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A fourth state criminal case came down 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

INTRODUCTION

The litigation movement to establish a categorical right to counsel at each turn has faced a doctrinal barrier that has foiled Civil Gideon² agitators. That barrier is the privilege that the United States Supreme Court has granted to the interest in actual physical liberty.³ In effect, the barrier demands that any litigant seeking the right to counsel in any case, civil or criminal, must show that his or her interests align with the fundamental, privileged interest in actual physical liberty in order to succeed.⁴ This daunting task has, predictably, yielded only spotty results — something like the patchwork right to counsel in Betts v. Brady,⁵ certainly nothing like the categorical federal constitutional right to appointed counsel in Gideon.⁶

². “Civil Gideon” in this article refers to the categorical, federal constitutional right to appointed counsel at civil trial, comparable to that same right in a criminal trial in Gideon v. Wainwright, 372 U.S. 335 (1963).
³. See, e.g., Lassiter v. Department of Social Services, 452 U.S. 18, 31 (1981) (“If, in a given case, the parent’s interests were at their strongest, the State’s interests were at their weakest, and the risks of error were at their peak, it could not be said that the Eldridge factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.”).
⁴. Id.
⁵. 316 U.S. 455 (1942). Betts, Gideon’s precursor, held that the right to counsel would be determined on a case-by-case basis. Id. at 471-72 (finding that “[W]e are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every [criminal case]. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.”). Gideon overruled Betts and established a categorical right to appointed counsel. See Gideon, 372 U.S. at 342 (“We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment’s guarantee of counsel is not one of these fundamental rights.”).
⁶. 372 U.S. at 344.
But trends in the Court’s jurisprudence suggest that this need not be so — that the doctrinal barrier of physical liberty need not obstruct the path to a categorical civil right to appointed counsel. The key to averting this barrier is to seek the right to counsel on appeal: Civil Douglas.7

A civil right to counsel on appeal has an obvious intrinsic value: poor appellants would be guaranteed some level of equality and justice in the civil appellate courts. But a civil right to counsel has perhaps an even more important instrumental value in the Civil Gideon movement. Just as Douglas foreshadowed the categorical right to counsel at trial in Gideon forty-three years ago,8 Civil Douglas would certainly foreshadow the categorical civil right to counsel, Civil Gideon.

This article first examines the litigation context in which a civil right to counsel on appeal arises. Next, the article argues that the doctrinal path to a civil right to counsel on appeal is clearer and better paved than the path to a right to counsel at trial. The article frames this argument in the context of U.S. Supreme Court jurisprudence to illustrate the path by way of the federal constitution and, vicariously, by way of those state constitutions that adopt the federal constitutional floor as their own. (State constitutions that provide individual rights greater than the federal constitution, of course, pave an even clearer path to a civil right to counsel on appeal.) Finally, the article reviews and comments on the handful of cases that have ruled on the civil right to counsel on appeal.

One final introductory note: the Civil Gideon movement is much broader than a constitutional litigation movement. (In fact, the federal constitutional litigation part of the movement may well now be the tiniest piece.) As evidenced by other presentations and articles in this Symposium, this diverse movement encompasses everything from pro bono to judicial reform. It is within that much broader context that this article argues for a civil right to counsel on appeal. Civil Douglas is merely a small piece within the greater whole — a modest contribution to the much richer movement to establish a right to counsel.

I. BACKGROUND: THE LITIGATION CONTEXT

Claims for a categorical, constitutional right to appointed counsel at trial, a Civil Gideon, at each turn run up against a remarkably durable barrier in the Supreme Court’s right-to-counsel jurisprudence: Lassiter v. Department of Social Services.9 The Court in Lassiter held that an indigent litigant in a proceeding to terminate her parental rights had no categorical right to counsel (as in Gideon10),

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7. “Civil Douglas” in this article refers to the categorical, federal constitutional right to appointed counsel on civil appeal, comparable to that same right in a criminal appeal in Douglas v. California, 372 U.S. 353, 357 (1963) (holding that appellants have a categorical right to counsel on appeal of a criminal conviction).

8. See LEWIS, supra note 1, at 186 (stating that Justice Douglas’ opinion, which held that poor prisoners were entitled to court-appointed counsel for their appeals, would be the rule applicable to future trials).


10. 372 U.S. at 339-40 (holding that the Sixth Amendment guarantees the accused the right to the assistance of counsel in criminal prosecutions where physical liberty is at stake).
but that she might have a right to counsel under certain circumstances, to be determined on a case-by-case basis.\textsuperscript{11} Thus, \textit{Lassiter} represents the same case-specific approach to the right to counsel in cases where physical liberty was \textit{not} at stake that the Court in \textit{Gideon} so roundly rejected in cases where physical liberty \textit{was} at stake.\textsuperscript{12}

By one reading, \textit{Lassiter} held out the promise that a right to appointed counsel at trial, which was previously applied only to cases in which actual physical liberty was at stake, might also extend under certain circumstances to cases involving other weighty interests.\textsuperscript{13} Thus, \textit{Lassiter} collapsed the de facto dichotomy that had seemingly evolved in the Court's jurisprudence on the right to counsel between cases involving physical liberty and cases involving other weighty interests.

But in another, more important way, \textit{Lassiter} actually reinforced and solidified this dichotomy.\textsuperscript{14} The \textit{Lassiter} Court recognized the de facto trend applying the right to counsel in \textit{Gideon} only when actual physical liberty was at stake; it then elevated this trend to constitutional significance.\textsuperscript{15} It did so by creating a legal presumption in all right-to-counsel cases that the right to counsel extended only in cases where actual physical liberty was at stake.\textsuperscript{16}

The Court seemed untroubled by the fact that its previous cases under the Sixth Amendment focused on physical liberty only because it was the only significant interest at stake.\textsuperscript{17} These cases could only have turned on physical liberty, as the Court did not consider other interests.\textsuperscript{18} The Court seemed equally untroubled by the fact that \textit{Lassiter} presented its first opportunity to rule on the right to counsel in a Fourteenth Amendment case where physical liberty was not at stake.\textsuperscript{19} In other words, the de facto trend focusing on the physical liberty interest was merely a function of the type of cases the Court had yet heard — Sixth Amendment claims to the right to counsel in criminal proceedings.\textsuperscript{20} The trend certainly did not represent any deliberate restriction on the right to counsel in Fourteenth Amendment claims with an equally weighty interest, even if not

\textsuperscript{11} \textit{Lassiter}, 452 U.S. at 31 ("If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the Eldridge factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.").

