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TERMINATION OF INDIGENTS' PARENTAL RIGHTS AFTER LASSITER: IGNORING COMPLEXITY AND PROTECTING THE BEST INTERESTS OF PSYCHOLOGICAL PARENTS

Roy M. Sobelson*

I. INTRODUCTION

Of all the civil remedies a state may utilize against its citizens, perhaps the most severe is the termination of one's parental rights. Having been described as a "tearing of the flesh," it clearly represents one of our system's most egregious infringements on the fundamental rights associated with the raising of one's family. While little uniformity exists among the states in terms of grounds for termination, procedures, courts utilized, terminology, and stan-

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1. As stated by Justice Ingram of the Georgia Supreme Court:

There can scarcely be imagined a more fundamental and fiercely guarded right than the right of a natural parent to its offspring. To terminate that right is to sever that right for the future as effectively in law as if it never had existed. It is a tearing of the flesh and it can be done by the court only under the most carefully controlled and regulated circumstances for the sake of the child.

2. Cases concerning unconstitutional interference with fundamental parental and marital rights include: Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (freedom of personal choice in matters of marriage and family life arbitrarily restricted by mandatory maternity leave rule); Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory school attendance law seen as denying the Amish the right to raise their children in accordance with their religious beliefs); Stanley v. Illinois, 405 U.S. 645 (1972) (law presuming unwed father to be unfit parent held to deprive him of his "privacy interest" in his children without due process of law); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (statute forcing parents to send children between the ages of eight and sixteen to public schools held to interfere unreasonably with parental control over the rearing and education of children); Meyer v. Nebraska, 262 U.S. 390 (1923) (statute forbidding teaching of foreign languages regarded as interfering with right of parents to educate their children). For further discussion of fundamental rights relating to marriage and the family, see infra text accompanying notes 60-65.

3. Compare the following state statutory provisions regarding the termination of parental rights. IND. CODE ANN. § 31-6-5-4 (Burns Cum. Supp. 1982) states:

A petition to terminate the parent-child relationship involving a delinquent child or a child in need of services must allege that:

(1) The child has been removed from the parent for at least six [6] months under a
dispositional decree;
(2) There is a reasonable probability that the conditions that resulted in the child’s removal will not be remedied;
(3) Termination is in the best interests of the child; and
(4) The county department has a satisfactory plan for the care and treatment of the child.

OKLA. STAT. ANN. tit. 10, § 1102.1 (West Supp. 1981-1982) provides: “Where the evidence in an action . . . for custody of a child or for the appointment of a guardian of the person of a child, . . . indicates that a child is deprived or in need of supervision, the court . . . may terminate parental rights in accordance with the provisions of this title." OKLA. STAT. ANN. tit. 10, § 1101(d) (West Supp. 1981-1982) further provides:

(d) The term “deprived child” means a child who is for any reason destitute, homeless or abandoned; or who has not the proper parental care or guardianship; or whose home, by reason of neglect, cruelty or depravity on the part of his parents, guardian or other person in whose care it may be, is an unfit place for such child; or who is in need of special care and treatment because of his physical or mental conditions and his parents, guardian or legal custodian is unable or willfully fails to provide it; or being subject to compulsory school attendance, the child is . . . absent from school for fifteen (15) or more days or parts of days within a semester or four (4) or more days or parts of days within a four-week period without a valid excuse, as defined by the local school boards.

TENN. CODE ANN. § 37-246(d) (Supp. 1982) states:

[The court may terminate parental rights if it finds on the basis of clear and convincing evidence that termination is in the child’s best interest and that one or more of the following conditions exist:

(1) The child has been removed from the custody of the parent by the court for at least one (1) year and the court finds that:
   (A) The conditions which led to the removal still persist;
   (B) There is little likelihood that these conditions will be remedied at an early date so that the child can be returned to the parent in the near future; and
   (C) The continuation of the legal parent and child relationship greatly diminishes the child’s chances of early integration into a stable and permanent home.

(2) The parent has been found to have committed severe child abuse against the child two (2) or more times.

(3) The parent has been sentenced to more than two (2) years imprisonment for conduct which has been or is found to be severe child abuse.

TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1982) provides:

A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:
   (A) voluntarily left the child alone in the possession of another not the parent and expressed an intent not to return; or
   (B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; or
   (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or
   (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or
   (F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; or
   (G) abandoned the child without identifying the child or furnishing means of...
identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; or

(J) been the major cause of:
(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or
(ii) the child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to return; . . .

(K) . . . and in addition, the court further finds that

(2) termination is in the best interest of the child.

VA. CODE ANN. § 16.1-283 (Repl. Vol. 1982) states:

B. The residual parental rights of a parent or parents of a child found by the court to be neglected or abused . . . may be terminated if the court finds based upon clear and convincing evidence, that it is in the best interests of the child and that:

1. The neglect or abuse suffered by such child presented a serious and substantial threat to his or her life, health or development; and
2. It is not reasonably likely that the conditions which resulted in such neglect or abuse can be substantially corrected or eliminated so as to allow the child's safe return to his or her parent or parents within a reasonable period of time.

Proof of any of the following shall constitute prima facie evidence of the conditions set forth in subparagraph B 2 hereof;

a. The parent or parents are suffering from a mental or emotional illness or mental deficiency of such severity that there is no reasonable expectation that such parent will be able to undertake responsibility for the care needed by the child . . .

W. VA. CODE § 49-6-5(a)(6) (1980) provides:

(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, [the court shall] terminate the parental or custodial rights and responsibilities and commit the child to the permanent guardianship of the state department or a licensed child welfare agency.

W. VA. CODE § 49-6-5(b) (1980) further provides:

(b) "[N]o reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that: (1) The parent or parents have habitually abused or are addicted to intoxicating liquors, narcotics or other dangerous drugs to the extent that proper parenting ability has been seriously impaired and the parent has not responded to or followed through with recommended and appropriate treatment . . .; (2) the parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable foster care plan . . .; (3) the parent or parents have not responded to or followed through with reasonable rehabilitative efforts of social, medical, mental health or other rehabilitative agencies . . .; (4) the parent or parents have abandoned the child; or (5) the parent or parents have repeatedly or seriously physically abused the child.

Arizona makes a parent's deprivation of his own civil liberties due to a felony conviction a ground for termination when the felony "is of such nature as to prove the unfitness of such parent to have future custody and control of the child." ARIZ. REV. STAT. ANN. § 8-533 (B)(4) (Supp. 1981-1982).

The Model Act to Free Children for Permanent Placement offers another set of guidelines for the termination of parental rights. Katz, Freeing Children for Permanent Placement Through a Model Act, 12 Fam. L.Q. 203, 216-17 (1978) [hereinafter cited as Model Act]. Section 4 of the Model Act provides:

(a) An order of the court for involuntary termination of the parent-child relationship shall be made on the grounds that the termination is in the child's best interests, . . . where one or more of the following conditions exist:
dards of proof required at trial or on appeal, all states have some form of termination remedy available. Most terminations, whether made in conjunction with prospective adoptions or independent of

1. the child has been abandoned . . . ;
2. the child has been abused or neglected in a prior proceeding;
3. the child has been out of the custody of the parent for the period of one year and the court finds that:
   (i) the conditions which led to the separation still persist or similar conditions of a potentially harmful nature continue to exist;
   (ii) there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future; and
   (iii) the continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home.


9. See, e.g., IDAHO CODE § 16-1506 (Supp. 1981); MICH. STAT. ANN. § 710.41 (Callaghan
such\textsuperscript{10} are deemed permanent and absolute.\textsuperscript{11} Furthermore, after termination is final, a former parent loses the right to notice of any further action regarding the child,\textsuperscript{12} and the inheritance rights of the child are cut off.\textsuperscript{13}

This unique\textsuperscript{14} proceeding was recently the subject of litigation in the Supreme Court of the United States. In \textit{Lassiter v. Department of Social Services},\textsuperscript{15} the Supreme Court held that the due process clause does not impose an absolute duty on the states to provide free legal counsel to indigent parents in termination cases.

\textsuperscript{10} See, e.g. Ind. \textit{Code Ann.} § 31-6-5-4 (Burns Supp. 1982).

\textsuperscript{11} E.g., id. § 31-6-5-6(a), which states that "[w]hen the juvenile or probate court terminates the parent-child relationship, all rights, powers, privileges, immunities, duties, and obligations (including any rights to custody, control, visitation, or support) pertaining to that relationship are permanently terminated, and the parent's consent to the child's adoption is not required." But see S.C. \textit{Code Ann.} § 20-11-50 (Law. Co-op. 1976), which provides for a natural parent's right to petition for restoration of rights after six months following termination unless the child has been placed in an adoptive home. The operative standard for such a determination is the best interest of the child.

\textsuperscript{12} See, e.g., Ind. \textit{Code Ann.} § 31-6-5-6(a) (Burns Supp. 1982) and Mont. \textit{Code Ann.} § 41-3-611(3) (1981); see also Model Act, supra note 3, § 18(c), at 246, which provides: "Any parent whose relationship with the child is terminated is not entitled to notice of the proceedings for the adoption of the child . . . nor has he any right to object . . . ." An interesting twist which has developed in this area is the call by some parties for an "open adoption" plan in which the natural parents retain the right to continuing contact and to knowledge of the child's whereabouts and welfare. \textit{See, e.g., In Re Department of Public Welfare, ___ Mass. ___}, 419 N.E.2d 285, 287 n.3 (1981).

\textsuperscript{13} Lassiter v. Department of Social Servs., 452 U.S. 18, 59 (1981) (Stevens, J., dissenting). Under the Model Act, however, the order divests the parent and child of all legal rights "except the right of the child to inherit from the parent." \textit{Model Act, supra} note 3, § 18(A), at 246. In Roelfs v. Wallingford, Inc., 207 Kan. 804, 809-10, 486 P.2d 1371, 1376 (1971), the Supreme Court of Kansas held that after termination of parental rights, the child is not entitled to his natural parent's worker's compensation benefits.

\textsuperscript{14} 452 U.S. at 27.

