Sidestepping *Lassiter* on the Path to Civil Gideon: Civil Douglas

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When describing the proceedings at the U.S. Supreme Court on March 18, 1963, the day the Court read its opinion in *Gideon v. Wainwright*, Anthony Lewis wrote in *Gideon's Trumpet*:

> A fourth state criminal case came from California, and Justice Douglas for a six-three majority said poor prisoners were entitled to free counsel for their appeals. To any informed listener it was obvious that this same rule must apply at trials and that *Betts v. Brady* was about to be overruled.[1]

The case that Lewis described is *Douglas v. California*.[2] The Court in that case held under Fourteenth Amendment due process and equal protection that indigent criminal convicts were entitled to counsel on their first appeal as of right. As between the two right-to-counsel cases handed down that day, *Douglas* was at least arguably the more pioneering case at the time. Yale Kamisar and Jesse Choper, the constitutional scholars, wrote this about the two opinions: "[I]f *Gideon* only toppled 'a bridge shaky and ready to come down,' *Douglas* may have dynamited some rather sturdy-looking ones."[3] Professor Kamisar went on to predict "that twenty years from now, perhaps sooner, *Gideon*, not *Douglas*, will be regarded as 'the other' right-to-counsel case handed down on March 18, 1963."[4]

History may have proved Professor Kamisar wrong on this point, but his prediction and Lewis's description lend fodder to an unexplored legal theory that has both instrumental and intrinsic value in the press to establish a civil right to counsel. This theory is "civil Douglas."

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[1] Anthony Lewis, Gideon's Trumpet 186 (1964).

[2] *Douglas v. California*, 372 U.S. 353 (1963).

[3] Yale Kamisar & Jesse Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 Minnesota Law Review 1, 7 (1963).

[4] Yale Kamisar, *Book Review*, 78 Harvard Law Review 478, 481 (1964) (reviewing Anthony Lewis's *Gideon's Trumpet*).

In this article I argue that the civil Douglas doctrinal path to a civil right to counsel on appeal is (perhaps paradoxically) more direct than the civil Gideon path to a civil right to counsel at trial. This is because the path to civil Gideon has to deal with the specter of *Lassiter v. Department of Social Services* and its inexplicable "presumption" against a civil right to counsel at trial when physical liberty is not at stake.[5] As a result, civil Gideon advocates have had to argue that the interests in their cases are equivalent to the physical liberty interest at issue in *Gideon* in order to gain traction under *Lassiter*; even cases involving the most important nonliberty interests, such as the right to parent, have yielded inconsistent results under this approach.

In contrast to *Lassiter* and the other access-to-justice at-trial cases that largely turn on the underlying substantive rights of the petitioner, the access cases on appeal turn instead on the procedural extent to which due process and equal protection demand a right to counsel.[6] Thus, for example, the Court in *Ross v. Moffitt* bound the right to counsel on appeal in *Douglas* to first appeals as of right, and not to subsequent discretionary appeals.[7] Moreover, access cases on appeal contain no *Lassiter*-like presumption. Therefore claims for civil Douglas need not rely first on those difficult arguments that equate the underlying rights of the petitioner to physical liberty interests. A civil Douglas claim thus sidesteps *Lassiter* and provides a clearer path to a civil right to counsel.

Once established, civil Douglas will be intrinsically useful because indigent appellants will have a categorical right to counsel. But it will also be instrumentally valuable: In the same way that *Douglas* presaged the downfall of *Betts* on that fateful March day in 1963, civil Douglas will mark the inexorable downfall of *Lassiter* and will be yet one more step in the direction of civil Gideon.

I offer one last introductory note. The civil Gideon movement, of course, is much more than a federal constitutional litigation movement. My proposal respects that. Thus I certainly do not offer civil Douglas as a panacea. Instead it is merely one additional step in the direction of civil Gideon, and any litigation toward civil Douglas must occur only within the larger context of a political movement. I pose my argument here in terms of Supreme Court jurisprudence to support constitutional arguments under those many state constitutions that follow Supreme Court doctrine in their own due process and equal protection clauses.

