 she was convicted of second degree murder and sentenced to 25 to 40 years imprisonment. In 1978 a petition was brought to terminate her parental rights because she had failed to show interest in the child. *Id.* at 20-21.

[FN101]. Ms. Lassiter, of course, could not have asked for custody of the child herself since she was a prisoner of the state.

[FN102]. *Id.* at 32. The scope of *Lassiter's* case-by-case approach to the determination of the right to counsel has recently become the subject of litigation in at least one circuit. In *Davis v. Page*, 714 F.2d 512 (former 5th Cir. 1983)(en banc), *cert. denied sub nom. Davis v. Gladstone*, 104 S.Ct. 735 (1984), the former Fifth Circuit was called upon to consider the impact of *Lassiter* on the right to appointed counsel in dependency proceedings. In a prior en banc decision in the same case, the court had held that due process requires the appointment of counsel for indigent parents in all Florida dependency proceedings. 640 F.2d 599 (5th Cir. 1981), *vacated and remanded*, 458 U.S. 1118 (1982). Meanwhile, the Supreme Court decided *Lassiter*. Consequently, the Fifth Circuit was presented with the question whether a proceeding in which a child is adjudged a dependent is distinguishable from a proceeding in which parental rights are terminated for purposes of the right to counsel under the due process clause.

The *Davis* court found that there was no material distinction between the case before it and *Lassiter* under any of the three *Eldridge* prongs. 714 F.2d at 517. The court therefore held that *Lassiter* is controlling in dependency proceedings and that the *Eldridge* factors must be weighed against the presumption against counsel (since the court determined that physical liberty was not at stake) on a case-by-case basis.

Interestingly enough, the *Davis* court noted that analysis of the parental interest at stake in dependency proceedings compared to that asserted in termination proceedings reveals a balance weighted even more heavily in favor of a case-by-case approach in the case before it than in *Lassiter*. *Id.* at 516. The parental interests in dependency proceedings militate in favor of greater flexibility concerning the appointment of counsel, rather than a rigid rule requiring counsel in all cases. The court observed that in contrast to the complete and irrevocable termination present in termination situations, the parental interest asserted in a Florida dependency proceeding will usually be in the temporary custody of the child. *Id.* at 515.

The dissent felt that *Lassiter* should not control because dependency proceedings and termination proceedings are different in kind as well as in degree. *Id.* at 533 (Vance, J., dissenting).

[FN103]. 372 U.S. 335 (1965).

[FN104]. *Lassiter*, 452 U.S. at 52 (Blackmun, J., dissenting).

[FN105]. *See id.* at 52-56. First, the fundamental liberty interests of parents were identified as undeniable and inextinguishable.

Second, Justice Blackmun reasoned that parental rights termination proceedings resemble criminal prosecutions. They are formal and adversarial, and are conducted according to formal rules of evidence and procedure. The state is represented by counsel who is an expert in the area of termination proceedings. The legal issues are neither simple nor clearly defined. The parent cannot possibly succeed without being able to identify material issues, develop defenses, gather and present sufficient supporting nonhearsay evidence, and conduct cross-examination of adverse witnesses. The inability of an uncounseled parent to show proper parenting effectively, or to identify the absence of one or more of the elements statutorily required for termination, could easily result in an erroneous decision. The parent is consequently denied a meaningful opportunity to be heard.

Third, the state's interests are not served by terminating the rights of concerned, responsible parents. Without counsel for the parent, however, the state's interest in the child's welfare swings toward terminating the parent-child relationship, regardless of the parent's virtues.

Most poignantly, the dissent concludes on the merits of the termination decision: “[T]he asserted willfulness of petitioner's lack of concern could obviously have been attacked since she was physically unable to regain custody or perhaps even to receive meaningful visits during 21 of the 24 months preceding the action.” *Id.* at 56.

In a sense, the essential difference between the majority decision and the dissenting view is that the former allowed the end to justify the means: “[T]he presence of counsel for Mrs. Lassiter could not have made a determinative difference.” *Id.* at 32-33. Justice Blackmun considered that the risk of error that is inherent in adversarial proceedings gives rise to the right to counsel.

Stated differently, the majority adopted an instrumental approach, while Blackmun adopted an intrinsic approach. *See Comment, No Frills Due Process--Who Needs Counsel?* 14 Conn. L. Rev. 733 (1982). The intrinsic approach addresses the elements of the essence of justice, which are partially construed from the principle that a litigant is entitled to a meaningful opportunity to be heard. Justice Blackmun argued persuasively that the majority had erred in focusing on the facts of the individual case instead of examining the nature of the proceeding. 452 U.S. at 49-52.

[FN106]. 452 U.S. at 48.

[FN107]. *Id.* at 52.

[FN108]. One need only recall the aftermath of *Betts v. Brady*, in which the Court held that the right to counsel

in criminal cases was to be determined on a case-by-case basis. Until *Gideon v. Wainwright* was decided 10 years later, the Court was flooded with right to counsel cases. Each case in which the right was improperly denied marked a new exception to the *Betts* rule, until finally the rule collapsed of its own weight. See Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 Mich. L. Rev. 219 (1962). See also text accompanying note 25 and cases cited therein.