\textsuperscript{12} See, e.g., \textit{Betts}, 316 U.S. at 471-72 (finding that the right to counsel would be determined on a case-by-case basis).

\textsuperscript{13} \textit{Lassiter}, 452 U.S. at 31 ("If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the Eldridge factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.").

\textsuperscript{14} \textit{Id.} at 26-27.

\textsuperscript{15} \textit{Id.} at 18.

\textsuperscript{16} \textit{Id.} ("In sum, the Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.").

\textsuperscript{17} \textit{Id.} at 25.

\textsuperscript{18} \textit{Id.} at 25-26.

\textsuperscript{19} \textit{Lassiter}, 452 U.S. at 25-26.

\textsuperscript{20} \textit{Id.}
physical liberty. The trend simply could not have represented such a deliberate restriction, as the Court had not yet heard such a claim — that was the very point of the Lassiter case. Nevertheless, the Court constitutionalized this trend in the form of a presumption against counsel in any case not involving physical liberty.

The Court in Lassiter held this presumption up against the factors in the familiar procedural due process test in Mathews v. Eldridge. That test considers the petitioner's underlying interests, the interests of the government, and the risks of an erroneous decision in determining the level of process due any given petitioner. By solidifying the presumption against counsel and by adopting the Mathews test, the Lassiter Court set the course for privileging questions of interests in Fourteenth Amendment right-to-counsel cases. Additionally, by setting its presumption as a kind of hurdle over which the Mathews factors must leap, the Court set the course for privileging physical liberty above all else.

Within this landscape, plaintiffs seeking a civil right to appointed counsel at trial — a Civil Gideon — have attempted to align their interests with physical liberty, to minimize the government's interest (or to align it with their own), and to demonstrate that their case is complex enough to result in an erroneous decision without counsel. Because of the weight of the interest, parental rights and cases seeking to terminate parental rights have been the primary focus of Civil Gideon litigation.

This litigation strategy has thus far seen mixed results. Thus, in a line of due process cases dealing with the right to counsel at trial, state and federal courts have sometimes granted a right to counsel and sometimes denied a right to counsel.

21. Id. at 30-31.
22. Id. at 26-27.
23. Id. at 27 (citing Mathews, 424 U.S. 319, 334-35 (1976)).
25. See, e.g., Garramone v. Romo, 94 F.3d 1446, 1449-50 (10th Cir. 1996) (holding that petitioner had a due process right to counsel in a deprivation-of-parental-rights hearing).
26. See infra notes 29 and 30 and accompanying text.
27. See, e.g., Garramone, 94 F.3d at 1450 (10th Cir. 1996) (holding that petitioner had a due process right to counsel in a deprivation-of-parental-rights hearing); Kenny A. v. Perdue, 356 F. Supp. 2d 1353, 1357 (N.D. Ga. 2005) (holding that children have a due process right to counsel in deprivation and termination-of-parental-rights proceedings, based upon their interests at stake); S.C.D. v. Etowah County Dep't of Human Res., 841 So. 2d 277, 279 (Ala. Civ. App. 2002) (finding that due process entitled parents to the right of counsel in a permanent child deprivation proceeding); In re O.S., 102 Cal. App. 4th 1402, 1407 (Cal. Ct. App. 2002) (finding that a parent has a constitutional right to counsel); In re Adoption of K.L.P., 735 N.E.2d 1071, 1076 (Ill. App. 2001) (holding that a parent in a termination proceeding has the right to counsel); In re Welfare of Luscier, 524 P.2d 906, 908 (Wash. 1974) (holding that appointment of counsel was constitutionally required in permanent deprivation proceedings for indigent parents); Marathon County Dep't of Soc. Services v. I.H., Nos. 91-0058, 91-0059, 1991 Wisc. App. LEXIS 1195, at *8 (Wis. Ct. App. 1991) (finding the parent was entitled to counsel under the due process clause of the federal constitution).
28. See, e.g., In re Travarius O., 799 N.E.2d 510, 513 (Ill. App. Ct. 2003) (finding that petitioner had no right to new counsel on a fourth occasion); In re Adoption of K.L.P., 735 N.E.2d 1071, 1076 (Ill. App. Ct. 2000) (holding that petitioner had no due process right to counsel in a termination proceeding, but the same petitioner had an equal protection right to counsel because similarly situated individuals under a different statutory scheme had a statutory right to counsel); K.D.G.L.B.P. v. Hinds County Dep't of Human Servs., 771 So. 2d 907, 911 (Miss. 2000) (holding that petitioner had no due process right to counsel in a termination proceeding).
based on balancing interests under the *Mathews* test. The plaintiff strategy in these cases is to equate the interest at stake — the fundamental right to parent — with the fundamental physical liberty interest in *Gideon*, to minimize the state’s interest (or to align the state’s interest in the well being of the child with the parent’s interest in the well being of the child), and to demonstrate that the termination proceeding is uniquely complex, raising the probability of an erroneous determination if counsel were not provided. This balance, however, inevitably runs up against the presumption in *Lassiter*. While courts sometimes rule that the *Mathews* factors overcome the *Lassiter* presumption, this strategy clearly cannot yield a categorical right to counsel without overturning *Lassiter*.

In seeking to avoid the *Lassiter* presumption, plaintiffs have won more consistent success with claims under state constitutional provisions. Some plaintiffs have even achieved a right to counsel at trial via an equal protection claim based on a disparity in statutory rights to counsel in different types of termination proceedings. While these strategies may continue to yield success, as state-by-

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30. 372 U.S. at 341.
35. See, e.g., *K.P.B. v. D.C.A.*, 685 So. 2d 750, 751 (Ala. Civ. App. 1996) (rejecting *Lassiter* under the state constitution, and holding that an indigent parent had a state constitutional right to counsel in a termination proceeding); *In re K.L.J.*, 813 P.2d 276, 279-86 (Alaska 1991) (rejecting *Lassiter* under the state constitution, and holding that a parent had a state constitutional right to counsel in a termination proceeding); *In re Jay R.*, 150 Cal. App. 3d 251, 260-62 (Cal. Dist. Ct. App. 1983) (rejecting *Lassiter* under the state constitution, and holding that an indigent parent had a state constitutional right to counsel in a termination proceeding); Danforth v. State Dept’ of Health & Welfare, 303 A.2d 794, 795 (Me. 1973) (holding that an indigent defendant in a custody proceeding was entitled to appointed counsel under state procedural due process); *In re A.S.A.*, 852 P.2d 127, 129 (Mont. 1993) (holding that a parent had a state constitutional due process right to appointed counsel in a proceeding to terminate parental rights); *State ex rel. T.H. v. Min*, 802 S.W.2d 625 (Tenn. Ct. App. 1990) (holding that the parent in this termination case was entitled to counsel under the state constitution, but that the state constitution did not grant a categorical right to counsel in termination proceedings).
36. See, e.g., *In re Adoption of K.L.P.*, 735 N.E.2d at 1071, 1078 (Ill. App. Ct. 2000) (holding that a litigant under the state Adoption Act, which did not provide for appointed counsel, had a state constitutional equal protection right to counsel, where a similarly situated litigant under the Juvenile Court Act would have had a statutory right to counsel); *In re Adoption of K.A.S.*, 499 N.W.2d 558, 566 (N.D. 1993) (holding that a litigant under the state Adoption Act, in which the right to counsel was uncertain, had a state constitutional equal protection right to counsel, where a similarly situated litigant...
state strategies they will, at best, yield a spotty, patchwork result resembling the
right to counsel under the case-by-case approach in *Betts* that the *Gideon* Court
overturned.  