\textsuperscript{15} Id. at 18. The facts of this case were indeed exceptional. In 1975, one year after a North Carolina District Court had declared petitioner's son to be "neglected" and transferred custody to respondent, petitioner was convicted of murder and began serving a 25-40 year sentence. Respondent petitioned for termination of Ms. Lassiter's parental rights in 1978, alleging that she had not seen the child since 1975; had left him in the foster care program for over two years; and had failed to show any effort to correct the conditions which led to the severance of custody. Petitioner was duly served with the petition and notice of the hearing. Although petitioner had been represented by counsel during the murder trial, she had neglected to mention the forthcoming hearing to her attorney. It was concluded at the hearing that petitioner had ample opportunity to obtain counsel and had failed to do so without just cause. Because she had not averred that she was indigent, the court did not appoint counsel for her. After the hearing the court terminated her parental status, concluding that she had willfully failed to display concern or responsibility for the welfare of the child, and that termination was in the child's best interest. \textit{Id.} at 20-24.
brought by the state.16 Holding that the right to appointed counsel exists only on a case by case basis, with the initial decision to be made by the trial court,17 the Court in effect adopted the same sort of system used in Betts v. Brady,18 which was later rejected in Gideon v. Wainwright19 and its progeny. While the Gideon court found a right to counsel in state courts inherent in the sixth amendment to the United States Constitution,20 Lassiter, not involving a criminal proceeding, was heard solely on due process, fourteenth amendment grounds.21 The Court acknowledged in its decision that its holding was contrary to the weight of authority in lower courts,22 model statutes,23 American Bar Association standards,24 and commentaries,25 all of which provide for or advocate the automatic appointment of counsel for indigent parents.

This article will examine the Court's reasons for such a holding and will demonstrate that the Court's return to acting as a "super family court"26 or "super legal aid bureau"27 is based on a view of

16. Id. at 31.
17. Id. at 32.
18. 316 U.S. 455 (1942).
20. The sixth amendment provides, in relevant part, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury... and... have the Assistance of Counsel for his defense." U.S. Const. amend. VI.
21. The fourteenth amendment provides: "No state shall... deprive any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV, § 1.
23. See, e.g., UNIF. JUVENILE COURT ACT § 26(A), 9A U.L.A. 1 (1968) which provides, in part:

Except as otherwise provided under this Act a party is entitled to representation by legal counsel at all stages of any proceedings under this Act and if as a needy person he is unable to employ counsel, to have the court provide counsel for him. If a party appears without counsel the court shall ascertain whether he knows of his right thereto and to be provided with counsel by the court if he is a needy person.

24. STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES Standard 2.3(b) (Institute of Judicial Administration — American Bar Association Joint Commission on Juvenile Justice Standards 1980).
26. Lassiter, 452 U.S. at 52 (Blackman, J., dissenting).
termination actions which is, at best naive, and at worst dangerously misleading. It is this author's contention that the termination proceeding, with its very high risk of inappropriately destroying families, mandates compulsory appointment of counsel in view of the courts' stated goal of doing what is ultimately in "the best interests of the child."\(^{28}\)

In analyzing petitioner Lassiter's claim that due process required appointment of counsel for her, the Court utilized the three point balancing approach first enunciated in *Mathews v. Eldridge*,\(^ {29}\) an action in which the petitioner asserted a due process right to a hearing preceding a cessation of Social Security disability benefits. The Court, in *Lassiter*, first found that "the pre-eminent generalization"\(^ {30}\) from all other right to counsel cases was that appointment of counsel was presumed mandatory only when the petitioner risked physical liberty loss as a result of the action in issue.\(^ {31}\) In the face of this presumption, the Court then considered the three balancing factors of the *Mathews* test: "[1] the private interests at stake, [2] the government's interest, and [3] the risk that the procedures used will lead to erroneous decisions."\(^ {32}\) The Court, which found the parent's interest "commanding"\(^ {33}\) and the state's "urgent,"\(^ {34}\) concluded that "[i]f . . . the parent's interests were at their strongest, the state's interests were at their weakest, and risks of error were at their peak, it could not be said that . . . due process did not therefore require the appointment of counsel."\(^ {35}\)

However, three problems become immediately apparent in the face of this type of analysis. First, the Court had never before used the three part balancing test of *Mathews* as a collective balancing factor itself to be weighed against some other "pre-eminent generalization," or presumption, particularly one of such strength as the Court accords the presumption that the right to appointed counsel exists only when the litigant may lose his physical liberty. Second, the Court drew this pre-eminent generalization from a line of cases rejecting the right to counsel for reasons which extend well beyond the focus on imprisonment as the sole factor determining the right

\(^{28}\) See infra note 155 and 158.
\(^{29}\) 424 U.S. 319 (1976).
\(^{30}\) *Lassiter*, 452 U.S. at 25.
\(^{31}\) Id. at 27.
\(^{32}\) Id.
\(^{33}\) Id.
\(^{34}\) Id.
\(^{35}\) Id. at 31.
to, and the necessity for, appointed counsel. Finally, in focusing on Ms. Lassiter's particular termination proceeding, rather than on such proceedings in general, the Court placed undue emphasis on the lack of complexity evident from the record and thereby failed to evaluate objectively the real and inherent risk of erroneous deprivation of fundamental rights inherent in the termination process.

Perhaps many articles will or have been written addressing the questions of whether the Mathews factors are appropriately invoked in cases such as this and whether it is proper to balance these factors against another presumption. Indeed, the question of the relative strength of each part of each presumption or factor is itself subject to debate. The focus here, however, is primarily on three questions. First, is the Court's "pre-eminence generalization" in fact supported by case law? Second, considering the structure of the typical termination case, should not the courts take account of the fact that a more formal proceeding with the protection of a professional advocate may better safeguard the interests of both the parent and the child? And third, do the complex substantive questions involved necessarily create an unreasonably high risk of erroneous deprivation of fundamental rights which could be substantially reduced by the presence of counsel?

II. THE PRE-EMINENT GENERALIZATION

Examining first the "pre-eminence generalization that a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation," the Court's emphasis on physical liberty seems to miss the point. It is true that all of the cases requiring appointment of counsel were either criminal or at

36. See infra text accompanying notes 41-53.
37. The Court stated that "[t]he dispositive question, which must now be addressed, is whether the three Eldridge factors . . . suffice to rebut the presumption and thus lead to the conclusion that the Due Process Clause requires the appointment of counsel when a State seeks to terminate an indigent's parental status." Lassiter, 452 U.S. at 31. Having said that, Justice Stewart, nevertheless seems to draw his conclusions from a review of the particular facts of the Lassiter case. See supra notes 32-33 and accompanying text. This approach was severely criticized by Justice Blackmun in his dissent. "This conclusion is not only illogical, but it also marks a sharp departure from the due process analysis consistently applied heretofore." 452 U.S. at 49 (Blackmun, J., dissenting).
least quasi-criminal. However, *In re Gault* had already made it abundantly clear that labels alone are not determinative. This remains especially true for actions heard in juvenile courts, where the majority of non-adoption related termination cases are heard. Perhaps the most important thing to note about the cases denying an automatic right to counsel, however, is not potential confinement or the civil/criminal dichotomy. Rather, it is more appropriate to focus on the nature of such proceedings in general to determine not only the possible consequences to the individual, but also the degree to which counsel is really needed as a means of insuring a party's meaningful participation.

In *Vitek v. Jones*, a case challenging the constitutionality of Nebraska's procedure for involuntary transfer of a prisoner from prison to a mental hospital, at least four Justices concluded there was a right to counsel. Noting that a fundamental change in the nature or curtailment of liberty carries due process implications, the opinion makes it clear that while the relevant inquiry is essentially a medical one, the fact that these questions are psychiatric, and thus subject to the "subtleties and nuances of psychiatric diagnoses," justifies at least the requirement that the proceedings be adversarial. Furthermore, the fact that the prisoner is thought to be suffering from mental disease means the prisoner has an even greater need for legal assistance. Thus, the Court in *Vitek* focused on at least two troublesome aspects of the procedure, its inherently complex and subtle nature, and the extent to which counsel may be needed to aid the prisoner in responding to the allegations presented by the state.

Even *Gagnon v. Scarpelli* and *Morrisey v. Brewer*, cited by the Court as supportive of this "pre-eminent generalization," focus on the nature, consequence, and purpose of particular types of proceedings in finding no automatic right to appointed counsel for in-

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42. Id. at 492.
43. Id. at 495.
44. Id. (quoting Addington v. Texas, 441 U.S. 418, 430 (1979)).
45. 445 U.S. at 495.
46. Id. at 496-97 (White, J., dissenting).
Gagnon, for example, raised the question of the necessity of appointed counsel to represent a previously sentenced probationer in a proceeding to revoke his probation. Placing great emphasis on the fact that the prisoner had already been sentenced after trial, and that the sentence had been suspended by his placement in a probation program, the Court held there was no per se right to appointed counsel. The Court was apparently skeptical of the inherent need for or likelihood of a "constructive contribution by counsel." Indeed, the Court said that the introduction of counsel would alter the nature of the proceedings significantly, causing the state to provide its own counsel who would likely present all available evidence and arguments, and the role of the hearing body itself would become "more akin to that of a judge at trial."

Such fears, of course, are not appropriate in the consideration of a parental termination proceeding. Though these proceedings are generally said to be conducted with the ultimate goal of acting in the best interests of the child, they are already undoubtedly adversarial, heard by a trial judge, and call for the vigorous participation of an attorney for the state and often for the child as

49. 411 U.S. at 778-80, 783.
50. Id.
51. Id. at 789-90.
52. Id. at 787. The Court noted a number of important factors about the probation process. With respect to the relationship between probationer and probation officer, "[t]he parole officer ordinarily defines his role as representing his client's best interests. . . . The parole officer's attitude. . . . reflects the rehabilitative rather than punitive focus of the probation/parole system. . . ." Id. at 784-85 (quoting F. Remington, D. Newman, E. Kimball, M. Melli & H. Goldstein, Criminal Justice Administration, Materials and Cases 910-11 (1969)). The court reversed saying:

[W]e think that the Court of Appeals erred in . . . [holding] . . . that the State is under a constitutional duty to provide counsel for indigents in all . . . parole revocation cases. . . . [W]hile in some cases he may have a justifiable excuse for the violation or a convincing reason why revocation is not the appropriate disposition, mitigating evidence of this kind is often not susceptible of proof or is so simple as not to require either investigation or exposition by counsel.

411 U.S. at 787.
53. Id.
54. See infra notes 155 and 158. See also Model Act, supra note 3.
55. See Lassiter v. Department of Social Servs., 452 U.S. 18, 42 (1981) (Blackmun, J., dissenting) and infra note 56.
Furthermore, the adverse consequences of an erroneous finding in a probation revocation hearing are significant, but not irreparable, at least not in the sense that a termination is. While improper continuation of a prison sentence is undoubtedly severe and can never really be undone, collateral remedies and the possibility of ultimate release are at least methods of preventing further harm to the prisoner. As will be demonstrated, however, once appeals of a termination are exhausted, the split of family and child is not only irrevocable; by then it may well be of necessity because of the protracted separation and its effect on the parent-child relationship.

Finally, it is significant that by the time the revocation question comes up, the prisoner has already been subjected to a prison sentence, albeit one that has been suspended. Thus, the time when he was most needful of representation, during the adjudication of the criminal charge and sentencing, has already passed; and he was obviously entitled to such representation at that time. In response, of course, it may be said that the traditional bifurcation of termination proceedings into fact finding and dispositional phases presents the same sort of situation. Yet, even though a judge may be involved technically only in fact finding at a given time, it is hard to imagine his being able to ignore the ultimate fate of the child and the parent's actions as they relate to the child's "best interests."