I. Background: Civil Gideon and *Lassiter*

The civil Gideon movement at every turn has had to deal with the scourge of *Lassiter v. Department of Social Services*. The Court in *Lassiter* applied the familiar three-part, Fourteenth Amendment due process test of *Mathews v. Eldridge* and held that civil litigants were entitled to a right to counsel only when the factors in the *Mathews* test overcame a presumption against a right to counsel in cases where physical liberty is not at stake.[8] The facts of *Lassiter*, a state-initiated termination-of-parental-rights case, presented a strong argument for a categorical civil right to counsel under *Mathews* because the civil defendant's interest (her parental rights) was quite high, the government's primary interest (the well-being of the child) overlapped with the defendant's interest, and the risk of an erroneous termination was demonstrably high.[9] Nevertheless, the Court in

[5] *Lassiter v. Department of Social Services*, 452 U.S. 18, 26–27 (1981) (Clearinghouse No. 29,118).

[6] The terms "access-to-justice cases" and "access cases" are used interchangeably to refer to cases in which access to judicial processes depends upon a right to counsel.

[7] *Ross v. Moffitt*, 417 U.S. 600 (1974).

[8] *Lassiter*, 452 U.S. at 31–32. Of course, by the time *Lassiter* came down, the categorical right to counsel was well established in cases where physical liberty was at stake. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that states must provide trial counsel to poor defendants faced with incarceration).

[9] *Lassiter*, 452 U.S. at 31.

Lassiter held that the petitioner had no right to counsel and that civil petitioners had no categorical right to counsel.[10]

Since *Lassiter*, civil Gideon advocates have been seeking to persuade courts of all stripes that the *Mathews* factors in the advocates' unique cases line up to overcome the presumption against the right to counsel.[11] Thus advocates seek to demonstrate a heightened interest on the part of the litigant and ultimately to equate the litigant's interest with physical liberty. They attempt to show that the government's interest is merely pecuniary, or that it aligns perfectly with the litigant's interest so that it does not affect the balance. They also try to show that the factors in their cases—such as the factual and legal complexities, the talent and skill of the opponent, and the handicap of the litigant—result in a singularly high risk of erroneous deprivation of a fundamental right.

In this vein, advocates pay particular attention to the petitioner's interests and repeatedly attempt to align them with the physical liberty interests in *Gideon* in order to overcome the *Lassiter* presumption. Parents' rights, because of their constitutional significance, have formed the basis of most of these claims. As if foretelling this strategy, Douglas J. Besharov wrote in a now-famous comment in the immediate aftermath of the *Lassiter* decision, "*Lassiter*, for all practical purposes, stands for the proposition that a drunken driver's night in the cooler is a greater deprivation of liberty than a parent's permanent loss of rights in a child."[12]

This strategy has yielded some success. The *Mathews* factors in certain individual cases—most frequently parental rights cases—overcome the *Lassiter* presumption against a constitutional right to counsel when physical liberty is not at stake, several states and at least one federal court have ruled.[13] The balance of the *Mathews* factors (or something like them) results in a state constitutional right to counsel in entire classes of cases, some state courts have even ruled.[14] But, notwithstanding its successes, this strategy of aligning underlying rights and focusing on interests under *Lassiter* has predictably yielded a spotty, patchwork landscape similar to the case-by-case landscape of the criminal right to counsel under *Gideon*'s precursor, *Betts v. Brady*.[15] This strategy then has been only partially successful in achieving a full civil right to counsel, a civil Gideon.

II. Sidestepping *Lassiter*: Civil Douglas

One way to avoid the necessary alignment of interests under *Lassiter* and its presumption is to avoid that case altogether: to sidestep it. One way to do this is to focus on a civil right to counsel on appeal, or civil Douglas. A good starting point is the case of *M.L.B. v. S.L.J.*, the 1996 Supreme Court case that provided

[10] *Id.* at 31–33 (holding that the Constitution does not require appointment of counsel in every parental termination proceeding).