[FN109]. 452 U.S. at 46 n.15. See also *Representation in Child Neglect Cases: Are Parents Neglected?*, 4 Colum. J.L. & Soc. Probs. 230 (1968).

[FN110]. 452 U.S. 1 (1981).

[FN111]. *Lassiter*, 452 U.S. at 58 (quoting *Little*, 452 U.S. at 13-14). Justice Blackmun attributed the inconsistency between the decisions in *Little* and *Lassiter* to the Court's presumed distinction between the nature of paternity actions and the nature of termination hearings. Perhaps the due process claim of *Little* differs from that of *Lassiter* insofar as the Connecticut paternity statute places an exceptional evidentiary burden on the putative father. Moreover, criminal sanctions await the father who fails to comply with the court's support order. Yet the question in both cases was whether to provide procedural safeguards when parental rights and obligations are at stake. The *Lassiter* presumption undermines the Court's commitment to fundamental fairness so zealously guarded in *Little*.

[FN112]. *Lassiter*, 452 U.S. at 27.

[FN113]. See J. Nowak, R. Rotunda & J. Young, *American Constitutional Law* 527 (2d ed. 1983).

[FN114]. See 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, 48 (1976).

[FN115]. Note, *Lassiter v. Department of Social Services: Due Process Takes an Ad Hoc Turn--What's a Parent to Do?*, 59 Den. L.J. 591 (1982).

[FN116]. *Lassiter*, 452 U.S. at 59 (Stevens, J., dissenting).

[FN117]. *Id.* at 60.

[FN118]. 694 F.2d 1043 (5th Cir. 1983).

[FN119]. *Id.* at 1046.

[FN120]. 694 F.2d at 1049-50.

[FN121]. *Id.* at 1050.

[FN122]. *Id.*

[FN123]. *Loving v. Virginia*, 388 U.S. 1, 12 (1967)(the Court held that Virginia's statute preventing interracial marriages violated the equal protection and due process clauses of the fourteenth amendment).

[FN124]. 401 U.S. 371 (1971).

[FN125]. Two years later, in [United States v. Kras](#), 409 U.S. 434 (1973), the Supreme Court refused to extend *Boddie* to an indigent plaintiff who was unable to pay filing fees to obtain a voluntary discharge in bankruptcy. The Court held that: “There is no constitutional right to obtain discharge of one's debts in bankruptcy.” *Id.* at 446. The right to discharge is not a “fundamental right,” and does not have the same standing as does marriage and divorce. Bankruptcy is one of many methods available to the debtor who wishes to adjust his finances, whereas the dissolution of a marriage can only be obtained through the judicial system. *Id.* at 443-45. Similarly, in [Ortwein v. Schwab](#), 410 U.S. 656 (1973), the Supreme Court held that the filing fee required to review an agency decision which resulted in reduced welfare benefits was constitutional because these interests were less significant than the appellants' interest in *Boddie*.

[FN126]. 32 N.Y.2d 93, 343 N.Y.S.2d 321, 296 N.E.2d 229 (1973).

[FN127]. 74 Misc. 2d 122, 344 N.Y.S.2d 572 (Sup. Ct. 1973)(overruled in [Jacox v. Jacox](#), 43 A.D.2d 716, 350 N.Y.S.2d 435 (App. Div. 1974)).

[FN128]. 74 Misc. 2d at 124-26, 344 N.Y.S.2d at 575-77.

[FN129]. 43 A.D.2d 716, 716-17, 350 N.Y.S.2d 435, 436-37 (App. Div. 1974). The court stated, however, that, “[C]ounsel must be provided by the Bar through the personal obligation of its members, traditionally recognized, to willingly accept assignments made by the Bench and to help those who cannot afford financially to help themselves.”

[FN130]. 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975).

[FN131]. In a case concerning an adopted person's application to gain access to his adoption records, [In re Romano](#), 109 Misc. 2d 99, 438 N.Y.S.2d 967 (Sup. Ct. 1981), the court noted that New York's Code of Professional Responsibility required members of the Bar to appear *pro bono*. Since the Court of Appeals had not overruled prior decisions upholding the discretionary power of the courts to assign counsel without compensation, the trial court could then require attorneys to represent indigents without providing for their compensation. 109 Misc. 2d at 103, 438 N.Y.S.2d at 970.

[FN132]. 598 P.2d 893 (Alaska 1979).