**II. CIVIL DOUGLAS**

While the doctrinal path to Civil Gideon is thus encumbered by the *Lassiter*
presumption, the doctrinal path to a civil right to counsel on appeal — Civil
Douglas — seems relatively clear. The starting point for this claim is the 1996
case, *M.L.B. v. S.L.J.*  

If *Lassiter* represents a partial collapse of the de facto
dichotomy between right-to-counsel cases involving physical liberty and those
involving other weighty interests, then *M.L.B.* represents the collapse of the
dichotomies between civil cases and criminal cases, between access-barrier cases
and right-to-counsel cases, and between rights at trial and rights on appeal.  

In a wide-ranging decision, the Court in *M.L.B.* romps through its judicial-access and
right-to-counsel decisions, freely comparing interests such as the right to parent
with interests like professional prospects in order to place that case within the
broader mosaic of its access and right-to-counsel jurisprudence.  

In order to effect these results, the Court relies upon a kind of conglomerated due-process-equal
protection approach:  

under the Juvenile Court Act and the Parentage Act had a certain statutory right to counsel).  *But see*,
who appeals a termination order in a private action had no equal protection right to counsel, even though
a similarly situated appellant in a state-initiated termination case had a statutory right to counsel),
*abrogated by In re J.W.*, 57 P.3d 363 (Cal. 2002) (holding that an appellant who appeals a termination
order in a private action had no equal protection right to counsel, even though a similarly situated
appellant in a state-initiated termination case had a statutory right to counsel).  

37. There is some risk that the state equal protection cases could paradoxically yield a set-back: If
states are concerned about the disparity in statutory right-to-counsel under different statutory schemes of
the same general type (e.g., schemes terminating parental rights), they may simply revoke the statutory
right to counsel in all statutory schemes of that type to avoid the disparate treatment and equal
protection problems.  

41. *M.L.B.*, 519 U.S. at 120.  
42. *M.L.B.* has been subject to much commentary based on this approach.  *See*, e.g., Lloyd C.
Anderson, *The Constitutional Right of Poor People to Appeal Without Payment of Fees: Convergence of
that Justice Thomas offered a forceful and prescient criticism of the approach in his dissent in that case).

An excerpt from the dissent follows:  

Under the rule announced today, I do not see how a civil litigant could constitutionally be
denied a free transcript in any case that involves an interest that is arguably as important as
the interest in Mayer. . . . What is more, it must be remembered that Griffin did not merely
invent the free transcript right for criminal appellants; it was also the launching pad for the
discovery of a host of other rights. . . . I fear that the growth of Griffin in the criminal area
may be mirrored in the civil area.  

*M.L.B.*, 519 U.S. at 143-44 (Thomas, J., dissenting).
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. In 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."43

In the course of creating its mosaic, the M.L.B. Court reaffirms and even expands some central principles from Lassiter. First, it reaffirms the importance of carefully comparing underlying interests in the context of something like a Mathews balancing test.44 Second, it reaffirms the privileged place of physical liberty in its judicial-access and right-to-counsel jurisprudence.45

The M.L.B. Court's willingness to adopt a conglomerated approach, and the concomitant free comparison of cases across civil and criminal, across those dealing with barriers and those dealing with the right to counsel, and across trial and appeal, reveals another pattern: cases dealing with access and the right to counsel at trial turn first on underlying interests, while cases dealing with access and the right to counsel on appeal turn first on principles of equality and procedure.46

Within the Court's mosaic of access and right-to-counsel cases, the Court has looked first to the underlying interests at issue to determine the level of access or right to counsel due a particular litigant. In short, interests bind rights at trial. Let us call this the "priority of interests" for shorthand.

In contrast, the Court has looked first to equality of access and the procedural extent to which a right is available on appeal. Rights on appeal are bound by principles of equality and the type of appeal at issue. Let us call this the "priority of equality in process" for shorthand.

The net result of these trends is that a claim for a civil right to appointed counsel at trial — Civil Gideon — will turn first on the interests involved. And unless a litigant can show a balance of interests sufficient to overcome the Lassiter presumption, the Constitution will not demand appointed counsel. At best this approach leads to a case-by-case determination, similar to that in Betts v. Brady.47

But a claim for a civil right to appointed counsel on appeal — Civil Douglas — will turn first on principles of equality and procedure (or the type of appeal at issue in the given case). Because the underlying interests matter less on appeal, and because a litigant does not face the Lassiter presumption on appeal, the

43. Id. at 120 (citations omitted).
44. Id.
45. Id. at 121-24.
46. Id. at 103.
47. 316 U.S. at 471.
doctrinal path to Civil Douglas is clearer and better paved than the path to Civil Gideon.\textsuperscript{48}

The following analysis first traces the Court’s jurisprudence at trial, focusing on the right to counsel at trial, then on the access cases at trial. Second, the analysis traces the Court’s jurisprudence on appeal, focusing on the access cases on appeal, then on the right to counsel on appeal.\textsuperscript{49}

A. The Priority of Interests at Trial

This section illustrates the priority of interests at trial, moving first through the cases on the right to counsel at trial and next through the access cases at trial. Both lines of cases show that the rights involved — the right to counsel and the right of access — turn first on the underlying interests at stake.