Thus, while the element of potential confinement is important, it should not be the sole determining factor in deciding whether the right to counsel exists. Obviously, the necessity for assistance and the degree to which professional counsel could make a material difference should be considered. In this vein, it is important to recognize the possibly severe restrictions of one's liberty and exercise of fundamental rights, even in the absence of actual imprison-


59. This seems a particularly salient consideration in light of the Court's consideration in Mathews of "the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. 319, 335 (1976).

60. See Alsager v. District Court of Polk City, Iowa, 406 F. Supp. 10 (S.D. Iowa 1976) (discussing "fundamental rights" as they relate to vagueness and related problems in termi-
ment or confinement. And this would seem particularly apropos in a state's tampering with rights so jealously guarded as those encompassed in the catch-all "right to family integrity." Having already recognized such fundamental rights as the right to marry freely, use contraception, direct a child's religious and secular educational training, and terminate pregnancy at early stages, the Court should also accord great deference to a parent's right to continue to control nearly every facet of a child's youthful experience:

Thus, the Court's generalization, if one be needed to balance against the Mathews factors, should take into account not only the possible confinement of the one asserting the right to counsel, but also the fundamental nature of the right or rights affected, and the degree to which counsel could aid both the parties and the court in coming to a decision that is both just and correct. Indeed, it seems folly to ignore the fact that at least one study has shown that parents who are represented are significantly more likely to prevail in actions such as these than those who are not.

Such considerations would seem to be even more appropriate in a case where fundamental rights of a person other than the parent are also affected. Thus, many states have recognized by statute the parent's right to counsel, many have also provided for counsel to the child as well, though the traditional thinking is that the state

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61. In H.L. v. Matheson, 450 U.S. 398 (1981), a pregnant unmarried minor challenged the constitutionality of the Utah statute which required that a physician notify the parents or guardian of a minor seeking an abortion. Emphasizing the protections afforded the relationship between parent and child, the Supreme Court held that one consideration served by the statute was that of "family integrity." Id. at 411. The Court noted that the "short shrift given to the dissent to '... family integrity' runs contrary to a long line of constitutional cases in this Court." Id. at 411 n.18 (citing Bellotti v. Baird, 443 U.S. 622, 637-39 (1979)).


67. According to the Court, thirty-three states and the District of Columbia provide by statute for the appointment of counsel in termination cases. Lassiter v. Department of Social Servs., 452 U.S. 18, 34 (1981). See also cases cited supra note 22.

68. See, e.g., IOWA CODE ANN. § 232.113(2) (West Supp. 1981-1982); KAN. STAT. ANN. § 38-
represents the interests of the child in termination proceedings. Indeed, many statutes go even further by stating that the fundamental right to family integrity is to be recognized and that courts should strive to keep families intact whenever possible.

III. The Lack of Formality and Protection

The focus on the peculiar nature of certain termination proceedings is especially important since one of the characteristics on which the Court focused in its analysis utilizing the three prongs of Mathews was the basically uncomplicated nature of the proceeding to terminate parental rights. Often this lack of complexity results from the Courts’ preference that termination cases retain a high degree of informality. But while the informality of proceedings such as probation revocation hearings, school suspension hearings, and commitment hearings may have led the Court to conclude that counsel is not always required, it is just such ostensible informality that often makes hearings in juvenile courts so difficult for parents to defend adequately. Informality may indeed cut both ways, as that very label often seems to be a signal to courts at both the trial and appellate levels that rules should not or need not be as strictly construed or enforced as in more “formal” proceedings. Parents may thereby be denied the right to invoke a variety of procedural devices and protections which would be available to assist in their defense in more “formal” proceedings. Hence this obfuscatory label of informality often has dire consequences in parental termination proceedings.

A significant number of termination cases are brought in juvenile

70. New York requires that the petitioner in a termination proceeding allege that the authorized agency has “made diligent efforts to encourage and strengthen the parental relationship . . . .” N.Y. Fam. Ct. Act § 614(c) (McKinney 1975).
Indiana expresses its desire for keeping families together by stating a preference that the courts and agencies employ the care, treatment, or rehabilitation that least interferes with family autonomy, is least disruptive of family life, and imposes the least restriction on the freedom of the child and his parent. Ind. Code Ann. § 31-6-4-16 (Burns 1979).
Wash. Rev. Code Ann. § 13.34.020 (1979) provides: “The Legislature declares that the family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle the legislature declares that the family unit should remain intact in the absence of compelling evidence to the contrary.”
courts, often as follow-up proceedings to findings that children are neglected, deprived, abused, or in need of supervision. Traditionally, proceedings in juvenile courts either are subject to general rules of civil procedure or operate under a system in which the application of such rules is discretionary. Whether a particular court is governed by traditional procedures may also have implications on the right to have the proceedings recorded or transcribed, as well as on the procedures for appeal.

Court procedures may have other ramifications that hamper the ability of a parent to prepare adequately for a hearing, cross-examine witnesses, or investigate the facts which may be the subject of the hearing. In many termination cases, the governing procedures either make no specific provisions for the right to discovery through depositions, interrogatories, requests for admission and the like, or such rights have been specifically denied by state courts. In at least one instance, a state court has granted the

82. See, e.g., Wash. Rev. Code Ann. § 13.34.110 (Supp. 1982), which provides that stenographic notes of the proceedings may be required. For one case dealing with the differences between juvenile procedures and those provided in other cases, especially in the area of appellate matters, see In re T.P.S., 595 S.W.2d 320 (Mo. Ct. App. 1980).
83. Representing a parent accused of child abuse may be particularly difficult in this respect. Several states have enacted detailed provisions for the compilation of child abuse reports. See, e.g., Ind. Code Ann. § 13-6-11-18 (Burns 1979); Ky. Rev. Stat. § 199.335(9) (1977); N.Y. Soc. Serv. Law § 422 (McKinney 1975). Acquisition of information useful in defending a parent from those reports may be stifled by provisions such as New York's, which states that "a subject of a report may receive . . . a copy of all information . . . provided, however, that the Commissioner is authorized to prohibit the release of data that could identify the person who made the report. . . ." N.Y. Soc. Serv. Law § 422(7) (McKinney 1975). However, Ga. Code Ann. § 99-4302 (1981), does not even grant subjects access to these reports.
84. But see Ind. Code Ann. § 31-6-7-11 (Burns 1979), which provides that the law of discovery of civil cases applies.
right to discovery subject to the discretion of the trial judge, but only in circumstances where the state was first found unreasonable in refusing to supply any information whatsoever to the parent. At any rate, it is clear that formal discovery in such courts is still not considered significant enough to rise to the level of a right protected by either the state constitution or United States Constitution.

If the right to discovery mechanisms is not mandated by either the federal or applicable state constitution, the participation of counsel may make a tremendous difference in the ability of the parent to counter the allegations of the state. An attorney would certainly be more likely than a parent to have experience in using informal methods of gathering relevant information, and this would be true even in the absence of investigative sophistication on the attorney's part. For example, he might still choose to move the court for permission to depose witnesses, even though the applicable procedures make no specific provisions for such.

Further implications flowing, at least in part, from the informal nature of the proceedings are found in the practically unbridled use of hearsay in these proceedings. Under several statutory schemes, the court has either the option or the duty to order that social investigations be made and reports thereof be submitted to the court. While some statutes clearly provide that these reports be furnished to all parties and their attorneys, some do not.

No. 179-230 (——).

88. Of course, the Court acknowledges that such was the case in Lassiter. See 452 U.S. 18, 32 (1981) and authorities cited infra note 94.
89. E.g., IND. CODE ANN. § 31-6-4-8 (Burns 1980); Wis. STAT. ANN. § 48.425 (West 1981-1982). See also Model Act, supra note 3, § 13. The commentary to section 13 states:
Subsection (a) requires that at the preliminary hearing of all involuntary petitions the judge order a psychosocial assessment of the child's needs to be done by social service personnel attached to the court or by an authorized agency, not the petitioner or mental health agency, or an independent social work practitioner. If an authorized agency is the petitioner, the court may direct that the psychosocial assessment be made by some other agency or by an independent social work practitioner to give the assessment the objectivity that is desirable. This section contemplates that social casework and other clinical services, organized and administered by an executive branch of state government, may be available to the court. If such personnel are not attached to the court, the Model Act requires that the judge utilize other resources.
91. See IND. CODE ANN. § 31-6-4-15(f) (Burns 1980).
These reports, often full of hearsay which may or may not be admissible under various recognized exceptions to the hearsay rule, are frequently viewed by the court with or without specific reference to them in the hearings. It is also clear that while many of these reports have been held to have been admitted erroneously, courts are reluctant to reverse decisions based on such reasons. Rather, the improper inclusion or consideration of such records is generally deemed harmless error.

In addition, many actions, particularly those based on allegations of abuse, are initiated by the filing and subsequent investigation of complaints by neighbors, family members, physicians, social workers, and others. Indeed, some such reports apparently are made in accordance with statutorily imposed duties to report suspected child abuse. While those reports which are made in good faith generally protect the reporters with immunity, the reports are rarely subject to scrutiny by the party. Even when they are open to review, the names of the reporting persons are often deleted. Thus, the use of these reports as evidence, or their mere inclusion in court records, may leave a party facing a full range of

92. See, e.g., Fed. R. Evid. 803(8). For a discussion of Minnesota's interpretation of such a rule, see In re Welfare of Brown, 296 N.W.2d 430 (Minn. 1980).
93. In re Love, 50 Ill. App. 3d 1018, 366 N.E.2d 139 (1977) involved the parent's assigning as error the trial court's consideration of private correspondence received by the judge which further apprised him of the parent's situation. While the report was filed and appeared in the appellate record, it was not subject to rulings on admissibility; and there was no opportunity to cross-examine. The court relied on the presumption that a judge in a bench trial relies on competent evidence, unless a clear showing to the contrary is made by the appellant. Id. at ____, 366 N.E.2d at 144.
96. See supra note 83.
99. E.g., S.C. Code Ann. § 20-9-20(d) (Law. Co-op. 1976) states: "Any person who in good faith makes reports pursuant to this chapter, or participates in judicial proceedings resulting therefrom, shall be immune to liability both civil and criminal for such reporting."
100. See supra note 83.
101. Id.
accusations which are impossible to counter because of the inability to cross-examine effectively, a right zealously protected by the Supreme Court in many cases.\textsuperscript{102}

Obviously, the presence of an attorney will not alleviate the problem of trying to counter allegations made by persons unknown to the parties. However, there may be exceptions to the rule that such names are unavailable; and an attorney would be more likely than a layman to have knowledge of any such exceptions. The attorney may also be more experienced at finding alternative ways of obtaining the same information, or at least at limiting the effects of information that cannot be adequately addressed.