[FN133]. *See generally* [Parsley v. Knuckles](#), 346 S.W.2d 1 (Ky. 1961)(no constitutional right to counsel in a divorce proceeding); [Farrell v. Farrell](#), 55 A.D.2d 586, 390 N.Y.S.2d 87 (App. Div. 1976)(there is no constitutional right to appointed counsel whose reimbursement would come from public funds, but the court may appoint counsel in accordance with the Bar's traditional responsibility to accept assignments to aid indigents); [Borkowski v. Borkowski](#), 90 Misc. 2d 957, 396 N.Y.S.2d 962 (Sup. Ct. 1977) (court holds there is no constitutional right to counsel, but upholds a statutory right to appointed counsel for the issue of child custody); [Menin v. Menin](#), 79 Misc. 2d 285, 359 N.Y.S.2d 721 (Sup. Ct. 1974), *aff'd*, 48 A.D.2d 904, 372 N.Y.S.2d 985 (App. Div. 1975)(the court offers uncompensated counsel to indigents in divorce suit, but this policy may be outweighed by attorney's right to compensation for representation); [Kiddie v. Kiddie](#), 563 P.2d 139 (Okla. 1977)(no constitutional right to appointed counsel in divorce proceeding involving child custody and support as well as property division, where trial court accepted husband's appearance *pro se*); [Wilson v. Wilson](#), 218 Pa. Super. 344, 280 A.2d 665 (1971)(no obligation to provide investigative and legal services to a party seeking a divorce).

As to the courts' discretionary power to appoint counsel, *see generally* [Peace v. Peace](#), 362 Mass. 536, 288 N.E.2d 602 (1972)(lower court ordered to consider appointment of counsel if the husband “so desires and is in-

igent”); *Cerami v. Cerami*, 44 A.D.2d 890, 355 N.Y.S.2d 861 (App. Div. 1974)(indigent defendant incarcerated in a state prison is entitled to appointed counsel through a federally-funded agency); *Emerson v. Emerson*, 33 A.D.2d 1022, 308 N.Y.S.2d 69 (App. Div. 1970)(where petitioner was unable to pay any expenses necessary to prosecute divorce action, the petitioner “was entitled to poor person relief, including assignment of counsel”); *Brounsky v. Brounsky*, 33 A.D.2d 1028, 308 N.Y.S.2d 72 (App. Div. 1970)(denial of appointed counsel to an imprisoned defendant whose indigency was uncontradicted was discretionary error); *Kaminski v. Kaminski*, 81 Misc. 2d 725, 366 N.Y.S.2d 848 (Sup. Ct. 1975)(discretionary appointment of counsel upon showing of poor person status; however, local government has no obligation to compensate assigned counsel); *Bartlett v. Kitchin*, 76 Misc. 2d 1087, 352 N.Y.S.2d 110 (Sup. Ct. 1973) (court permitted to assign counsel in divorce action); *Garner v. Garner*, 59 Misc. 2d 29, 297 N.Y.S.2d 463 (Sup. Ct. 1969)(the court has discretionary power to appoint counsel where the defendant proceeds as a poor person); *Kelly v. Kelly*, 45 Pa. D. & C.2d 299 (1968)(it is the responsibility of the court to appoint counsel because “[t]here can be no equality before the law unless representation is afforded to those who are financially unable to employ a lawyer”).

[FN134]. *See Reynolds v. Kimmons*, 569 P.2d 799 (Alaska 1977)(recognized the right to court-appointed counsel under state constitution); *Salas v. Cortez*, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (under federal and state constitutions), *cert. denied*, 444 U.S. 900 (1979); *Artibee v. Cheboygan Circuit Judge*, 397 Mich. 54, 243 N.W.2d 248 (1976)(under state constitution); *Hepfel v. Bashaw*, 279 N.W.2d 342 (Minn. 1979)(under supervisory power of court to ensure fairness); *M. v. S.*, 169 N.J. Super. 209, 404 A.2d 653 (1979)(inherent power of the court); *Madeline G. v. David R.*, 95 Misc. 2d 273, 407 N.Y.S.2d 414 (Fam. Ct. 1978)(under federal and state constitutions); *State ex rel. Graves v. Daugherty*, 266 S.E.2d 142 (W. Va. 1980)(under state constitution).

[FN135]. *See Sheppard v. Mack*, 68 Ohio App. 2d 95, 427 N.E.2d 522 (1980)(no possibility of serious deprivation of liberty); *State v. Walker*, 87 Wash. 2d 443, 553 P.2d 1093 (1976)(threat of imprisonment not immediate).

[FN136]. 451 A.2d 480 (Pa. Super. Ct. 1982).

[FN137]. *Id.* at 485 (quoting *Little v. Streater*, 452 U.S. 1, 13 (1981)).

[FN138]. 451 A.2d at 482 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971)): “[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.”

[FN139]. 452 U.S. 1 (1981).

[FN140]. Unlike the termination of parental rights, paternity actions nearly always “raise the spectre of a loss of physical freedom.” 451 A.2d at 485.

[FN141]. 439 N.E.2d 1367 (Ind. App. 1982).

[FN142]. *Id.* at 1370. *See Corra*, 451 A.2d 480.

[FN143]. The court considered the state's interest primarily financial because the mother assigns her right to financial support from the father to the welfare department. Thus the welfare department can become the predominant party in interest. The court depicted the state as a leviathan searching for monetary sustenance at the expense of the rights of its citizens: “The State then emphasizes its concern to find *any* man it can hold financially liable to reimburse it, and, as the case here, without the aid of blood tests, urges the acceptance of the uncorroborated

testimony of the mother as sufficient proof of paternity.” *Kennedy*, 439 N.E.2d at 1371.