[11] See., e.g., *In re Adoption of K.L.P.*, 735 N.E.2d 1071, 1075 (Ill. App. Ct. 2002) ("[The parent] maintains that due process principles as set forth in *Lassiter* … required the trial court to appoint her counsel under the facts of the present case."); see also cases cited *infra* notes 13 and 14.

[12] Douglas J. Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After* Lassiter v. North Carolina, 15 Family Law Quarterly 205, 221 (1981).

[13] See, e.g., *In re Powers*, 624 N.W.2d 472, 477–78 (Mich. Ct. App. 2001) ("The constitutional concepts of due process and equal protection also grant respondents in termination proceedings the right to counsel"); *State ex rel. T.H. v. Min*, 802 S.W.2d 625, 626–27 (Tenn. Ct. App. 1990) (holding that the balance of *Lassiter* factors weigh in favor of right to counsel in a state-initiated custody hearing); *Garramone v. Romo*, 94 F.3d 1446, 1449–50 (10th Cir. 1996) ("After balancing all the [*Lassiter*] factors, we conclude that, under the constitutional guarantee of procedural due process, [the petitioner] had a right to counsel at the [custody and neglect proceedings].").

[14] See, e.g., *K.P.B. v. D.C.A.*, 685 So. 2d. 750, 752 (Ala. Civ. App. 1996) (holding that Alabama constitutional due process requires appointment of counsel for indigents in termination of parental rights cases); *Matter of K.L.J.*, 813 P.2d 276, 286 (Alaska 1991) (holding that Alaska constitutional due process requires appointment of counsel for indigents in termination of parental rights cases); *In re Jay R.*, 197 Cal. Rptr. 672, 681 (Cal. Ct. App. 1983) (holding that California constitutional due process requires appointment of counsel for indigents in certain nonconsensual stepparent adoptions).

[15] *Betts v. Brady*, 316 U.S. 455 (1942) (holding that the courts should determine right to trial counsel in criminal cases on a case-by-case basis).

so much fodder for civil Gideon instigators.[16] A state may not, consistent with equal protection and due process, condition an appeal of a trial court decree terminating parental rights on the parent's ability to pay record-preparation fees, *M.L.B.* held.[17] The Court applied a conglomerated Fourteenth Amendment equal protection/due process approach:

> We observe first that the Court's decisions concerning access to judicial processes, commencing with *Griffin* and running through *Mayer*, reflect both equal protection and due process concerns.… [I]n the Court's *Griffin*-line of cases, "[d]ue process and equal protection principles converge." The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs.… The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action. A "precise rationale" has not been composed … because cases of this order "cannot be resolved by resort to easy slogans or pigeonhole analysis."[18]

In application, this approach amounted to a kind of doctrinal mapping exercise: The Court mapped out the cases in its access-to-justice jurisprudence and, through careful comparisons, located the *M.L.B.* case on that doctrinal map. The result was a comparison between *M.L.B.* and *Mayer v. Chicago*, a case which barred states from conditioning an appeal of a conviction for a petty offense (which involved no physical liberty interest) on the defendant's ability to pay a transcript fee.[19] The Court aligned the petitioner's interest in parental rights in *M.L.B.* with the defendant's interest in the collateral effects of a conviction in *Mayer*; the Court aligned the risk of error in each case and aligned the government's financial interest in each case.[20] Just as in *Mayer*, then, the Court in *M.L.B.* ruled that the appellate fee was unconstitutional.[21]

The Court in *M.L.B.* drew upon its conglomerated doctrine and freely compared access cases at both the trial level and the appellate level, seemingly conflating its access jurisprudence across due process and equal protection and across trial and appeal.[22] Notwithstanding its conflation and the resulting lack of a "precise rationale," a careful reading of these access cases cited in *M.L.B.* reveals two distinct trends in the Court's access jurisprudence.[23] First, the Court privileges questions of substantive rights over procedure in the cases involving access to trial. Second, and in contrast to its approach at trial, the Court privileges questions of procedure over substantive rights in the cases involving access to appeal. Taken together, these trends suggest that the doctrinal path to civil right to counsel on appeal is clearer and more direct than the path to civil right to counsel at trial.