Therefore, informality\textsuperscript{103} and the often insistent repetition of the admonition that termination proceedings are not intended to be adversarial,\textsuperscript{104} punitive,\textsuperscript{105} or complicated,\textsuperscript{106} merely serve to under-

\textsuperscript{102} In Greene v. McElroy, 360 U.S. 474 (1959), petitioner was discharged from his position as an aeronautical engineer because of the revocation of his security clearance by the Industrial Employment Review Board. Allegations that he was a security risk because of his association with known members of the Communist party were presented and proven at the hearing, with the board relying on confidential reports never made available to petitioner. The Supreme Court, in discussing the importance of the right of cross-examination, said:

\begin{quote}
 Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. . . . [This Court] has spoken out not only in criminal cases, . . . but also in all types of cases where administrative and regulatory actions were under scrutiny. . . . [U]nder the present . . . procedures not only is the testimony of absent witnesses allowed to stand without the probing questions . . . but, in addition, even the members of the clearance boards do not see the informants or know their identities. . . ."
\end{quote}

\textit{Id. at 496-98.} Obviously, the problem addressed by the Court is similar to that faced by a parent who is confronted with a juvenile court's use of confidential reports, especially those regarding suspected child abuse. As mentioned in note 83, supra, the use of such reports may put a severe burden on a parent. In Levine, \textit{Access to "Confidential" Welfare Records in the Course of Child Protection Proceedings, 14 J. Fam. L. 535 (1976)}, it is further suggested that the reliability of the information in the reports may be compromised by the use of non-experts who interpret and compile this information. The reports typically contain "notations from interviews with family members, opinions and statements from various informants and experts, and psychological and medical material. Although they are clearly essential to the function of child welfare agencies, . . . child welfare records have been notorious repositories of opinion, hearsay, and gossip." \textit{Id. at 536.}

\textsuperscript{103} See \textit{In re Bredendick, 74 Ill. App. 3d 946, 393 N.E.2d 675 (1979); In re Hewitt, 272 N.W.2d 852 (Iowa 1978); Ex parte Label, 350 Mo. 286, 156 S.W.2d 37 (1941); State v. Campbell, 325 Mo. 561, 32 S.W.2d 69 (1930).}

\textsuperscript{104} For an extensive analysis of litigants' rights to procedures and protections that are inherent in an adversarial proceeding, such as notice, discovery, right to counsel, and right to a speedy hearing, see Singleman, \textit{A Case of Neglect: Parents Versus Due Process in
score the lack of procedural safeguards often accorded parties faced with possible deprivation of a substantial or "fundamental" interest. That such safeguards should exist in a unique procedure such as termination seems clear. In this regard, it is appropriate to point out that *Lassiter* relied in part on the fact that not all termination proceedings have some of the less desirable characteristics previously noted. Yet, as *Goldberg v. Kelly* made clear, "procedural due process rules are shaped by the risk of error inherent in the . . . process as applied to the generality of cases, not the rare [ones]. . . ." Thus it is necessary to consider some of the factors which may, in the general sense, contribute to the risk of error inherent in the process.

As previously pointed out, the lack of adequate discovery mechanisms and the inability to rely on strict evidentiary rules to keep out reports and investigative materials based on hearsay are just two factors relevant to this inquiry. From the standpoint of representation of the parent, these disadvantages stand in marked contrast to the procedural advantages claimants enjoyed in the Social Security cases described in *Mathews*. There, the Court noted,
the inquiry is more focused,111 relies mostly on medical reports,112 and the recipient is entitled to see all of the reports made by the various governmental agencies113 in preparing for his "nonadversary"714 case. Thus, while Social Security claimants are apprised of specific, regulated grounds115 for claims determinations and the proof upon which the government may rely, the parent in termination proceedings is sometimes forced to guess at both the nature of the government's claims and the supporting evidence.

But there are other more serious points about parental termination proceedings in general which serve to increase both the already heavy burden on the parent116 and the possibilities of making a determination without adequate consideration of all possible facts, inferences, and arguments that could be presented by counsel. In much the same manner that many criminal statutes have been attacked on constitutional grounds, many litigants have challenged termination or neglect proceedings statutes on the ground that they are vague and therefore unenforceable.117 While some of these challenges have been successful,118 the majority have failed.119 Perhaps because of the inherently difficult task of defining abuse and neglect, these statutes must necessarily be somewhat vague. Indeed, at least one court has implied that the emphasis on the child's welfare and the necessary involvement of interests of more than one party should result in a loosening of the standards by which we determine how much vagueness is constitutionally permissible.120 Whether this conclusion is right or wrong, however,

111. Id. at 343.
112. Id. at 344.
113. Id. at 338.
114. Id. at 339.
115. Id. at 335-36.
116. A parent seeking to prevail against the State must be prepared to adduce evidence about his or her personal abilities and lack of fault, as well as proof of progress and foresight as a parent that the State would deem adequate and improved over the situation underlying a previous adverse judgment of child neglect.
117. See, e.g., Alsager v. District Court of Polk County, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd on other grounds, 545 F.2d 1137 (8th Cir. 1976), in which the petitioners, whose parental rights had already been terminated, filed a civil rights action challenging the constitutionality of the Iowa neglected children statute both on its face and as applied.
there is no question that these statutes, which necessarily incorporate many subjective standards, are often vague; and this vagueness has several implications for the parent.121

First, this vagueness invites the courts to base decisions far more on notions of morality than psychological benefit or detriment122 or particular actions by the parents. Perhaps because of this, these statutes tend to be used most against persons of the lower socioeconomic strata, especially those on public assistance.123 These statutes often focus on vague notions of relationships, proper care or control,124 moral upbringing,125 depravity,126 emotional well-being,127 and other factors that may not in any sense of the word be associated with any specific parental actions or abuse of a clear legal mandate. Although this may be both necessary and appropriate, it nevertheless increases the possibility of leveling charges against a parent who is unaware that his conduct could in any way be considered inappropriate in the sense that it may lead to the breakup of his or her family. At the same time, it decreases the likelihood that a parent will be put on notice adequately or will be able, in any true sense, to contend for his cause or change his be-

121. The court in Alsager suggested that this vagueness could possibly be cured by a state law construction limiting it, but then suggested that the evil of vagueness is further compounded by the use of a "substantial evidence" standard on appeal. 406 F. Supp. 10, 19-20 (1976). See infra text accompanying notes 143-45. The problem is exacerbated by the difficulty of defining some of the relevant terms, especially "child abuse." As one author has stated:

A paradox of legal definition is that the more comprehensive it [the definition] appears, the less it may actually permit to be achieved. All-embracing definition may decay into mere description. Courts, especially when asked to intervene in protected human relations such as exist between parents and child . . . require precision. The precisely-sharpened legal scapel may enter where the blunt-edged hatchet has no access, and the tendency to legislate a rude hatchet attack upon abusive parents may be self-defeating. Widely phrased formulae may become applicable to acts and persons they were not intended or expected to cover . . . The opposing risk to a court being too hard to persuade of legislation's applicability to a specific case or incident, namely that the court is too easily persuaded, is no more acceptable.

Dickens, Legal Responses to Child Abuse, 12 Fam. L.Q. 1, 4-5 (1978).
123. For a discussion regarding the greater likelihood of a poor family's being subjected to allegations of neglect and similar charges, see Kay & Phillips, Poverty and the Law of Child Custody, 54 Calif. L. Rev. 717, 733-39 (1966).
125. Id.
behavior in a way that is acceptable to the court.\textsuperscript{128}

In addition, a parent is also likely to be faced with the problem of addressing grounds which he had no intention of violating.\textsuperscript{129} Clearly, the focus of a termination proceeding is not, and should not be, on the existence of any malice or criminal intent on the parent's part. Yet, in the case of a parent with an unconventional or arguably immoral\textsuperscript{130} lifestyle, the fact that his notions of child rearing are well thought out and well intended\textsuperscript{131} may be relevant to the question of whether the child's best interests are being considered. It is entirely possible that conduct found violative of a statutory scheme in one court may be seen by another court as an innovative and thoughtful approach to raising a child.

Probably the clearest and most often cited ground for termination which may be contrary to the notion that intent is not required is the ground of abandonment.\textsuperscript{132} Since many statutes avoid the difficulty of defining intentional abandonment by substituting certain specified lengths of separation of parent and child as grounds for termination, several in essence retain abandonment,

\textsuperscript{128} In \textit{Alsager}, for instance, the District Court identified what it saw as three inherent dangers of vague statutes such as those leading to parental rights terminations. They are the absence of fair warning of exactly what kinds of behavior are prohibited by the statute, the improper delegation of discretionary powers of construction and enforcement to the courts, and the undue inhibition of protected constitutional rights. The petition in \textit{Alsager} stated that the parents "substantially and continuously and repeatedly refused to give their children necessary parental care and protection and . . . said parents are unfit by reason of conduct detrimental to the physical and mental health or morals of the children." 406 F. Supp. 10, 13-14, 18 (S.D. Iowa 1976). \textit{Cf. In re T.M.M.}, 267 N.W.2d 807, 813 (N.D. 1978) (Petition did not provide sufficient notice to allow parents to prepare and participate meaningfully in the hearing).

\textsuperscript{129} Obviously, the requirement of \textit{mens rea} in criminal law takes this consideration into account.

\textsuperscript{130} \textit{E.g.}, \textit{Ga. Code Ann.} \S\ 24A-3201(a)(2) (1981) provides for the termination of parental rights with respect to a child who is "deprived." Section 24 A-401(h)(1) defines "deprived child" as a child who "is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals. . . ." (emphasis added).

\textsuperscript{131} In \textit{Alsager}, the Court mentioned the problems that would face a parent who imposed upon his child a rigid scheme of discipline which he felt appropriate to a proper upbringing. 406 F. Supp. at 18. Because of this problem, some statutes provide an exception which is intended to prevent infringement upon the parent's right to act in accordance with religious beliefs. \textit{See, e.g.}, \textit{Okla. Stat. Ann.} tit. 10, \S\ 1101(d) (West Supp. 1981-1982) which states: "Provided, however, no child who, in good faith, is being provided with treatment and care by spiritual means alone in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to be a deprived child. . . ."

constructive or real, as a primary ground for termination. Thus, a parent facing a termination based on a specific length of separation, whether intentional or not, may be unaware of the appropriateness of presenting reasons for the separation and evidence regarding its effects on the existing parent-child relationship. The presence of an attorney would certainly increase the likelihood that such an argument would be made by the parent.