[FN144]. *Id.* at 1371 (citing *Salas v. Cortez*, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529, cert. denied, 44 U.S. 900 (1979)).

[FN145]. Ind. Code § 31-6-7-2(b); § 31-6-5-3(7) (1979).

[FN146]. The state's involvement resulted from Ind. Code §§ 12-1-6.1-1-20, which implemented Title IV D of the federal Social Security Act, 42 U.S.C. §§ 651-660 (1976). The Act requires the state to appoint an agency to obtain and enforce orders for support of children for whom application to Aid to Families with Dependent Children has been made, and when necessary, to establish paternity to reduce the number of recipients. The appointed agency contracted with the prosecuting attorney in the mother's county to bring the paternity action.

[FN147]. 57 Or. Ct. App. 303, 644 P.2d 1132 (Or. App. 1982).

[FN148]. 452 U.S. 1 (1981).

[FN149]. *Stoutt*, 644 P.2d at 1135.

[FN150]. 306 N.C. 333, 293 S.E.2d 95 (1982), cert. denied, 103 S.Ct. 745 (1983).

[FN151]. 293 S.E.2d at 98. *But see Corra*, 451 A.2d at 486 (“denial of court-appointed counsel at the initial paternity proceeding may result in defendants being sent to jail without ever having had a meaningful opportunity to be heard on the issue of their paternity” (emphasis added)).

[FN152]. 325 N.W.2d 740 (Iowa 1982).

[FN153]. This section mandates that counsel be appointed for putative fathers.

[FN154]. 716 F.2d 1335 (10th Cir. 1983).

[FN155]. The Tenth Circuit judge summarily concluded that the prisoners' equal protection claim was meritless. *See* discussion *supra* note 47.

[FN156]. *Nordgren*, 716 F.2d at 1337-38.

[FN157]. *Id.* The court acknowledged that Utah enforces support obligations with criminal sanctions that may lead to imprisonment. Nevertheless, the criminal nonsupport action is a separate proceeding subject to all the substantive and procedural safeguards required in all criminal cases. The court seems to have based its holding that appointed counsel was not required in the paternity actions on its assumption that if the state subsequently prosecuted the defendant for nonsupport, he would be entitled to appointed counsel who could relitigate the paternity issue. For a discussion of an indigent's right to appointed counsel in contempt proceedings, see *supra* text accompanying notes 70-80.

[FN158]. *See generally* Appleman, *Right to Counsel in Deportation Proceedings*, 14 San Diego L. Rev. 130 (1976).

[FN159]. 333 U.S. 6, 10 (1948)(citations omitted).

[FN160]. 8 U.S.C. § 1362 (1982).

[FN161]. 516 F.2d 565 (6th Cir. 1975).

[FN162]. 411 U.S. 778 (1973)(appointed counsel not required for parole revocation hearing).

[FN163]. *Aguilera-Enriquez*, 516 F.2d at 568 (quoting *Scarpelli*, 411 U.S. at 790).

[FN164]. Later, when the Court decided *Lassiter*, Justice Blackmun made the same observation in his dissent. 452 U.S. at 42 (Blackmun, J., dissenting). See discussion *supra* note 93.

[FN165]. *Aguilera-Enriquez*, 516 F.2d at 569 n.3.

[FN166]. The earlier decisions were based on the civil-criminal distinction. See *Ah Chiu Pang v. INS*, 368 F.2d 637 (3d Cir. 1966)(no right to appointed counsel or notification of constitutional rights upon apprehension); *Dunn-Marin v. INS*, 426 F.2d 894 (9th Cir. 1970)(lack of counsel did not vitiate deportation proceeding); *Tupacyupanqui-Marin v. INS*, 447 F.2d 603 (7th Cir. 1971)(knowing waiver valid where not informed of right to appointed counsel because no such right exists for deportation hearings). Courts in ensuing cases did not reach the crux of the issue, either because indigency was not established, the alien had waived the right to counsel, or provision of counsel would not have affected the outcome. See *Henriquez v. INS*, 465 F.2d 119 (2d Cir. 1971)(no prejudice from absence of counsel where sole issue undisputed; specifically declined to rule whether appointed counsel is required where she might have affected outcome), *cert. denied*, 410 U.S. 968 (1972); *Villanueva-Turado v. INS*, 482 F.2d 886 (5th Cir. 1973)(knowing waiver; facts undisputed); *Rosales-Caballero v. INS*, 472 F.2d 1158 (5th Cir. 1973) (insufficient proof of indigency); *Burquez v. INS*, 513 F.2d 751 (10th Cir. 1975)(waiver; attorney would not have made a determinative difference); *Barthold v. INS*, 517 F.2d 689 (5th Cir. 1975)(waiver).

[FN167]. See, e.g., *Anderson v. New York State Div. of Parole*, 546 F. Supp. 816 (S.D.N.Y. 1982), in which the plaintiff persuaded the court to annul his parole revocation because appointed counsel, to which he was entitled as a matter of constitutional right, had not been provided. He then filed a civil suit against a number of public officials for compensatory and punitive damages totaling \$700,000.