A. Access at Trial: Substantively Bound

The Court's decisions related to access to trial courts are keenly attuned to the petitioner's interests and to alternative avenues of relief. When a petitioner's interests are high, the Court ensures equal access and overturns barriers; when interests are lower, the Court upholds barriers to access. The fee cases are excellent examples of this trend. In *Boddie v. Connecticut* the Court, relying

[16] *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (Clearinghouse No. 52,214).

[17] *Id.* at 123.

[18] *Id.* at 120 (citations omitted).

[19] *Mayer v. Chicago*, 404 U.S. 189 (1971).

[20] *M.L.B.*, 519 U.S. at 121–23.

[21] *Id.* at 128.

[22] *Id.* at 110–21.

[23] *Id.* at 120.

on fundamental associational rights (i.e., the rights to marry and, presumably, to divorce) and the divorce court's monopoly power over divorce in the state, overturned the imposition of court fees in a divorce case.[24] Similarly, in *Little v. Streater*, the Court, relying on fundamental parental rights, liberty rights, and pecuniary interests, overturned the imposition of costs for blood tests in a paternity case.[25]

In contrast, in *United States v. Kras*, the Court upheld fees required to secure a discharge in bankruptcy.[26] In *Ortwein v. Schwab* the Court upheld court fees required to challenge an agency determination reducing petitioner's welfare benefits.[27] The Court held in these cases that the interests—discharge in bankruptcy and welfare benefits—were low and that petitioners had other nonjudicial redress for their underlying problems. The Court therefore upheld the barriers in those cases.

The counsel cases at trial also illustrate this trend of a focus on interests. In *Gideon v. Wainwright* the Court held that an indigent criminal defendant was entitled to counsel when his physical liberty was at stake.[28] The Court extended this principle somewhat in *Alabama v. Shelton*, holding that a petitioner was entitled to counsel when his suspended sentence could end up in actual deprivation of his physical liberty.[29] But in *Scott v. Illinois* and *Gagnon v. Scarpelli* the Court made clear that a petitioner was entitled to counsel at trial only when the proceeding would result in an actual deprivation of physical liberty.[30] Thus the *Lassiter* Court drew the line at physical liberty and ruled that an indigent civil petitioner whose physical liberty was not at stake would have to overcome a presumption against counsel in order to receive counsel at trial. These cases illustrate the trend at trial: when determining access rights, including the right to counsel, the Court's decisions turn on the underlying substantive rights.

B. Access on Appeal: Procedurally Bound

In contrast, the Court's decisions related to access on appeal turn on the procedural extent to which due process and equal protection demand equal access. The fee cases again illustrate this trend most saliently. The leading case here is *Griffin v. Illinois*, in which the Court overturned a requirement that criminal defendants purchase a trial transcript as a condition of appeal.[31] The defendant in that case was incarcerated for his alleged crime, but the Court applied this same principle to cases involving nonliberty interests. For example, in *Mayer v. Chicago*, the Court overturned a similar transcript requirement in a criminal case that involved, for the defendant, serious collateral consequences but no jail time.[32] Similarly, in *Lindsey v. Normet*, the Court overturned a double-bond requirement for appellants seeking to appeal an eviction—a housing interest.[33] Most recently, in *M.L.B. v. S.L.J.*, the Court overturned a record-

[24] *Boddie v. Connecticut*, 401 U.S. 371 (1971) (Clearinghouse No.1692).

[25] *Little v. Streater*, 452 U.S. 1 (1981).

[26] *United States v. Kras*, 409 U.S. 434 (1973) (Clearinghouse No. 6537).

[27] *Ortwein v. Schwab*, 410 U.S. 656 (1973) (Clearinghouse No. 7694).