These characteristics of vagueness, the lack of requirement of any specific act or acts, in the absence of any specific intent, all create potential notice problems affecting the adequacy of the representation of the parental interests. What then becomes of a parent brought into this legal process? What sort of allegations or proof must he be prepared to meet?

These questions become all the more important in light of the fact that the petition alleging grounds for termination usually need not be very specific to warrant action by the court. And it is likely that a parent will find a rather lax attitude on the court's part regarding verification, specificity, time limits, and other

134. See supra note 128, which describes the language used in the Alsager petition. The Model Act, supra note 3, § 9 commentary, in recognition of this problem, states:

Particular attention has been given to recent cases, such as Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (1976), which held the Iowa termination notice procedure violative of the parents' due process rights. Paragraph (6) of subsection (a) thus requires that the petition not only state the facts on which termination is sought, but must also refer to the particular legal standard from Sections 3 and 4 that apply. These requirements are designed to meet the new due process demands for precision in defining concepts like the quality of parental care and the meaning of neglect. . . . The assumption of subsection (a)(6) above is that these requirements for a new specificity in termination proceedings will prevent the issuance of termination decrees based on vague and undefined statutory generalities. Furthermore, compliance with the requirement of subsection (a)(6) will facilitate the emphasis placed by the Model Act on provision of right to counsel. . . . As a result of subsection (a)(6), counsel for either parent or the child will now immediately know the allegations on which the case for termination is based since these must be stated specifically in the petition. There is the further requirement that the effect of a termination decree must be clearly stated. If these data, the information identifying the petitioner, and the nature of the relationship between the petitioner and the child are not given, the court must dismiss the petition. Without such information parents whose rights to the custody and control of their children have been challenged cannot adequately prepare a defense.

135. KAN. STAT. ANN. § 38-817(a) (1981) provides that on filing of a petition to declare a child to be delinquent or deprived, the district court shall fix a time for hearing which "shall be within two (2) weeks . . . ." (emphasis added). However, the Court of Appeals of Kansas has held the statute to be discretionary, not mandatory, thus rejecting the argument that noncompliance with the statute defeats jurisdiction. In re Flournoy, 5 Kan. App. 2d 220, 613 P.2d 970 (1980).
technical aspects of these proceedings. But beyond that, the differences between these proceedings and many others seem to create a system in which all cards are unnecessarily stacked against the unwitting parent. For example, while some statutes provide a right to jury trial, this is by no means a general rule and is probably not constitutionally mandated. Furthermore, typical rules of privilege and confidentiality are often abrogated specifically to allow the use of testimony in termination proceedings. Once the evidence has been heard, the judge or referee is generally required to make findings of fact and a decision based on a standard of preponderance of the evidence, clear and convincing evidence, or other standards set by statute or case law. Moreover, the traditional appellate standards are even more onerous for a parent, since many do not require reversal except upon a finding that the decision is based on an abuse of discretion, is clearly erroneous, or other such strict standards. Nebraska, which allows a


137. Although the Supreme Court has not yet addressed this question, the Court held in McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971), that a juvenile being tried on a criminal charge in a juvenile court was not constitutionally entitled to a jury trial. Singleman, supra note 104, at 1084, takes the position that the lack of a jury, when taken in conjunction with the fact that most of these proceedings are closed to the public, removes the hearings from public scrutiny, which could impair the parent's right to a fair hearing. She suggests the possible use of advisory juries to cure the problem.


144. See In re Welfare of Solomon, 291 N.W.2d 364, 367 (Minn. 1980).

trial de novo in the supreme court, is clearly an exception to the rule.\textsuperscript{146}

These characteristics of the general scheme of termination statutes have at times been justified on the grounds that these proceedings are intended to be informal or flexible\textsuperscript{147} or that all technical rules and rights are subordinate to the best interests of the child.\textsuperscript{148} All, however, are relevant to a critical analysis of the Court's use of the third factor in the \textit{Mathews} test, specifically, the risk of erroneous deprivation.

\section*{IV. Risks Created by the Intrinsic Complexity of the Inquiry}

It is essential to make further note of the situation in which the \textit{Mathews} Court made the risk of erroneous deprivation an important factor. In \textit{Mathews}, the Court had to decide whether a disability payment recipient whose benefits were being terminated was entitled to a hearing before the termination took place.\textsuperscript{149} The Supreme Court emphasized several important elements of the challenged proceedings. First, it noted that the sole interest of the recipient was in the "uninterrupted receipt of his benefits"\textsuperscript{150} and that "[i]n the event of wrongful termination, other government

\begin{itemize}
\item \textsuperscript{146} See \textit{In re Carlson}, 207 Neb. 540, 299 N.W.2d 760 (1980).
\item \textsuperscript{147} See, e.g., \textit{State v. McMaster}, 259 Or. 291, 486 P.2d 567 (1971).
\item \textsuperscript{148} \textit{In re David}, ___ R.I. ___, 427 A.2d 795, 800-01 (1981) was a case in which the father whose rights were terminated asserted that the Rhode Island statute was unconstitutionally vague and that the standard of proof required was "beyond a reasonable doubt." Regarding the standard of proof assertion, the court stated: "[W]e must be careful, in erecting an edifice of impenetrable procedural safeguards in favor of parents, that we do not neglect to protect the interests of children who are often the helpless victims of parental neglect or abuse." \textit{Id.} at ___, 427 A.2d at 800. In rejecting appellant's claim of vagueness, the court held:

[T]he person whose conduct was alleged to have violated the statutory standard has reasonable notice of such violation in the context in which the issue arose. . . . This is not a matter merely of interference with a private right by a state agency. The process involves the determination of the right of a minor child to . . . spend the remainder of his or her childhood in a family setting in which the child may grow and thrive. . . . [W]e have long espoused the position that the rights of parents are a most essential consideration, but we further recognize that the best interests and welfare of the child outweigh all other considerations.

\textit{Id.} at ___, 427 A.2d at 801 (citations omitted).
\item \textsuperscript{149} \textit{Mathews v. Eldridge}, 424 U.S. 319, 323 (1976).
\item \textsuperscript{150} \textit{Id.} at 340.
benefits [would]... become available." Furthermore, if the initial decision was deemed incorrect, the recipient was "entitled to retroactive payments." The emphasis on these facts makes it clear that the "risk of erroneous deprivation" comprises at least two components. First, there is the question of reliability of procedures, that is, whether the procedures are adequate to insure a high degree of predictability and correctness in the decision making process. The second is the question of whether an erroneous deprivation will work a substantial or irremediable harm upon the rights of the party involved. On both of these questions, the Court in Mathews found the procedures and the consequences to be acceptable. It is precisely because of these two facets of risk, however, that Lassiter seems to misweigh the Mathews factors.

Despite the lack of uniformity in the various procedures and vocabulary, almost all termination of parental rights proceedings focus primarily on the "best interests of the child." This standard, unlike the question of a worker's "physical and mental condition" which the Mathews Court described as "a sharply focused and easily documented decision," is a very complex and difficult one to apply. It is made even more complicated since the child's

151. Id. at 342.
152. Id. at 340.
155. E.g., Ind. Code Ann. § 31-6-5-2(a)(3) (Burns 1982) requires that a petition for termination include an allegation that termination is in the child's best interests. The "best interests" test has been criticized on a number of grounds, not the least of which is its tendency to be used as an excuse for evaluating every aspect of a parent's private life and often as a tool for the unwarranted infringement upon a parent's right to exercise his religion, associate freely with others, and travel as he wishes. Wis. Stat. Ann. § 48.426(2) (West Supp. 1981-1982) states that "[t]he best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter." See also Boskey & McCue, Alternative Standards for the Termination of Parental Rights, 87 SETON HALL L. REV. 1, 21-22 (1978); Comment, Child Custody: Best Interests of the Children v. Constitutional Rights of Parents, 81 DICK. L. REV. 733 (1977).
156. 424 U.S. at 343.
157. Id.
158. See Foster & Freed, Child Custody (pt. 1), 39 N.Y.U. L. REV. 423 (1964), in which the authors discuss the competition between two of these principles — making a custody award in accordance with the best interests of the child, yet not depriving a natural parent, especially a mother, of custody unless "unfit." The writers suggest that courts often consider criteria which are inadequate, in that these criteria "fail to force courts to consider essential factual, social, medical, and psychological information." Id. at 438. See also Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties, 73 YALE L.J. 151 (1964) [hereinafter cited as Alternatives], in which the author states that the "proper cus-
best interests may have already been sharply interfered with by previous placement in foster homes,\textsuperscript{159} shifting from one institution or home to another,\textsuperscript{160} lack of adequate counseling,\textsuperscript{161} and a host of other possible problems. Nevertheless, the "best interests" standard seems to prevail. Thus, the question which must first be asked about the risk of erroneous deprivation is whether procedures generally employed in termination cases have the necessary indicia of reliability and predictability to warrant the Supreme Court's refusal to hold that the right to appointed counsel exists in all such cases brought by the state. As such, it is incumbent upon us to examine the various complexities of the decisions made in the best interests of the child and to ask whether the presence of an attorney as a general rule can substantially reduce the risk of erroneous deprivation.

When the Court notes that "the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high,"\textsuperscript{162} it takes too restrictive a view of the nature of such proceedings. Evidence of todays goal" — maximizing the interests of the child — can be furthered by the court's concentrating on the psychological well-being of the child. Id. at 156-57. Moreover, it is suggested that continued emphasis on the parental right doctrine and the procedural devices favoring the natural parent are defensible in these terms only by an intuitive but incomplete psychological generalization that a "blood tie" between parent and child will eventually result in more and better love and, hence, in a more adequate psychological development of the child. Id. at 157-58 (citations omitted).

While the articles focus generally on disputes between parents and third parties, they nevertheless point up the difficulties posed by the construction and use of such seemingly simple tests as "the best interests of the child" or "the parental right." One response to this course has been the proposal of a test known as the "least detrimental available alternative for safeguarding the child's growth and development." J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child 53-64 (1973) [hereinafter cited as Goldstein].

159. At least one study of a Massachusetts foster care program indicates that more often than not, placement outside the child's home is permanent. The study also indicated that children in foster care rarely received adequate counseling and that very little was done to prepare or support foster parents. A.R. Gruber, Children in Foster Care: Destitute, Neglected . . . Betrayed 176 (1978). This could prove to be especially difficult for a parent in a state where a parent with a child in foster care is said to have an affirmative duty to work towards the eventual return of the child to his care. See In re William L., 477 Pa. 322, 383 A.2d 1228, 1233 (1978), cert. denied, 439 U.S. 880 (1978).