[FN168]. This Article considers only those forms of remedies which seek to vindicate individual rights. Although the remedy of disciplinary proceedings is available against an attorney, whether her misconduct arose in a civil, criminal, or quasi-criminal context, the remedy is a public one, intended to promote good relations between the legal profession and the public or to protect the public from “bad” lawyers. See, e.g., Breshnahan, “*Ethics and the Study and Practice of Law: The Problem of Being Professional in a Fuller Sense*,” 28 J. Legal Educ. 189 (1976); Frankel, *Why Does Professor Abel Work at a Useless Task?*, 59 Tex. L. Rev. 723 (1981); Frankel, *Review, Code of Professional Responsibility*, 43 U. Chi. L. Rev. 874 (1976). The injured party is merely a complainant or witness to the proceedings. He therefore has no control over the investigation or the decision whether to impose sanctions. Certainly, he has no recourse, appellate or otherwise, if no discipline is imposed or if the sanction is not stringent enough to provide retribution for the wrong done.

The second problem with using disciplinary proceedings as a remedy is that a finding that the lawyer breached professional norms has no effect at all on the legal action which was the source of the complaint. In fact, the relationship of a lawyer's breach of ethical obligations and the standard of care required of her and enforced in malpractice actions is not substantial. Except when an ethical rule “accurately states a common law principle [of attorney's liability for failure to perform his obligation to his client], which then is the basis for a

legal malpractice cause of action," it has been held that ethical regulations are not intended to define standards for the civil liability of attorneys for misconduct. R. Mallen & V. Levit, *Legal Malpractice* § 67, at 139-40 (2d ed. 1981).

Another shortcoming of disciplinary proceedings is that there is no clearly articulated standard of competence which must be met by the lawyer under the Code of Professional Responsibility. The precise nature of the Code's requirements have been a subject of national debate in the past and are likely to be even more so since the American Bar Association House of Delegates adopted new rules in August, 1983. *See* 52 U.S.L.W. 2077 (1983). Further, the penalties imposed upon even clear violations of the Code are unpredictably and inconsistently applied. It is difficult to know in advance, therefore, precisely what a lawyer is supposed to do for her client, how well she must do it, and the consequences of her failure to conform to whatever these requirements may be.

[FN169]. Mallen & Levit, *supra* note 168, § 100, at 169-70.

[FN170]. *Id.* § 251, at 318.

[FN171]. *See, e.g.*, the discussion on the complexities of conducting a trial within a trial in C. Kindregan, *Malpractice and the Lawyer* 37-40 (rev. ed. 1981).

[FN172]. D. Stern, *An Attorney's Guide to Malpractice Liability* 495-96 (1977). Moreover,

[a] client's burden of proving injury as a result of his attorney's negligence is especially difficult to meet when the attorney's conduct prevented the client from bringing his original cause of action or the attorney's failure to appear caused judgment to be entered against him as a defendant.

Id. at 495.

[FN173]. *Id.* at 496.

[FN174]. Malpractice actions arising from criminal cases present even greater problems. Not only is the criminal malpractice litigant faced with the "suit within a suit" and inadequacy of money damages problems, he must also, for example, grapple with the problem of assessing the amount of the damages. Furthermore, in many jurisdictions, the criminal malpractice plaintiff must prove *factual* innocence of the underlying crime. *See* Kaus & Mallen, *The Misguiding Hand of Counsel--Reflections on "Criminal Malpractice"*, 21 U.C.L.A. L. Rev. 1191 (1974).

[FN175]. Such claims are considered only if the existing record is sufficiently developed. *See* [United States v. Costa](#), 691 F.2d 1358, 1363 (11th Cir. 1983)(claim of inadequate representation during trial for narcotics violation deemed sufficiently developed to merit review on appeal); [United States v. Phillips](#), 664 F.2d 971, 1040 (former 5th Cir. 1981)(partial holding that between conviction and sentencing for violation of R.I.C.O. statute, trial judge's listing deemed sufficient to merit review on appeal), *cert. denied sub nom.* [Meinster v. United States](#), 457 U.S. 1136 (1982).

[FN176]. There is presently a vigorous debate about whether access to the federal courts for relief from state court convictions should be more severely restricted. *See generally* Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 Harv. C.R.-C.L. L. Rev. 579 (1982); Reynolds, *Summer v. Mata: Twilight's Last Gleaming for Federal Habeas Corpus Reviewing State Court Convictions? Speculations on the Future of the Great Writ*, 4 U. Ark. Little Rock L.J. 289 (1981); Smith, *Federal Habeas Corpus--A Need for Reform*, 73 J. Crim. L. & Criminology 1036 (1982); Tobert, *Overly-Broad Application of Federal Habeas Corpus*, 43 Ala. Law. 22 (1982); Note,

Guilt, Innocence and Federalism in Habeas Corpus, 65 Cornell L. Rev. 1123 (1980).

[FN177]. See discussion *infra* text accompanying notes 178-86.

[FN178]. 287 U.S. 45 (1932).

[FN179]. *Id.* at 53.