1. The Right to Counsel at Trial and the Priority of Interests

The Court’s jurisprudence on the right to counsel at trial seemed to shift somewhat over time in its emphasis on the complexity of the proceedings and the precise nature of the interest at stake. In its earliest Sixth Amendment cases, for example, the Court seemed to prioritize principles of equity and fairness in a complex, adversarial proceeding over the litigant’s interest — the criminal defendant’s physical liberty interest — in determining whether a defendant had a right to appointed counsel.\textsuperscript{50} Later Sixth Amendment cases, and especially the most recent cases, emphasized the precise nature of the defendant’s liberty interest in determining the right to appointed counsel.\textsuperscript{51} Similarly, the Fourteenth Amendment cases seemed to shift their focus between the complexity of the proceedings and the nature of the interest at stake, but the most recent cases prioritized the interest.\textsuperscript{52}

\textsuperscript{48} The importance of Douglas may not have surprised commentators on March 18, 1963, the day both Gideon and Douglas came down. For example, constitutional scholars Yale Kamisar and Jesse Choper wrote this about the two opinions: “If Gideon only toppled ‘a bridge shaky and ready to come down,’ Douglas may have dynamited some rather sturdy-looking ones.” Yale Kamisar & Jesse Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 MINN. L. REV. 1, 7 (1963). 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.” Yale Kamisar, Book Review, 78 HARV. L. REV. 478, 481 (1964) (reviewing ANTHONY LEWIS, GIDEON’S TRUMPET (Random House 1964)).

\textsuperscript{49} The analysis necessarily excludes some cases, even lines of cases. Because it relies on the reasoning and conglomerated framework set out in M.L.B., it also relies on the cases and lines of cases cited therein.

\textsuperscript{50} Argersinger v. Hamlin, 407 U.S. 25, 29-32 (1972) (balancing equity and justice in determining the right for counsel); Gideon, 372 U.S. at 342 (arguing that individuals have a right to counsel for the purpose of a fair trial); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (arguing that individuals have a right to counsel for the purpose of a fair trial).

\textsuperscript{51} See, e.g., Scott v. Illinois, 440 U.S. 367, 370-72 (1979) (solidifying the focus on physical liberty).

\textsuperscript{52} Vitek v. Jones, 445 U.S. 480, 494-97 (1980) (focusing on the inherent weight of the liberty interest at stake in determining an individual’s right to counsel).
Notwithstanding this doctrinal evolution, one principle becomes clear in all trial-level right-to-counsel cases after about 1979: the right to appointed counsel turns first on the litigant’s interest — physical liberty. This priority of the interest of physical liberty in determining the right to counsel in many ways hits its apex in *Lassiter v. Department of Social Services*, a Fourteenth Amendment case in which the Court elevated the priority of physical liberty to a presumption against counsel in any case where physical liberty was not at stake.

This section traces the evolution of the cases on the right to counsel at trial through the Sixth and Fourteenth Amendments to illustrate the priority of the interest of physical liberty in both lines of cases.

a. Sixth Amendment Right to Appointed Counsel at Trial

The starting point for the right to appointed counsel is, of course, *Gideon*. The Court in *Gideon* held that the Sixth Amendment right to counsel in criminal cases applied to the states via the Fourteenth Amendment Due Process Clause. *Gideon* thus overturned *Betts v. Brady*, which held that the Sixth Amendment right to counsel was not a “fundamental right, essential to a fair trial,” and therefore that it was not incorporated to the states. After *Betts*, any right to counsel in a state criminal prosecution would be determined on a case-by-case basis by the presiding court, based on “the interest of fairness,” not the Sixth Amendment. In overturning *Betts*, *Gideon* ended the case-by-case approach to the right to counsel and instead established a categorical right to appointed counsel for indigent defendants in state criminal prosecutions. As if to punctuate the importance of counsel in criminal proceedings, *Gideon* went one step further: it held that when a defendant could not afford counsel, counsel must be appointed. Thus, *Gideon* established a *categorical right to appointed* counsel for indigents in state criminal prosecutions.

On one level, *Gideon* simply holds that the Court in *Betts* erred in not incorporating the Sixth Amendment right to counsel to the states: “We think the...
Court in Betts had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion for the Due Process Clause of the Fourteenth Amendment.  

On this level, Gideon analyzed the Sixth Amendment right to counsel under familiar incorporation standards, including whether the right was "fundamental." In answering this question, the Court looked to well settled cases going back as far as ten years before Betts and holding that "the right to the aid of counsel is of this fundamental character," among [those incorporated rights were] the fundamental right of the accused to the aid of counsel in a criminal prosecution, and "[the assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." Thus, according to the Court in Gideon, Betts rested on tenuous grounds even when it came down; certainly in 1963, when Gideon reached the Court, Betts indeed looked like a "bridge shaky and ready to come down."  

Gideon, as a case on incorporation of the fundamental right to counsel in criminal prosecutions, was therefore not tremendously surprising.  

On a different level, Gideon set the Court on a path to determine the categorical right to counsel in both criminal and civil trials based on the underlying interests at stake. This reading may have surprised the Gideon Court, for nothing in the Gideon opinion compels this result. In other words, by its plain terms, Gideon does not turn on the underlying right at stake — there, Clarence Earl Gideon's physical liberty interest in avoiding incarceration. Rather, the language of Gideon suggests that the case turns instead on ensuring a fair trial in the highly adversarial criminal courts — irrespective of the underlying liberty interest. Thus, the Court writes:

[I]n our adversar[ial] system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interests in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to

65. Id. at 341.  
66. Id.  
67. Powell, 287 U.S. at 68.  
69. Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (stating that "[t]he Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done'").  
70. Kamisar & Choper, supra note 48, at 7 (quoting KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 303 (William S. Hein & Co.) (1960)).  
71. 372 U.S. at 343-44.  
72. Id. at 337-39.  
73. Id. at 343-44.  
74. Id. at 344.
prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. . . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. 75

The language and reasoning seem to set the Court on a path to cabin the right to counsel at trial first based on considerations of fairness, equity, and the adversarial nature of the proceeding — considerations that might easily extend beyond a criminal case and apply in civil cases, but for the fact that the right to counsel in Gideon rested on the Sixth Amendment (and not squarely on the Fourteenth Amendment). 76 The reasoning does not suggest that the right to counsel at trial turns first on the underlying interests of the defendant, although Clarence Earl Gideon’s liberty interests certain loomed strongly in the background of the case. 77

Nearly 10 years later, the Court in Argersinger v. Hamlin 78 seemed to balance considerations of equity and fairness in a criminal prosecution with the defendant’s liberty interests in determining the Sixth Amendment right to counsel. 79 Thus like Gideon, 80 Argersinger turned on principles of equity and fairness in a highly adversarial criminal prosecution, 81 though the Court seemed to grant somewhat greater weight to the defendant’s liberty interests. 82 The criminal defendant in Argersinger was charged with carrying a concealed weapon, punishable by imprisonment up to six months, a $1000 fine, or both. 83 The trial court sentenced him to ninety days in jail without the benefit of appointed counsel. 84 The U.S. Supreme Court rejected the Florida Supreme Court’s ruling that the Gideon right to appointed counsel extended only to “non-petty offenses punishable by more than six months imprisonment” and held that the Sixth Amendment right to appointed counsel applies to any case that actually leads to imprisonment. 85 In defining the