161. See supra note 159.

the fact that these proceedings will not always be complicated is partly found in *Lassiter* itself. No experts testified at the hearing and the "case presented no specially troublesome points of law. . . ."\(^{163}\) Likewise, the Court found that hearsay evidence was admitted.\(^ {164}\) Furthermore, it is obvious from the transcript that Ms. Lassiter did not have even a rudimentary understanding of the nature or purpose of cross-examination.\(^ {165}\) Because the Court found that such lack of complexity may exist in many cases, it concluded that it is more sensible to judge each case on its own merits.\(^ {166}\)

There are several inherent difficulties with this approach. First, it is virtually impossible for the trial judge to recognize the possible legal or evidentiary problems until after the evidence has been presented; and it is obviously too late then to decide that counsel is needed to help the parent. As the dissent notes, "[d]etermining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case."\(^ {167}\) Furthermore, to assume that such anticipation consists solely of recognizing and utilizing traditional theories and approaches previously employed by statutes, cases, or commentary, makes the common law system appear to be virtually ignorant of change and development.

Perhaps even more importantly, however, there is an added burden placed on a court. While the system is an adversarial one in which the interests or desires of the child, the parents (or two parents in conflict), and the state, may all be quite different, the juvenile court is generally admonished to act in accordance with the best interests of the child. In order to achieve this end, a court must sometimes compare the consequences of returning the child to his home with those of lengthening an extant foster care placement or severing the parent-child relationship entirely.\(^ {168}\) This comparison may, and should, be an enormously complicated procedure, especially given the plethora of psychological, sociological,

\(^{163}\) *Id.* at 32.

\(^{164}\) *Id.*

\(^{165}\) *Id.* at 54-55 (Blackmun, J., dissenting).

\(^{166}\) *Id.* at 32.

\(^{167}\) *Id.* at 51 (Blackmun, J., dissenting).

\(^{168}\) See, e.g., Wis. Stat. Ann. § 48.426(3)(f) (West Supp. 1981-1982) (requiring that the court consider whether termination will enable the child to enter into a more stable family relationship, taking into account "the conditions of the child’s current placement, the likelihood of future placements, and the results of prior placements").
psychiatric, and legal literature and thought on these subjects.

For example, Goldstein, Freud and Solnit have suggested in their controversial\(^6\) book *Beyond the Best Interests of the Child*\(^7\) that the courts adopt at least three guidelines that should always be taken into account in making placement decisions. While these guidelines are neither universally accepted nor necessarily exhaustive of all appropriate considerations, they nevertheless provide at least one framework for decision which has been used by some courts.\(^8\)

169. The word controversial is used advisedly. While the book was cited by the Supreme Court of the United States in *Smith v. Organization of Foster Families*, 431 U.S. 816, 841 (1977), not all courts utilizing the book have enthusiastically embraced all of its premises or implications. One of the most outspoken critics, for instance, has been Judge Nanette Dembitz of the New York Family Court. With respect to the authors’ attempt to provide a psychoanalytically based theory to produce useful guidelines to govern judicial decisions regarding placement, she has said that “[t]he promise is seductive but impossible. . . .” Dembitz, *Beyond Any Discipline’s Competence* (Book Review), 83 YALE L.J. 1304, 1304 (1979). Nevertheless, she does concede that the book does “make several persuasive points concerning child care controversies.” *Id.* For a rather comprehensive survey of the book’s reception by lawyers, social scientists, and judges of various courts, see Crouch, *An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child*, 13 FAM. L.Q. 49 (1979).

170. GOLDSTEIN, supra note 158. The primary focus of the book is the use of the “psychological parenthood” theories, especially as such theories may lead to decisions which conflict with the rights of the biological parent. According to the authors, for the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become his “psychological parent” in whose care the child can feel valued and wanted. An absent biological parent will remain, or tend to become, a stranger.

*Id.* at 17. Furthermore they state:

> Whether any adult becomes the psychological parent of a child is based thus on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult — but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.

*Id.* at 19 (emphasis added).

In order to explain more fully concepts utilized by them and to make implementation of such by a legislature easier, the authors suggest certain provisions for a model child placement statute. *Id.* at 97-101. Paragraph 10.6 of this model statute defines the “least detrimental available alternative” as “that child placement and procedure for child placement which maximizes, in accord with the child’s sense of time . . . , the child’s opportunity for being wanted . . . and for maintaining on a continuous, unconditional, and permanent basis a relationship with at least one adult who is or will become the child’s psychological parent. . . .” *Id.* at 99. The authors prefer this as a substitute for the test which looks only to the best interests of the child. *Id.* at 53-64.

171. One of the first cases to embrace similar types of theories was *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, 156-58 (1966), *cert. denied*, 385 U.S. 949 (1966), a decision
First, the authors suggest that placement decisions should safeguard the child’s need for continuity of relationships.\textsuperscript{172} Even this seemingly simple guideline is fraught with potential difficulties in application. Disruptions in continuity tend to have different consequences at different ages.\textsuperscript{173} Changes affecting continuity may have

which denied a father custody in a habeas corpus proceeding against his wife’s parents after her death. Though the father was apparently fit, the court found that custody by the grandparents was in the best interests of the child. The decision has been described as “arguably defensible in light of the psychological testimony relating specifically to the instability that would be caused by a change in custody.” Comment, Recent Cases, 79 Harv. L. Rev. 1710, 1715 (1966).

For references to Goldstein, supra note 158, as support for each theory, see, for example, Ex parte Henderson, 387 So.2d 201, 203 (Ala. 1980) (referring to the psychological parent-child relationship which had developed between child and appellees); In re Angelia, \textsuperscript{158} Cal. 3d \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}623 P.2d 198, 171 Cal. Rptr. 637 (1981) (noting the author’s recommendations of the least detrimental available alternative tests); In re Juvenile Appeal, 177 Conn. 648, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}420 A.2d 875, 883 (1979) (citing psychiatrist’s opinion that a babysitter had become child’s psychological parent); Rodriguez v. Koschny, 57 Ill. App. 3d 355, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}373 N.E.2d 47, 52 (1978) (disrupting continuity of relationship between child and psychological parents as basis for terminating natural mother’s rights); In re Joseph, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}Ind. App. \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}416 N.E.2d 857 (1981) (regarding the need for continuity of relationships); In re Guardianship of D., \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}169 N.J. Super. 230, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}404 A.2d 663, 667 (1979) (quoting from Goldstein, supra note 158, regarding attachment to persons providing comfort and affection — the psychological parent); Nehra v. Uhlar, 168 N.J. Super. 167, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}402 A.2d 264, 268 (1979) (stating that “the real problem which transcends all other considerations still exists — namely, whether the removal of the children from their present stable environment will harm them psychologically . . . .”); Doe v. State, 165 N.J. Super. 392, 406, 398 A.2d 562, 569 (1979) (noting the suggestion that the child have his own representative in litigation); In re Sanjivini K., \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}47 N.Y.2d 374, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}319 N.E.2d 1316, 1322, 418 N.Y.S.2d 339, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}339 (1979) (Fuchsberg, J., concurring) (noting that had disruption of child’s relationship with foster parent occurred, natural mother could not be getting custody); Filler v. Filler, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}219 N.W.2d 96, 98 (N.D. 1974) (referring to the least detrimental available alternative); Reflow v. Reflow, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}24 Or. App. 365, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}545 P.2d 894, 899 (1976) (stressing continuity in family environments as most important part of child’s development); In re Williams, 477 Pa. 322, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}383 A.2d 1228, 1241, cert. denied, 439 U.S. 880 (1978) (regarding continuity of relationship as important to a child); In re Tremayne, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}286 Pa. Super. 480, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}429 A.2d 40, 48 n.6 (1981) (regarding the need for continuity of relationships, especially in early childhood); In re Kegel, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}35 Wis. 2d 574, \textsuperscript{158} \textsuperscript{158} \textsuperscript{158}271 N.W.2d 114, 120 (1978) (Abramson, J., dissenting) (noting the great controversy over the psychological parent-child relationship).

172. Goldstein, supra note 158, at 6, 31-40. See also New Developments in Foster Care and Adoption, chs. 3, 6 (J.P. Triseliotis ed. 1980). In Note, Measuring the Child’s Best Interests — A Study in Incomplete Considerations, 44 Den. L.J. 132 (1976) [hereinafter cited as Measuring], the author uses Painter v. Bannister, 258 Iowa 1390, N.W.2d 152, cert. denied, 385 U.S. 949 (1966), as an example of the incomplete and often inappropriate consideration by courts of sociological factors bearing on the question of the child’s best interests. The author concludes that the Painter court’s emphasis on security and stability, for example, seemed to place a high value on mediocrity, since it may have favored stability over possible intellectual stimulation available in the father’s home. Measuring, supra this note, at 144. For a discussion of the comparative strengths of the parental rights, best interest, and psychological well-being “tests,” see Alternatives, supra note 158.

173. Goldstein, supra note 158, at 32-34.
adverse effects on everything from a child's eating and sleeping habits, to his ability to make emotional attachments, his cleanliness and speech, and the possible development of dissocial and delinquent or criminal behavior. And since terminations are permanent, the appropriate weighing of this factor against others seems all the more critical.

The second suggested guideline is the child's, not the adult's, sense of time. To a great extent, such a consideration seems to be directly contrary to the normal use of legal time limits. The law of abandonment, in which time and length of separation are most relevant, "rests primarily on the intent of the neglecting parent, not on the duration of his or her absence." Despite the extent to which time factors are considered relevant in and of themselves, terminations usually require a specified period of time in the one year range. Apparently then, under many statutes' separation grounds, the child's sense of timing and perception of the length of separation are far less important in determining the quality of existing relationships than are arbitrary rigid time requirements.

It is self-evident that a parent facing termination may find it important to focus on the quality of relationship developed or the particular effects of a certain length of separation on the individual child. While the child's age may be particularly germane to the way in which he reacts to long term separations, these reactions may also be a product of the individual child's intelligence, background, and life experiences. Many of these factors may not seem relevant to a parent. Thus, an attorney for the parent would be the one most likely to bring these factors to the court's attention, thereby increasing the amount of relevant information the court could use in making a decision.

Finally, the authors suggest that any placement decision should take into account the law's inability to effectively supervise inter-

174. Id. at 34 & n.2.
175. See supra note 11.
176. GOLDSTEIN, supra note 158, at 40-49.
177. Id. at 47 & n.25.
178. See, e.g., IND. CODE ANN. § 31-6-5-4(1) (Burns 1982) (requiring a minimum of six month's separation of parent and child before a petition to terminate the relationship can be filed with the juvenile or probate court); TENN. CODE ANN. § 37-246(d)(1) (Supp. 1981) (requiring that the child be separated from the custody of the parents for a minimum of one year before the courts will terminate parental rights).
179. See, Family Integrity, supra note 160.
personal relationships and to make long range predictions.\textsuperscript{181} Since a termination of parental rights necessarily ends the relationship between parent and child, the predictability and reliability of such decisions is critical. In order to make an appropriate decision in the best interests of the child, a court must be sure before terminating the relationship that, if it was ever meaningful, it will not continue to be so\textsuperscript{182} or cannot be reestablished.\textsuperscript{183} Furthermore, predictability is enhanced by a close and careful look at the emotional stability of both the child and the parent or parents; and therefore, a careful and detailed professional evaluation of both may be critical.