[FN180]. *Id.* at 71.

[FN181]. 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

[FN182]. 148 F.2d at 668-69.

[FN183]. *Id.* at 669.

[FN184]. *Id.* at 670.

[FN185]. See *supra* text accompanying notes 25-32.

[FN186]. Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 Am. Crim. L. Rev. 233, 236 (1979).

[FN187]. The Supreme Court has, however, heard arguments in two cases which should provide a definition. Oral arguments were made before the Court in *United States v. Cronin*, 675 F.2d 1126 (10th Cir. 1982), *cert. granted*, 103 S.Ct. 1182 (1983)(No. 82-660), and in *Strickland v. Washington*, 693 F.2d 1243 (former 5th Cir. 1982), *cert. granted*, 103 S.Ct. 2451 (1983)(No. 82-1554), on January 10, 1984. 52 U.S.L.W. 3531 (1984).

[FN188]. 397 U.S. 759 (1970).

[FN189]. *Id.* at 770-71 (emphasis added).

[FN190]. *Tollett v. Henderson*, 411 U.S. 258, 268 (1973).

[FN191]. See *Trapnell v. United States*, 725 F.2d 149 (2d Cir. 1983); *United States v. Costa*, 691 F.2d 1358 (11th Cir. 1982); *United States v. Decoster*, 624 F.2d 196 (D.C. Cir. 1979)(plurality opinion); *Dyer v. Crisp*, 613 F.2d 275 (10th Cir.), *cert. denied*, 445 U.S. 945 (1980); *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979); *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977); *United States v. Easter*, 539 F.2d 663 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977); *United States ex. rel. Williams v. Twomey*, 510 F.2d 634 (7th Cir.) (abandoning “farce or sham” in favor of “assistance which meets a minimum standard of professional representation”), *cert. denied*, 423 U.S. 876 (1975); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974); *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974); *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970); *In re Taylor v. State*, 291 Ala. 756, 287 So. 2d 901 (1973)(stating that no one factor determines effectiveness of counsel, but that factors to be considered include overall fairness of the trial, reasonableness of counsel's assistance, and loyalty to client), *cert. denied*, 416 U.S. 945 (1974); *Risher v. State*, 523 P.2d 421 (Alaska 1974); *People v. Pope*, 23 Cal. 3d 219, 590 P.2d 859, 152 Cal. Rptr. 425 (1979); *People v. White*, 182 Colo. 417, 514 P.2d 69 (1973); *State v. Clark*, 170 Conn. 273, 365 A.2d 1167, *cert. denied*, 425 U.S. 962 (1976); *Harris v. State*, 293 A.2d 291 (Del. 1972)(holding the test to be whether under the totality of circumstances, counsel was so incompetent that the “accused was not afforded genuine and effective legal representation”); *Pitts v. Glass*,

231 Ga. 638, 203 S.E.2d 515 (1974); *State v. Kahlewai*, 54 Hawaii 28, 501 P.2d 977 (1972); *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975); *State v. Massey*, 207 N.W.2d 777 (Iowa 1973); *Winter v. State*, 210 Kan. 597, 502 P.2d 733 (1972)(interpreted as abandoning farce and mockery in *Schoonover v. State*, 2 Kan. App. 2d 481, 582 P.2d 292 (1978)); *State v. Myles*, 389 So. 2d 12 (La. 1980); *Lang v. Murch*, 438 A.2d 914 (Me. 1981); *Reid v. Warden, Maryland Penitentiary*, 5 Md. App. 199, 246 A.2d 312 (1968)(“genuine and effective representation”); *Commonwealth v. Saferian*, 366 Mass. 89, 315 N.E.2d 878 (1974); *People v. Garcia*, 398 Mich. 250, 247 N.W.2d 547 (1976); *White v. State*, 189 Minn. 40, 248 N.W.2d 281 (1976); *Seales v. State*, 580 S.W.2d 733 (Mo. 1979); *State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977); *State v. Fleury*, 111 N.H. 294, 282 A.2d 873 (1971); *State v. Orona*, 97 N.M. 232, 638 P.2d 1077 (1982); *People v. Droz*, 39 N.Y.2d 457, 348 N.E.2d 880, 384 N.Y.S.2d 404 (1976)(stating that the right to effective counsel includes the right to assistance by an attorney who has taken time to prepare the case and “who is familiar with and able to employ at trial basic principles of criminal law and procedure”); *State v. Bragg*, 221 N.W.2d 793 (N.D. 1974)(court suggests that it will follow the Sixth Circuit in abandoning farce and mockery); *State v. Hester*, 45 Ohio St. 2d 71, 341 N.E.2d 304 (1976)(holding the test for effective assistance of counsel to be whether under all the circumstances the accused “had a fair trial and substantial justice was done”); *Johnson v. State*, 620 P.2d 1311 (Okla. 1980); *Krummacher v. Gierloff*, 290 Or. 867, 627 P.2d 458 (1981); *Commonwealth ex. rel. Washington v. Maroney*, 427 Pa. 599, 235 A.2d 349 (1967)(not explicitly rejecting farce and mockery but stating that the “particular course chosen by counsel [must have] some reasonable basis designed to effectuate his client's interests”); *State v. Turley*, 113 R.I. 104, 318 A.2d 455 (1974); *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975); *Ex parte Gallegos*, 511 S.W.2d 510 (Tex. Crim. App. 1974); *In re Cronin*, 133 Vt. 234, 336 A.2d 164 (1975); *State v. Myers*, 86 Wash. 2d 419, 545 P.2d 538 (1976)(standard is whether the accused was afforded effective representation and a fair and impartial trial); *State v. Thomas*, 203 S.E.2d 445 (W. Va. 1974); *State v. Harper*, 57 Wis. 2d 543, 205 N.W.2d 1 (1973). See generally Foust & Beckman, *Ineffective Assistance of Counsel* (unpublished memorandum on file with the *Harvard Civil Rights-Civil Liberties Law Review*).