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75. Id. at 342 (arguing that individuals have a right to counsel for the purpose of a fair trial).
76. Id.
79. Id. at 37-38 ("We hold that no person may be deprived of his liberty who has been denied the assistance of counsel guaranteed by the Sixth Amendment.").
80. 372 U.S. at 344.
82. Id. at 37-38.
83. Id. at 26.
84. Id.
85. Gideon, 372 U.S. at 344.
86. State ex rel. Argersinger v. Hamlin, 236 So. 2d 442, 443 (Fla. 1970) (following Duncan v. Louisiana, 391 U.S. 145, 159 (1968), in holding that the right to a jury trial applied only in cases where the criminal defendant faced more than six months in prison), rev’d, 407 U.S. 25 (1972).
87. Argersinger, 407 U.S. at 37.
scope of the Sixth Amendment right to appointed counsel, the language and reasoning in *Argersinger* suggest that the right turns both on principles of fairness and equity in the context of a highly adversarial criminal prosecution and the defendant’s liberty interests. The Court wrote, “[w]e are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.” Because of the seemingly heightened concern for the defendant’s liberty interest — and the specific focus on imprisonment — this reasoning may translate less well to a right to counsel in complex civil cases than the reasoning in *Gideon*.

Against this reading of *Gideon* and *Argersinger*, the Court in *Scott v. Illinois* completes its move to prioritize the defendant’s liberty interests in right-to-counsel cases. The Court in *Scott* limited the right to counsel to those trials that would result in actual imprisonment — that is, an actual deprivation of physical liberty. Thus, the right to counsel in *Scott* turned first on the defendant’s liberty interest, not the previously prioritized considerations of equity and fairness in criminal prosecutions. *Scott* involved a criminal prosecution for shoplifting merchandise valued at less than $150. The defendant was convicted under an Illinois statute that set the maximum penalty at either a $500 fine or one year in jail, or both. He received a $50 fine, with no jail time. In holding that the defendant had no Sixth Amendment right to appointed counsel, the Court’s reasoning focused primarily on the defendant’s liberty interests, not principles of equity and fairness in a criminal trial. Thus, the Court wrote: “We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.” Although the Court in *Scott* seemed to prioritize the defendant’s liberty interests, criminal prosecution principles of equity and fairness certainly did not drop out of consideration.

Most recently, the Court reaffirmed the priority of the defendant’s liberty interest in *Alabama v. Shelton* by summarizing the holding in the *Gideon-

88. Id. at 33.
89. Id. (emphasis added). The Court referred throughout the opinion to trials “where an accused is deprived of his liberty” and to “a case that actually leads to imprisonment even for a brief period,” suggesting the importance of the defendant’s liberty interest in determining a Sixth Amendment right to appointed counsel. Id. at 32-33 (emphasis added).
91. Id. at 369.
92. Id. at 373.
93. Id.
94. Id. at 368.
95. Id.
96. Scott, 440 U.S. at 370-72.
97. Id. at 373 (quoting Argersinger, 407 U.S. at 25, in prioritizing the defendant’s liberty interests over principles of equity and fairness in determining the right to counsel).
98. Id. at 373-74 (emphasis added).
99. Id. at 373.
Argersinger-Scott line with the phrase, "‘actual imprisonment’ rule." The defendant in Shelton was sentenced to thirty days in jail, but the trial court immediately suspended the sentence and imposed a two-year period of probation. The Court ruled that the defendant was entitled to appointed counsel at trial because the sentence, probation, could have resulted in the actual deprivation of his liberty.

On the one hand, the Court’s almost exclusive focus on the defendant’s liberty interest underscored the priority of the defendant’s liberty interest in Sixth Amendment cases on the right to counsel. But, on the other hand, Shelton also demonstrated how attenuated a defendant’s liberty interest may be to trigger the right to counsel at trial. The Court in Shelton thus held that the critical turning point in its Sixth Amendment jurisprudence was not whether a defendant had a right to counsel in a trial where he or she might lose his or her liberty immediately, but rather whether the defendant had a right to counsel for the underlying trial for which he or she was ultimately imprisoned. The Court distinguished between a probation-revocation hearing and the underlying trial and ruled that the defendant, imprisoned after a probation violation, was actually imprisoned for the underlying offense — the offense for which he had been convicted at his underlying trial. Therefore, the right to counsel attached at the point of trial because even probation with a suspended prison term may result in actual imprisonment for the underlying offense.

In terms of the liberty interest, the Court in Shelton seemed to take a step back from the state-imposed deprivation of liberty in the Gideon-Argersinger-Scott line, and instead, included a deprivation that in some important ways was self-imposed. In other words, a defendant sentenced to probation has some choice in whether he or she goes to prison because an individual is subject to imprisonment only if he or she violates the terms of probation. The imprisonment results, to be sure, from the underlying criminal conviction, but the element of self-determination in the probation context distinguishes probation from a criminal trial at which an actual term of imprisonment is immediately imposed by the state and presumably against the interests and choice of the defendant.

101. Id. at 662.
102. Id. at 658.
103. Id. at 674 (ruled that a probation violation would result in imprisonment for the underlying crime, not for the probation violation, and thus the probation sentence may have resulted in deprivation of liberty. Therefore, the defendant was entitled to appointed counsel at trial for the underlying crime.).
104. Id. It is critical to note, however, that the Court must have seriously considered principles of equity and fairness in an adversarial criminal trial to arrive at its conclusion here. The Court’s narrow focus on the underlying criminal trial (as opposed to the probation revocation hearing) as the relevant point at which defendant’s liberty interest is at stake, suggests that the Court was keenly attuned to principles of equity and fairness at the trial — the “critical stage when . . . his vulnerability to imprisonment is determined.” Id.
106. Id. at 664.
107. Id.
108. Id.
109. Id. at 674.
Shelton was a capstone to the Sixth Amendment cases on the right to counsel at trial because it reaffirmed the Court's priority of the defendant's interests, but it also seemed to relax the demand for an interest in involuntary incarceration as the trigger for the right to counsel. Instead, Shelton, perhaps foreshadowing Halbert v. Michigan, opened the door for a right to counsel in situations where an individual voluntarily places his or her liberty in peril, even if the underlying conviction ultimately resulting in incarceration was involuntary.

b. Fourteenth Amendment Right to Appointed Counsel at Trial

These same considerations — the defendant's liberty interests and principles of equity and fairness in the context of adversarial proceedings — also drove the Court's decisions in the right-to-counsel cases at trial under the Fourteenth Amendment. From the earliest cases in this line, the Court made clear that, just as in the more recent Sixth Amendment right-to-counsel cases at trial, the defendant's liberty interest was paramount in the Fourteenth Amendment right-to-counsel cases at trial.