It is clear that these specific guidelines have not been enthusiastically embraced by all courts hearing termination cases. Nevertheless, granting even marginal validity to these theories suggests that adequate and zealous representation\textsuperscript{184} of the rights of the involved parents should include at least a consideration of these factors. An approach suggesting that any case which appropriately considers these factors is “not complicated”\textsuperscript{185} and does not involve any “specially troublesome points of law”\textsuperscript{186} is both too naive and too callous to effectively consider the child’s best interests.

V. THE INHERENT RISK OF ERRONEOUS DEPRIVATION OF A FUNDAMENTAL RIGHT

At least one commentator has suggested that the \textit{Lassiter} decision reflects an unwillingness by the Supreme Court to reverse Ms. Lassiter’s termination based solely on the trial court’s failure to appoint counsel, especially since the evidence favoring termination was so strong and compelling.\textsuperscript{187} Since it is anything but certain

\begin{itemize}
\item \textsuperscript{181} \textit{Id.} at 49-52.
\item \textsuperscript{182} \textit{See Tenn. Code Ann.} § 37-246(d) (Supp. 1981).
\item \textsuperscript{183} \textit{Id.}
\item \textsuperscript{184} \textit{See generally} Model Code of Professional Responsibility Canon 6, DR 6-101(A)(2) (1980).
\item \textsuperscript{185} Lassiter v. Department of Social Servs., 452 U.S. 18, 32 (1981).
\item \textsuperscript{186} \textit{Id.}
\item \textsuperscript{187} Besharov, \textit{Terminating Parental Rights: The Indigent Parent’s Right to Counsel after Lassiter v. North Carolina}, 15 Fam. L.Q. 205, 218 (1981). The author cites the Court’s own criticisms of Petitioner’s apparent lack of concern for her son:

\text{Here, the trial court had previously found that Ms. Lassiter had expressly declined to appear at the 1975 child custody hearing. Ms. Lassiter had not even bothered to speak to her retained lawyer after being notified of the termination hearing, and the court specifically found that Ms. Lassiter’s failure to make an effort to contest the termination proceeding was without cause.}

\textit{Lassiter}, 452 U.S. at 33. \textit{But see id.} at 57 (Blackmun, J., dissenting), in which Justice Black-
that all cases will be that strong in favor of termination, the second
part of the "erroneous deprivation" test becomes particularly im-
portant. The question is whether an appellate court's finding that
counsel should have been appointed will ever warrant a reversal
solely on that ground. To address this question, it will be necessary
to examine, once again, the time involved in a termination pro-
ceeding and its effect on the child. It then becomes clear that,
given the prevalence of such theories as "psychological
parenthood" and "common law adoptive parents" and the em-
phasis on ongoing relationships with the child, it may well be im-
prudent, as well as contrary to the best interests of the child, to
reverse the decision on appeal after the child has already spent a
great deal of time away from his parents.

Examination of this problem may best be done by tracing a ter-
minal case through its typical stages. More often than not, a ter-
mination case is heard in two stages, one fact finding and the
other dispositional. The fact finding has often taken place in the
context of a proceeding to determine whether the child in question
is deprived, neglected, abused, in need of supervision, or lacking parental supervision. Often, once a finding of need is

mun noted: "Petitioner has plainly not led the life of the exemplary citizen or model par-
... But the issue before the Court is not petitioner's character; it is whether she was
given a meaningful opportunity to be heard when the state moved to terminate absolutely
her parental rights." (citations omitted).

188. See Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949
(1966) (first major case which used this theory explicitly); Sorentino v. Family and Chil-
dren's Soc'y, 74 N.J. 313, 378 A.2d 18 (1977), aff'd, 77 N.J. 483, 391 A.2d 497 (1978); (where
the New Jersey Supreme Court was faced with the question of whether to return a child to
her natural mother, following a finding that the mother's consent for adoption was void,
when the child had been in the custody of the adoptive parents from one month after birth
to thirty-one months later). Stating the issue as whether transferring custody to the plaintiff
(mother) would raise the probability of serious harm to the child, the court held that cus-
tody should be granted to the adoptive parents with the case remanded to consider the
question of terminating the mother's parental rights. Though no specific mention was made
of GOLDSTEIN, supra note 158, or the phrase "psychological parenthood," the court noted
that "the Sorentinos have had no existing relationship (save one of blood) with the
child.... Here the passage of time permitted the roots [to the adoptive parents] to be
nurtured and to develop fully." 74 N.J. at —, 378 A.2d at 23.


190. See, e.g., IND. CODE ANN. §§ 31-4-4-15(f), 31-6-5-4 (West 1979); N.Y. FAM. CT. Act. §
623 (McKinney 1975).

191. See KAN. STAT. ANN. § 38-802(g)(1) (1981); UNIF. JUVENILE COURT ACT, § 47.


195. IND. CODE ANN. § 31-6-4-3(a)(1) (Burns Supp. 1982).
made, the child is then placed in the custody of the state welfare agency, or in an institution or foster home. At this point, there may be regular reviews of the situation to determine whether the child's deprivation is likely to continue or the prospects of rehabilitation of the family are sufficiently minimal to warrant severance of the parent-child relationship. Thus, by the time the trial court examines the question of termination the parent and child may have already been separated, with or without continuing supervision and counseling in the interim for a rather lengthy period of time.

Indeed, in Ms. Lassiter's case, she and her son had not even communicated with one another for several years by the time the termination question was heard. It is true that Ms. Lassiter's imprisonment presented an extraordinary situation in this regard, but the actual reason for the separation may not be relevant. The question that arises with Ms. Lassiter's case and others is whether the lengthy separation itself would produce the type of relationship between her son and foster parents that would warrant terminating the relationship with his mother solely because of the length of separation and the quality of the bond between the child and his present caretakers. It is this risk, that the separation time considered in conjunction with the best interests of the child will necessitate termination on its own, that makes the failure to require counsel so devastating.

Unfortunately a finding that the trial court erred on the question of appointment of counsel may be made too late to be remedied adequately. Unless the agency involved has made a concerted effort to counsel both parent and child during the entire process,

197. See IND. CODE ANN. § 31-6-4-19(b)(2) (Burns Supp. 1982).
198. See In re Welfare of Solomon, 291 N.W.2d 364 (Minn. 1980).
199. Lassiter, 452 U.S. at 21, 23.
200. See Smith v. Organization of Foster Families, 431 U.S. 816 (1977). See also Drummond v. Fulton County Dep't of Family and Children Servs., 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978), in which the foster parents maintained that during the time they kept a foster child, mutual feelings of love and dependence developed. They further asserted the existence of rights accorded traditional family units. Naturally, they claimed to be the child's "psychological parents." The court held, however, that no such constitutionally protected rights existed in that case. For further discussion of the effects of long term foster care, see J. Goldstein, A. Freud, & A. Solnit, BEFORE THE BEST INTERESTS OF THE CHILD (1979) [hereinafter cited as FREUD].
201. According to the Assistant Attorney General of North Carolina, once the state moves for termination, it "has made a decision that the child cannot go home and should not go
the breakdown of the family unit may be a \textit{fait accompli}^{202} by the
time the decision is appealed. Even with extensive counseling it
may occur, especially with a very young child.

It is therefore in the child's best interests to attach to the trial
court proceeding every safeguard of reliability possible. Otherwise,
an initially inappropriate termination may be made with the result
that it ultimately becomes unwise or impossible to reunite the fam-
ily. On the other hand, it may well be that an appropriately
granted termination will lead to a lengthy and difficult appeals
process, perhaps resulting in a reversal that is made solely because
the appellate court is unsure about whether the complete and most
important arguments, inferences, and proven facts were produced
at trial. This lengthy period of uncertainty, during which the child
may be the subject of unwarranted placement changes and trauma,^{203}
will obviously be contrary to the child's best interests.^{204}

Use of the psychological parenthood theories of Goldstein,
Freud, and Solnit again illustrates the inherent complexity of any
decision which is truly made in the best interests of the child. Of
course, the factors enumerated in their book are applicable not
only to termination cases, but also to any placement^{205} decision af-
flecting a child. But the finality and severity which accompany a
decision to terminate necessarily make those factors both more im-
portant and more complex.

At this point it is best to review some of the basic premises re-
ilied upon by the authors and by some courts to examine the extent
to which an erroneous termination and resulting extended separa-
tion may affect a family which, although not ideal, nevertheless
need not be destroyed. First, however, it should be reiterated that
the "best interests test" is utilized because courts recognize their
special duty as a result of the parens \textit{patriae}^{206} power, to insure the
well-being and development of those incapable of managing and

\footnotesize{home. It no longer has an obligation to try and restore that family. \ldots" Lassiter, 452 U.S.
at 47 (Blackmun, J., dissenting) (quoting Record at 40).

once the state has acted to remove a child from his house, placing him in foster care, the
bond with his psychological parents, if developed, should not be disturbed).

203. \textit{Goldstein, supra note 158, passim.}

204. \textit{See id. at 36, 39.}

205. \textit{See id. at 5, 7-8, 31-52.}

206. For a rather extensive treatment of the origins of the doctrine, see Rendleman,
\textit{Parens Patriae: From Chancery to the Juvenile Court}, 23 S.C.L. Rsv. 205 (1971).}
controlling their own affairs. Clearly, most courts recognize this power and the best interests of the child to be superior to any inherent fundamental rights of the parents.

In order to act in the child’s best interests, the courts must be cognizant of these premises and facts and act in accordance with them. According to the authors and many other authorities, every child has a need for continuity of affectionate and stimulating relationships with an adult or adults. This continuity and the strength of ongoing relationships are apparently more important than a blood relationship, since children have no conception of such. Thus, events leading up to a child’s birth are largely irrelevant to the child in terms of his emotional development. Most important to the child are the day to day interchanges with the adults who take care of him or her. On the strength of these interchanges, the person in whose care the child is more likely to develop satisfactorily is the one to whom the child becomes attached through the knowledge that this particular person tends to his or her everyday needs, both emotional and physical. Accordingly, the role of a “psychological parent” can be fulfilled by anyone who is the regular caring adult; but it is never filled by the absent or inactive person.

Obviously, then, there is a need to determine what is meant by an “absent” or “inactive” parent. The common and statutory law in this country probably closely approaches defining the “absent” or “inactive” parent within the concept of abandonment. While this elusive standard may take intent into account more than any other potential ground for termination, it is also often tied to a specific time frame. The standard is further complicated by the fact that the reason for the absence of the parent in the first instance may also be considered relevant.