[28] *Gideon*, 372 U.S. at 335.

[29] *Alabama v. Shelton*, 535 U.S. 654 (2002); see also *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (Clearinghouse No. 8245) (holding that the right to counsel extends even to petty criminal cases where the defendant's physical liberty is at stake).

[30] *Scott v. Illinois*, 440 U.S. 367 (1979) (Clearinghouse No. 25,297); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (Clearinghouse No. 4320).

[31] *Griffin v. Illinois*, 351 U.S. 12 (1956).

[32] *Mayer*, 404 U.S. at 189.

[33] *Lindsey v. Normet*, 405 U.S. 56 (1972) (Clearinghouse No. 2802).

preparation fee required for appeal of a private termination-of-parental-rights proceeding—a parental rights interest.[34] The defining characteristic of these cases is the right of access to appeal almost irrespective of the underlying right. With the very strong equal protection influence, the Court in these cases sees equal access to appeal itself as a powerful interest—clearly an interest that cannot be conditional on one's ability to pay.

The counsel cases on appeal, too, stand for the proposition that the Court privileges questions of process over substantive rights in access cases on appeal. For example, the Court in *Ross* and *Evitts v. Lucey* limited the right to counsel in *Douglas* to the petitioner's first appeal as of right.[35] Thus, following the reasoning in *Ross*, the Court in *Pennsylvania v. Finley* refused to extend *Douglas* to postconviction proceedings.[36] Most recently the Court in *Halpert v. Michigan* held that a defendant could not have waived his right to counsel on his first appeal by virtue of his *nolo contendere* plea at trial.[37]

The hallmark of these cases is a definition of the scope of right to counsel on appeal based on process first—appeals as of right versus discretionary appeals. As a matter of fact, the petitioner in each of these cases was incarcerated, but the decisions themselves rest on the process, not the liberty interests at stake. None of these cases contains any of the careful parsing of underlying interests that are the mainstay of the Court's opinions on counsel at trial. This is most notably absent in *Halpert*, where the petitioner's liberty interest seems the most tenuous of the bunch.[38] Taken together with the Court's jurisprudence on appellate fees, the trend is clear: the appellate access decisions turn first on process, not the underlying substantive rights. Thus, by focusing on counsel on appeal, the path to a civil right to counsel may be clearer.

III. Conclusion

Because the Court's jurisprudence on access to appeal turns first on process, not substantive rights, arguments for civil right to counsel on appeal need not focus first on aligning the underlying substantive rights with the right to physical liberty, or otherwise to focus on the interests under the *Matthews* test, in order to satisfy the singular demands of *Lassiter*. Instead arguments for civil right to counsel on appeal may sidestep *Lassiter* by focusing on process—the first appeal as of right, pursuant to *Douglas*.

Nonetheless, advocates should be cognizant that all of the Court's access-to-appeal cases, which include fee cases and counsel cases, involve weighty interests. Even if the cases do not turn on those interests, they are there. So perhaps the best case to achieve civil right to counsel on appeal is one that involves the most important interest short of physical liberty: parental rights.

An appropriate termination-of-parental-rights case on appeal could be the vehicle for civil Douglas, a more direct path to a civil right to counsel. And once established, just as *Douglas* presaged the fall of *Betts* thirty-three years ago, civil Douglas, as one of several litigation strategies all in the context of a broader political movement, could help foreshadow the fall of *Lassiter*.

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[34] *M.L.B.*, 519 U.S. at 102.

[35] *Ross*, 417 U.S. at 600 (1974); *Evitts v. Lucey*, 469 U.S. 387 (1985).

[36] *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

[37] *Halpert v. Michigan*, 125 S. Ct. 2582 (2005).

[38] *Id.* (holding that an indigent criminal defendant was entitled, pursuant to the due process and equal protection clauses, to appointed counsel on appeal of a conviction on a voluntary plea of *nolo contendere*, not an involuntary guilty verdict).