The earliest case in this line is In re Gault, where the Court held that a youth was entitled to appointed counsel in a juvenile delinquency hearing that resulted in his commitment to a state industrial school. Although the Court's decision closely examined the nature of juvenile delinquency proceedings, the ruling turned primarily on the liberty interest at stake. Referencing Powell v. Alabama, Gideon v. Wainwright, and Kent v. United States, the Court held "that [the right to counsel] is . . . essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21." The Court concluded:

[The Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

110. Id. at 654.
113. 387 U.S. 1 (1967).
114. Id. at 4.
115. Id. at 27.
116. 287 U.S. 45 (1932).
120. Id. at 41 (emphasis added).
The Court similarly prioritized the defendant’s liberty interest in *Vitek v. Jones.*\(^{121}\) That case parsed the liberty interest even more finely, and the right to counsel thus attached based on a particular *type* of liberty. The Court in that case held that a convicted felon transferred from a state prison to a mental hospital was entitled to a hearing and appointed counsel prior to transfer.\(^ {122}\) The liberty interest was based upon the prisoner’s reasonable expectation that, as codified in state law, he would not be transferred to a mental hospital unless he suffered from a mental disease or defect that could not be treated in the prison.\(^ {123}\) The Court distinguished this transfer from an administrative transfer between prisons — which ordinarily did not give rise to a liberty interest — because such a transfer was generally within the sound discretion of the prison authorities.\(^ {124}\) The liberty interest here thus attached to a particular kind of transfer within the system, not the broader liberty to be free from restraint entirely on which the earlier cases turned. Whether the prisoner was incarcerated, was transferred to another prison, or was transferred to the mental hospital, he had already lost his broader liberty. Yet the transfer to the hospital triggered a more narrow liberty interest protected by the state laws authorizing that kind of transfer.

In contrast to *In re Gault\(^ {125}\) and *Vitek v. Jones,*\(^ {126}\) the Court ruled in *Gagnon v. Scarpelli\(^ {127}\) that a criminal convict had no absolute right to appointed counsel. In that case, the defendant, Scarpelli, was found guilty of armed robbery and was sentenced to fifteen years in prison.\(^ {128}\) The trial judge suspended Scarpelli’s sentence and placed him on probation for seven years.\(^ {129}\) Just one day after he started his probation period, Scarpelli was apprehended in the course of a burglary, in violation of the terms of his probation.\(^ {130}\) The Court ruled that a probation revocation hearing implicated a lesser “conditional liberty,” not the absolute liberty in, say, *In re Gault.*\(^ {131}\) As to the right to counsel, the Court relied on the rehabilitative nature of probation and the informal nature of the probation

122. *Id.* at 496-97.
123. *Id.* at 487-88.
124. *Id.* at 489.
125. 387 U.S. 1 (1967).
128. *Id.* at 779.
129. *Id.*
130. *Id.* at 779-80.
131. *Scarpelli,* 411 U.S. at 781 (citing *Morrissey v. Brewer,* 408 U.S. 471, 480 (1972)). The Court aligned a probation revocation hearing with a parole revocation hearing, based on the level of interest, liberty, at stake: “[P]arole [r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.” *Morrissey,* 408 U.S. at 480 (1972). Similarly, the Court distinguished the combined probation revocation and sentencing hearing in *Mempa v. Rhay,* 389 U.S. 128 (1967), based on the level of interest at stake:

[C]ounsel must be provided an indigent at sentencing even when it is accomplished as part of a subsequent probation revocation proceeding. But this line of reasoning does not require a hearing or counsel at the time of probation revocation in a case such as the present one, where the probationer was sentenced at the time of trial. *Scarpelli,* 411 U.S. at 781.
revocation proceeding in ruling that the Due Process Clause did not demand a
categorical right to appointed counsel in probation revocation proceedings.\textsuperscript{132} Scarpelli thus suggests that when the interest at stake is lower than absolute liberty
and when the proceedings are less than fully adversarial, the Due Process Clause
may not require appointed counsel. Instead, the Fourteenth Amendment right to
counsel would be determined on a \textit{Betts}-like case-by-case basis.

The Court in \textit{Lassiter} solidified this principle and marked the high point of the
Court’s priority of liberty in its right-to-counsel jurisprudence.\textsuperscript{133} \textit{Lassiter} ruled
that an indigent parent was not entitled to appointed counsel in a case brought by
the state to terminate her parental rights.\textsuperscript{134} The Court applied the now-familiar
three-part procedural due process test articulated in \textit{Mathews v. Eldridge}\textsuperscript{135} and concluded that

the parent’s interest is an extremely important one (and may be
supplemented by the dangers of criminal liability inherent in some
termination proceedings); the State shares with the parent an interest
in a correct decision, has a relatively weak pecuniary interest, and, in
some but not all cases, has a possibly stronger interest in informal
procedures; and 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{136}

Then, in a rather surprising move, the Court reviewed the line of cases running
from \textit{Gideon} through \textit{In re Gault} (and discussed supra) and concluded that the right
to appointed counsel had historically attached only at the point of deprivation of
personal liberty.\textsuperscript{137} Then, from this observation, it created out of whole cloth a new
“presumption” that an indigent litigant had a right to counsel \textit{only} in cases
involving a deprivation of liberty:

\begin{quote}
In sum, the Court’s precedents speak with one voice about what
“fundamental fairness” has meant when the Court has considered the
right to appointed counsel, and we thus draw from them the
presumption that an indigent litigant has a right to appointed counsel
only when, if he loses, he may be deprived of his physical liberty. It
\end{quote}

\begin{thebibliography}{13}
\bibitem{132} Scarpelli, 411 U.S. at 781, 783-89.
\bibitem{133} \textit{Lassiter}, 452 U.S. at 32-34.
\bibitem{134} \textit{id}.
\bibitem{135} 424 U.S. 319, 334-35 (1976).
\bibitem{136} \textit{Lassiter}, 452 U.S. at 31.
\bibitem{137} \textit{id} at 25-26. The Court’s observation here was positive, not normative. The Court concluded as
a matter of fact that its cases granted the right to appointed counsel only when physical liberty was at
stake. But this truth was more a matter of historical accident than doctrinal necessity. The whole point
of \textit{Lassiter}, of course, was to rule on the right to counsel in a new type of case — a case where physical
liberty was \textit{not} at stake. By incorporating the historical accident (that no type of interest other than
physical liberty had as a matter of fact triggered the right to counsel) into its constitutional doctrine, the
Court seemed to try to have it both ways; it preserved the priority of physical liberty, but it allowed for
the future possibility of another interest to trigger the right to counsel.
\end{thebibliography}
is against this presumption that . . . [the factors in the three-part Mathews test, discussed supra] must be measured.\textsuperscript{138}