209. Goldstein, supra note 158, at 12.
210. Id.
211. Id.
212. Id. at 19.
214. In re Juvenile Action No. S-264, 126 Ariz. 488, 616 P.2d 948 (1980). The state sought to terminate the parental rights of an imprisoned father who did not communicate with his children for three years before the action was filed. In affirming the dismissal of the state’s case, the Supreme Court of Arizona emphasized the fact that the father chose not to contact his children for reasons which included his inability to communicate well. The court held:
Many psychologists and experts in the field of child development, however, find that neither the reasons for separation nor the specific length of separation are necessarily determinative of what is in the best interests of the child. This factor alone explains the reluctance of some courts to utilize "psychological parenthood" theories. In Hoy v. Wills, for instance, the trial court virtually disregarded all of the expert's opinion regarding the formation of a psychological parenthood bond solely because the expert stated that a child who had been kidnapped and kept away from his parents for a great deal of time might then be more appropriately placed in the custody of the kidnappers, who had become the child's psychological parents. Many authorities feel that the most important factors are the positive nature of the new relationship, the continuity in the child's life, and the lack of continuing closeness with the biological parent.

These factors all combine to leave a court in search of some appropriate guidelines to follow. At least three appropriate guidelines are suggested by Goldstein, Freud, and Solnit. The first they suggest is that placement decisions should safeguard the child's need for continuity of relationships. This is especially troublesome in light of the Lassiter holding. If, as the authors suggest, instability of all mental processes during the period of development needs to be offset by stability and uninterrupted support, the appeals process with its inherent chance of modification or reversal, can only increase instability. It may be aggravated by haphazard foster care placements, which are sometimes characterized by rela-

The term abandon[ment] must be somewhat elastic and questions of abandonment and intent are questions of fact for the resolution of the trial court. . . . Although the best interests of the child are a valid factor in deciding an abandonment allegation, abandonment cannot be predicated solely on the best interests of the child. The appropriate test is "whether there has been conduct on the part of the parent which implies a conscious disregard of the obligations owed by a parent to the child, leading to the destruction of the parent-child relationship."

Id. at 950 (citations omitted).
216. Id. at 270, 398 A.2d at 111.
217. GOLDSTEIN, supra note 158, at 31-40.
218. As a consequence, the authors propose the following rule regarding timely hearings and appeals:

Trials and appeals should be conducted as rapidly as is consistent with responsible decisionmaking. The court shall establish a timetable for hearing, decision, and review on appeal, which, in accord with the specific child's sense of time . . . shall maximize the chances of all interested parties to have their substantive claims heard while still viable, and shall minimize the disruption of parent-child relationships. . . .

Id. at 24.
relationships that are too distant\textsuperscript{219} or perhaps too close.\textsuperscript{220} This is especially troublesome because in many cases the foster parents want to adopt, and cling stubbornly to the child,\textsuperscript{221} only to be forced after a great lapse of time to return the child to his natural parents.

Perhaps it is the second guideline,\textsuperscript{222} however, which poses even greater problems. The authors, who clearly believe that a child’s age affects his need for stability, his ability to cope with absence, and his sense of time, suggest that placement decisions should reflect the child’s sense of time, rather than the adult’s. This seems to be most appropriately applied to the abandonment question. But even in the absence of behavior that most courts would characterize as abandonment, the extended separation of parent and child during the litigation and appeals process may lead to the same result. The child may see his lack of interaction with his “real” parent as something akin to an abandonment of him. A child is said to be “not sufficiently matured to enable him to use thinking to hold on to the parent he has lost.”\textsuperscript{223} This can have far reaching effects. For instance, the authors suggest that for a child under five years an absence of parents for more than two months is beyond comprehension. They conclude that the “procedural and substantive decisions should never exceed the time that the child-to-be-placed can endure loss and uncertainty.”\textsuperscript{224} Certainly an appeal with the concomitant possibility of a reversal or remand increases uncertainty, especially when courts stay any further action until the appellate remedies of the parent are exhausted.

The third guideline recognizes that courts are hard pressed to supervise the sometimes tenuous relationship between parent and

\textsuperscript{219} Id. at 23-26.
\textsuperscript{220} Id. at 26.
\textsuperscript{221} For an extreme example of this kind of obstinate refusal to return a child to her rightful parents, see Grimes v. Yack, 289 Pa. Super. 495, 433 A.2d 1363 (1981). The adoptive parents attempted to keep a child, though the consent for adoption had been revoked by the natural mother. The adoptive parents, while pressing their claim for adoption of the child, attempted to have the court rule on the issue as if it were a custody case and thus focus on the best interests of the child, rather than the right of the mother to have her child returned to her. The court emphasized that this was an adoption proceeding, rather than a custody case, and was therefore not appropriate for a pure “best interest of the child” inquiry; however, the psychological parenthood argument was adamantly urged both by the appellant and amici.
\textsuperscript{222} See Goldstein, supra note 158.
\textsuperscript{223} Id. at 40. See also Freud, supra note 200, at 39-57.
\textsuperscript{224} Id. at 42.
child during this period of relative uncertainty. It also recognizes that some decisions, once made, are then beyond the possibility of sensible and meaningful correction. This guideline has perhaps been the most controversial part of the theories of psychological parenthood, at least those expressly advanced by Goldstein, Freud, and Solnit. The authors make an attempt to keep in perspective the notion that the law is inherently incapable of supervising interpersonal relationships. They assert that the law "may be able to destroy human relationships, but it does not have the power to compel them to develop." Thus, the likelihood that supervised visitation and the like will prevent a total and irreversible family breakdown in a manner consistent with the child's best interests is probably not very high.

Thus, a typical scenario may unfold as follows. On a given date, the parent is served with notice that his parental rights will be terminated because he or she has failed to provide proper and necessary parental care and protection to his or her children. Within the appropriate statutory time period, the parent appears in the juvenile court which has jurisdiction. Appearing before the judge, the indigent parent is asked whether he has counsel to represent him. Since he cannot afford to retain counsel, the court proceeds to weigh the various interests at hand to decide whether appointment of counsel is mandated by Lassiter. Upon a review of the pleadings and the reports in the file, the court finds that the case presents no especially complex points of law and that the state does not intend to call any expert witnesses. Based on a review of all of these factors, the court declines to appoint counsel for the indigent parent.

Finding that the state has met its burden of proof, the court terminates the parent-child relationship, placing the child in a foster home during the appropriate appeal period, assuming the child was not already in temporary care before the institution of this action. Some time after the final order is entered, the parent is able to retain counsel for the purpose of appeal. During the period between the hearing and the appellate decision, which is often substantial, the parent and the child are neither counseled nor encouraged or allowed to visit with one another.

225. Id. at 50.
226. Evidence indicates that the lack of contact between children in foster care and their natural parents is closely related to poor emotional adjustment and delayed return home. This lack of contact may well confuse the child and lead to insecurity about his personal identity. Moreover, it seems evident that even when rehabilitation of the family is not a
At the first level of appeal the termination is affirmed, the appellate court finding that there is substantial evidence to support the finding of the juvenile court. On appeal to the highest court of the state, or beyond, it is held that counsel should have been appointed in the first instance. The original decision made by the juvenile court and sustained by the intermediate appellate court is reversed. The juvenile court now appoints counsel to represent the parent in a proceeding where the entire purpose of the proceeding is ostensibly to act in the best interests of the child.

The juvenile court is now presented with an impossible dilemma. If the parent-child relationship was not an ideal one in the first place, and perhaps warranted a finding that the family was in need of some help, what should now be done if the child has formed a significant emotional attachment with his foster parents? What if those foster parents have now become the "psychological parents" of the child? Should the court ignore the best interests of the child and destroy the relationship that has formed during the extensive appeal period? Or should it ignore what is clearly the right of the parent to raise his own child? Even if the child’s best interests out-weigh the rights of the parents, is it in the best interests of the child to destroy his relationship with his parent or parents and possibly his siblings at this point?

The appointment of counsel in the first instance, of course, would not guarantee that this would never happen. It would, however, increase the likelihood that alternative theories are presented, that procedural and substantive questions are fully explored, and that necessary expert testimony regarding the complexities of the parent-child relationship is presented for the fullest possible consideration in the juvenile court the first time.

VI. Conclusion

It is clear that there are at least three serious problems with both the reasoning employed in and the ramifications of the Supreme Court’s decision in Lassiter. First, the Court has taken a rather restrictive view of the scope of its earlier decisions regarding the constitutional right of indigent citizens to have attorneys appointed at state cost to represent their own interests. The Court

realistic possibility, contact with the child's parents is of positive value to the child's sense of identity and self worth. New Developments in Foster Care and Adoption, supra note 172.
has clearly created and sanctified a presumption that such a right applies only in cases where the party's physical liberty is at stake. This presumption is obviously one of considerable strength when considered in conjunction with other appropriate balancing factors.

It is also manifest that the Supreme Court has a great deal of latitude in weighing the three components of the *Mathews* due process test. In *Lassiter*, the Court acknowledged the low priority of the state's economic interests and the high priority of the fundamental rights involved. Yet, the Court failed to take account of the fact that the structure and nature of most parental termination proceedings often leave the parent virtually incapable of adequately addressing the issues raised. The combination of exceedingly malleable grounds, lax evidentiary and procedural standards, and relatively low standards of proof required, unnecessarily infringes upon the parent's rights to notice and fair play. This jeopardizes the child's best interests, as well as the interests of the parent. Appointment of counsel would enhance not only the fairness of the proceedings, but also the reliability of results.

Finally, the recent adherence by many courts to theories of psychological parenthood and similar concepts ultimately increases the risk of erroneous deprivation of the rights of both the parent and the child involved. This risk becomes intolerably high in parental termination suits when an indigent parent is denied the right to appointed counsel. This risk has two distinct parts. First, there is the danger that the absence of counsel will result in an adversarial hearing that is not adversarial at all, at least not in its most desirable form. This stems from the likelihood that the hearing may not be conducted as zealously and creatively as possible. Hence the risk of not obtaining the best possible resolution would be unnecessarily increased, especially in light of the seemingly low cost of appointing counsel. Secondly, and perhaps more significantly, the risk created by not requiring the presence of counsel is closely related to the relative stability of the family at question. In other words, because the relationship between parent and child may deteriorate beyond repair during the litigation process itself, the lack of counsel may significantly increase the chances that the decision made by the trial court on the merits of the termination petition will have to be affirmed by an appellate court, regardless of its true merit.

It therefore seems more sensible, more humane, and more protective of the rights of all persons involved in a termination pro-
ceeding to attach to the original action every feasible and affordable indicia of reliability. The presence of an attorney to represent the rights of the parents is an appropriate way of making this entire process both fairer and more reliable.