[FN192]. 491 F.2d 687 (6th Cir. 1974).

[FN193]. *Id.* at 696.

[FN194]. *Id.*

[FN195]. 432 F.2d 730 (3d Cir. 1970).

[FN196]. *Id.* at 736.

[FN197]. *Id.*

[FN198]. *Id.* at 739. At least one circuit has tried, albeit unsuccessfully, to put detailed requirements into the effectiveness standard, by incorporating the American Bar Association's Standards for the Defense Function. *United States v. Decoster (Decoster III)*, 624 F.2d 196 (D.C. Cir. 1979). See Note, *Identifying and Remediating Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, 93 Harv. L. Rev. 752 (1980).

[FN199]. *Finer, Ineffective Assistance of Counsel*, 58 Cornell L. Rev. 1077, 1079 (1973).

[FN200]. *Bines, Remediating Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 Va. L. Rev. 927, 937 (1973).

[FN201]. The first, third, fourth, seventh, eighth, and ninth federal circuits as well as 10 states apply some form of the “normal” competency test of effectiveness. *See* [United States v. Bosch](#), 584 F.2d 1113 (1st Cir. 1978); [Moore v. United States](#), 432 F.2d 730 (3rd Cir. 1970); [Marzullo v. Maryland](#), 361 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); [United States ex rel. Williams v. Twomey](#), 510 F.2d 634 (7th Cir. 1975), *cert. denied*, 423 U.S. 876 (1975); [United States v. Phillips](#), 640 F.2d 87 (7th Cir.), *cert. denied*, 451 U.S. 991 (1981); [United States v. Easter](#), 539 F.2d 663 (8th Cir.), *cert. denied*, 434 U.S. 844 (1976); [Cooper v. Fitzharris](#), 586 F.2d 1325 (9th Cir. 1978)(en banc).

See also [People v. Blalock](#), 197 Colo. 320, 592 P.2d 406 (1979); [State v. Anonymous](#), 34 Conn. Supp. 656, 384 A.2d 386 (1978); [Stough v. State](#), 62 Hawaii 620, 618 P.2d 301 (1980); [State v. Killpack](#), 276 N.W.2d 368 (Iowa 1979); [Commonwealth v. Adams](#), 374 Mass. 722, 375 N.E.2d 681 (1978); [State v. Mays](#), 203 Neb. 487, 279 N.W.2d 146 (1979); [State v. West](#), 117 N.H. 343, 373 A.2d 348 (1977); [Baxter v. Rose](#), 523 S.W.2d 930 (Tenn. 1975); [State v. Thomas](#), 157 W. Va. 640, 203 S.E.2d 445 (1974); [State v. Harper](#), 57 Wis. 2d 543, 205 N.W.2d 1 (1972).

[FN202]. The importance of maintaining the integrity of the criminal process is a central concern of courts and of those who would restrict access to habeas relief. For example, Bines, *supra* note 200, at 933, argues that the *Moore* normal competency standard is best suited to ensure the provision of constitutionally effective counsel “without subverting the finality of criminal judgments.” He adds that the quality of representation by defense counsel created by the *Moore* standard

protects the guilt-determining process. Ordinary skill and care obviously implies protection of the defendant with sufficient vigor, and presentation of all defenses necessary for the trier of fact to reach a realistic conclusion on the ultimate issue of whether the accused committed the *actus reus* with the necessary *mens rea*.

Id. at 938.

[FN203]. 103 Wis. 2d 403, 308 N.W.2d 887 (Wis. Ct. App. 1981).

[FN204]. *Id.* at 405, 308 N.W.2d at 889.

[FN205]. *Id.* at 406, 308 N.W.2d at 889 (quoting [Link v. Wabash R.R.](#), 370 U.S. 626, 634 n.10 (1962)).

[FN206]. 455 U.S. 745 (1982).

[FN207]. 452 U.S. 18 (1981).

[FN208]. [Santosky](#), 455 U.S. at 753.

[FN209]. *See id.* at 756-57.

[FN210]. *See* [Kenner v. Watha](#), 115 Mich. App. 521, 323 N.W.2d 8 (1982); [Covington v. Cox](#), 82 Mich. App. 644, 267 N.W.2d 469 (1978).