The Court elevated physical liberty to this level of presumption notwithstanding its previous, much more nuanced examinations of physical liberty interests in \textit{In re Gault}, \textit{Vitek}, and \textit{Scarpelli}, which, taken together, might have suggested that "physical liberty" alone is far too rough a triggering mechanism for the right to counsel. In other words, even in 1981, the Court might reasonably have concluded that some types of physical liberty categorically trigger the right to appointed counsel, while others do not. It might reasonably have concluded further that some interest beyond physical liberty might trigger the right to appointed counsel, while others might not. If it had so concluded, it could not have created the "physical liberty presumption," which, by its nature, elevates physical liberty above all considerations in the Mathews balancing test. The hurdle of physical liberty that the presumption set for the Mathews factors to overcome thus solidified the priority of physical liberty — and the lesser place of other due process interests and the complexity of the proceeding — in the Court's right-to-counsel jurisprudence at trial.\textsuperscript{139}

2. Access to the Courts and the Priority of Interests

The priority of interests couples with the monopoly power of the courts (a concept derivative of the interests) in the access cases. This section traces first the fee cases, and then the standard of evidence cases to show that, like the counsel cases, the priority of interests reigns supreme in the cases at trial.

a. Fee Barriers to Court

The priority of interests is perhaps most salient in the fee cases, where an impending litigant's access to a trial court is denied because of his or her inability to pay court fees or costs. The leading case here is \textit{Boddie v. Connecticut},\textsuperscript{140} which involved a trial court fee of about $60 for individuals seeking a divorce.\textsuperscript{141} The fee effectively denied access to the trial court for the class of individuals who could not afford to pay it.\textsuperscript{142} The Court held that the fee requirement ran afoul of the Fourteenth Amendment Due Process Clause.\textsuperscript{143}

141. \textit{Id.} at 372.
142. \textit{Id.} at 372-73.
143. \textit{Id.} at 382-83. At least two justices read \textit{Boddie} more broadly, to turn on the poverty classification (sounding in equal protection) instead of the underlying right (sounding in due process). \textit{See} Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 955-56 (1971) (Black, J., denying certiorari) ("In my view, the decision in \textit{Boddie v. Connecticut} can safely rest on only one crucial foundation — that the civil courts of the United States and each of the States belong to the people of this country and that no
The Court’s opinion turned first on the underlying interest at stake: the right to marry (and divorce). But the Court was also keenly attuned to the fact that litigants may only terminate their marriage through the courts — that courts have a monopoly on divorce. Thus, the Court concluded:

Given the basic position of the marriage relationship in this society’s hierarchy of values and the concomitant state monopolization of the means for legally dissolveing this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

The Court ruled similarly in Little v. Streater, a case involving a state statute that required the party seeking blood grouping tests in a paternity action (here, the putative father) to pay for those tests. Like the Court in Lassiter, discussed supra, the Court in Streater turned to the balancing test in Mathews v. Eldridge, and thus focused first on the interests of the litigant:

The private interests implicated here are substantial. Apart from the putative father’s pecuniary interest in avoiding a substantial support obligation and liberty interests threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship. This Court has frequently stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection.

The Court’s very careful consideration of the interests at stake and the alternatives to litigation (if any, and derivative of those interests) is further illustrated by its comparison of the interest here with the interests in Boddie, discussed supra, and United States v. Kras, and Ortwein v. Schwab, both discussed infra:
In *Boddie*, we held that due process prohibits a state from denying an indigent access to its divorce courts because of inability to pay filing fees and costs. However, in *Kras and Ortwein*, the Court concluded that due process does not require waiver of filing fees for an indigent seeking a discharge in bankruptcy or appellate review of an agency determination resulting in reduced welfare benefits. Our decisions in *Kras* and *Ortwein* emphasized the availability of other relief and the less “fundamental” character of the private interests at stake than those implicated in *Boddie*. Because appellant has no choice of an alternative forum and his interests, as well as those of the child, are constitutionally significant, this case is comparable to *Boddie* rather than to *Kras* and *Ortwein*.153

Thus based on the very weighty interests at stake and on the monopoly of the courts in availing those interests, the Court ruled that the requirement that a litigant pay for blood tests violated the Fourteenth Amendment Due Process Clause.154

Consistent with the priority of interests at trial, then, when a litigant’s interests are at the apex — that is, when physical liberty is at stake — the Court has unsurprisingly ruled fee requirements unconstitutional.155 Thus was the case in *Bearden v. Georgia*,156 in which the Court ruled that a criminal sentencing court could not revoke probation (and imprison the defendant) for failure to pay a fine and make restitution, pursuant to the defendant’s terms of probation.157 *Bearden* does not contain the kind of careful parsing of interests as in other fee cases; it does not have to: the interest at stake — physical liberty — is concededly fundamental. But the Court in *Bearden* was also very careful to limit its principle to those probationers who *cannot afford to pay a fine*, not to those who *choose not to pay a fine*,158 thus removing the element of choice from constitutional protection. This holding seems in tension with the principle in *Shelton*, discussed supra, which held that a defendant had a right to counsel at trial when the trial court suspended a prison sentence and imposed probation, because a probation violation, based presumably on a volitional act, would result in incarceration.159

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152. 410 U.S. 656 (1972).
154. Id. at 16-17.
155. The Court has also ruled transcript fees unconstitutional in cases where physical liberty is at stake. See *Roberts v. LaValle*, 389 U.S. 40 (1967) (holding that an indigent criminal defendant subject to incarceration was entitled to a transcript, at state expense, of a preliminary hearing); *Morrissey*, 408 U.S. 471 (holding that due process demands certain procedural requirements at a parole revocation hearing). But see *Britt v. North Carolina*, 404 U.S. 226 (1971) (holding that an indigent criminal defendant subject to incarceration in a second trial was not entitled to a transcript of his first trial (which ended in deadlock), because adequate alternatives to a transcript were available). Like the other cases in the *Boddie-Streater-Kras-Ortwein* line, these cases turn on the interests at stake and whether alternatives to the particular process exist to protect or avail the underlying interests.
157. Id. at 672.
158. Id. at 668-69.
In contrast to Bearden, the Court upheld filing fee requirements in a pair of cases where the interest at stake was lower and where the courts did not monopolize the means to avail the interest. Thus, the Court upheld a filing fee requirement for bankruptcy court under the Fifth Amendment Due Process Clause in United States v. Kras. The Court ruled that an interest in bankruptcy did "not rise to the same constitutional level" as the fundamental interest in marriage, and that the courts did not monopolize the interest in bankruptcy: "[i]n contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors."