[FN211]. Schwarzer, *Dealing with Incompetent Counsel--The Trial Judge's Role*, 93 Harv. L. Rev. 633, 642-43 (1980). These observations are made in the context of a discussion of appellate review of alleged ineffectiveness of criminal defense counsel, but are clearly applicable to all appellate proceedings.

[FN212]. 458 U.S. 502 (1982).

[FN213]. 28 U.S.C. § 2254 (1976).

[FN214]. Ms. Lehman filed the writ on behalf of her children who she claimed were in the custody of the state. The language of 28 U.S.C. § 2254(a) permits applications for habeas corpus writs “in behalf of a person in custody.”

[FN215]. 458 U.S. at 510-11.

[FN216]. See Justice Blackmun's dissent, *id.* at 516-23, arguing that to fashion, in this case, a jurisdictional bar to federal habeas review of state custody determinations is historically and precedentially incorrect.

[FN217]. These include, for example, the defendant's vulnerability against the significantly greater resources of the state, the complexity of the proceedings, the need to ensure the integrity of the fact-finding process, the desire to protect the interests of the state and the public as well as those of the defendant, and the societal interest in a public perception of fundamentally fair judicial proceedings.

[FN218]. See *supra* text accompanying notes 28, 41-42.

[FN219]. Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 Miss. L.J. 43, 72 (1974).

[FN220]. Harper & Harper, *Lawyers and Marriage Counselling*, 1 J. Fam. L. 73, 80 (1961).

[FN221]. Andalman & Chambers, *supra* note 219, at 48.

[FN222]. *Id.* at 75.

[FN223]. Consider, for example, the bar's reluctant and hostile role in the development of the Office of Economic Opportunity legal services program, in J. Auerbach, *Unequal Justice* 269-308 (1976).

[FN224]. See, e.g., Lawson, *Presuming Lawyers Competent to Protect Fundamental Rights: Is It An Affordable Fiction?* 66 Ky. L.J. 459 (1978).

[FN225]. Andalman & Chambers, *supra* note 219, at 83 (emphasis added).

[FN226]. *Id.* at 72-73.

[FN227]. See, e.g., Goldberg, *Defender Systems of the Future: The New National Standards*, 12 Am. Crim. L. Rev. 709 (1975); Note, *Providing Counsel for the Indigent Accused: The Criminal Justice Act*, 12 Am. Crim. L. Rev. 789 (1975).

[FN228]. Many articles have been written concerning the problems of financing free legal assistance. See, e.g., Allison & Phelps, *Can We Afford to Provide Trial Counsel for the Indigent in Misdemeanor Cases?* 13 Wm. & Mary L. Rev. 75 (1971); Boone, *A Source of Revenue for the Improvement of Legal Services Part II: A Recommendation for the Use of Clients' Funds Held by Attorneys in Non-Interest Bearing Trust Accounts to Support Programs of the Texas Bar Association and an Analysis of the Federal Income Tax Ramifications*, 11 St. Mary's L.J. 113 (1979); Wagner, *Through the Money Maze*, 37 NLADA Briefcase 13 (1980); Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 Iowa L. Rev. 1249 (1970).

[FN229]. 18 U.S.C. § 3006A (1982).

[FN230]. *Id.* § 3006A(d)(1).

[FN231]. *Id.* § 3006A(e).

[FN232]. *Id.* § 3006A(d)(3).

[FN233]. *See, e.g., Menin v. Menin*, 79 Misc. 2d 285, 359 N.Y.S.2d 712 (Sup. Ct. 1974), *aff'd*, 48 A.D.2d 904, 372 N.Y.S.2d 985 (App. Div. 1975).

[FN234]. Andalman & Chambers, *supra* note 219, at 85.

[FN235]. 432 F.2d at 736. *See supra* text accompanying notes 195-200, for a discussion of *Moore*.

[FN236]. *Gideon v. Wainwright*, 372 U.S. 335, 339-42 (1963).

[FN237]. *See supra* text accompanying notes 175, 211.

[FN238]. *See supra* text accompanying notes 212-216.

[FN239]. Fed. R. Civ. P. 60(b) says:

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; or; (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

[FN240]. *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2864 (1973).

[FN241]. *See, e.g., Berube v. McKesson Wine & Spirits Co.*, 7 Mass. App. Ct. 426, 388 N.E.2d 309 (1979); *Thelen v. Thelen*, 53 N.C. App. 684, 281 S.E.2d 737 (1981); J. Moore, *Moore's Federal Practice* ¶¶ 60.22[2], 60.27[2], and cases noted therein.

[FN242]. “The court may exercise its power under clause (6) on conditions that will place the parties in status quo.” 11 C. Wright & A. Miller, *supra* note 240, at 214.

[FN243]. Moore, *supra* note 241, ¶ 60.28[3], at 407-08.

[FN244]. *Id.* at 322-23 (footnotes omitted).

[FN245]. A Rule 60 motion is clearly not a substitute for appellate review. It neither tolls the time to appeal from the initial decision nor affects the finality of that judgment. Moore, *supra* note 241, ¶ 60.27[1], at 269-70.
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