Similarly, the Court upheld a filing fee requirement to challenge a reduction of welfare benefits under the Fourteenth Amendment Due Process Clause in Ortwein v. Schwab. The Court compared the interests in Ortwein with Boddie and ruled that welfare, like bankruptcy, had "far less constitutional significance than the interest of the Boddie appellants."

b. Standards of Proof as Barriers to Court

Just as the fee cases turn on the interests at stake and the nature of the proceedings to avail those interests, so, too, a line of cases ruling on the standard of evidence turns on the underlying interests at stake and the nature of the proceeding. Thus, the Court held in Addington v. Texas that a mere "preponderance" standard of evidence runs afoul of due process principles in a civil commitment proceeding. The Court ruled that Fourteenth Amendment Due Process demanded a "clear and convincing" standard of proof before the state could commit an individual against his will to a mental hospital. The Court's ruling turned on the underlying interests and the nature of the proceeding to avail those interests: "[i]n considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof."

The Court held that the interests in civil commitment proceedings involved a "significant deprivation of liberty" and "social consequences to the individual" — weighty interests that require due process protections. But in rejecting the demand for an even higher standard, "beyond a reasonable doubt," the Court distinguished between the characteristics of a civil commitment proceeding and a criminal trial or delinquency proceeding:

160. Kras, 409 U.S. at 446. The Court also upheld the requirement under equal protection, similarly focusing on the interests involved. Id.
161. Id. at 444-45.
162. Id. at 445.
164. Id. at 659.
166. Id. at 427.
167. Id. at 431-33.
168. Id. at 425.
169. Id. at 425-26.
There are significant reasons why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions. In a civil commitment state power is not exercised in a punitive sense. Unlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution.\(^{170}\)

In other words, while the Court considered both the underlying interests and the nature of the proceeding in setting the standard of evidence, the Court specifically rejected a claim for a higher standard of proof based primarily on the nature of the proceeding. This reasoning seems to suggest that the same underlying interest — the fundamental interest in liberty in a civil commitment proceeding — would trigger the highest standard of proof, "beyond a reasonable doubt," if the nature of the civil commitment proceeding were more complex, more adversarial, or otherwise more like a criminal trial.

Building on the principle in *Addington*, the Court in *Santosky v. Kramer*\(^{171}\) ruled that a mere "preponderance" standard of evidence ran afoul of due process principles in a state-initiated proceeding to terminate parental rights.\(^{172}\) The Court focused first on the underlying interests, the fundamental interest in the right to parent: "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."\(^{173}\)

Through a careful comparison of interests, the Court aligned the fundamental interest in the right to parent with the liberty interest in *Addington*.\(^{174}\) But the Court in *Santosky* was clear that these interests were somewhat lower than the interest in physical liberty in a criminal prosecution.\(^{175}\) At the same time, the Court recognized that the state action in *Santosky* effected a permanent deprivation of the underlying right, while civil commitment (and delinquency, deportation, and denaturalization) were all reversible actions.\(^{176}\) The net result of its exacting comparison of interests was that due process demanded a "clear and convincing" standard in cases involving the termination of parental rights.\(^{177}\)

Finally, the Court limited the due process demand for heightened level of proof in *Rivera v. Minnich*.\(^{178}\) The Court held that a "preponderance" standard in

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\(^{170}\) *Id.* at 428 (footnote and citation omitted). *In re Winship*, 397 U.S. 358, 368 (1970) (setting the standard of proof in a delinquency hearing at “beyond a reasonable doubt”).


\(^{172}\) *Id.* at 758.

\(^{173}\) *Id.* at 753.

\(^{174}\) *Id.* at 754-56.

\(^{175}\) *Id.* at 755. This conclusion is somewhat surprising given the reasoning in *Addington*. As described *supra*, the Court in *Addington* seemed to reject a claim for a higher standard of proof based primarily on the nature of the civil commitment proceeding (and not based primarily on the underlying interest in physical liberty). *Addington*, 441 U.S. at 428. Aside from the relatively relaxed nature of the civil commitment proceeding itself, nothing in *Addington* compels a conclusion that physical liberty in a civil commitment proceeding is somehow different than physical liberty in, say, a criminal prosecution.

\(^{176}\) *Santosky*, 455 U.S. at 759.

\(^{177}\) *Id.* at 769-70.

\(^{178}\) 483 U.S. 574 (1986).
cases to establish paternity was constitutionally permissible.\textsuperscript{179} The Court carefully compared the interests in a case involving "the State's termination of a fully existing parent-child relationship" (as in \textit{Santosky}) with the interests in "the legal obligations accompanying a biological relationship between parent and child" (at issue here).\textsuperscript{180} Using the same kind of careful, exacting comparison of underlying interests that the Court used in \textit{Santosky},\textsuperscript{181} the Court in \textit{Minnich} held that the interest in avoiding legal obligations attendant to a paternity ruling was less than the interest in \textit{Santosky}, and therefore the lower standard of evidence was consistent with the demands of the Fourteenth Amendment Due Process Clause.\textsuperscript{182} Thus, the priority of interests runs through the line of cases effecting access based on the standard of proof.

\section*{B. The Priority of Equality in Process on Appeal}

The appellate cases — those involving access to the appellate process and those involving counsel on appeal — turn first on principles of equity and the type of process (i.e., the type of appeal) in determining rights on appeal, primarily pursuant to equal protection principles. Notably absent from these cases is the kind of careful comparison and exacting parsing of interests that are the mainstay of the cases at trial. Instead, the Court focuses almost exclusively on equal access within a particular type of appeal — the priority of equality in process. This section traces the priority of equality in process first through the access cases on appeal, then through the counsel cases on appeal.

\subsection*{1. Access to the Appellate Process}

The leading case on equal access on appeal is \textit{Griffin v. Illinois},\textsuperscript{183} a case that predates \textit{Gideon} and \textit{Douglas} by seven years. In \textit{Griffin}, the Court ruled unconstitutional a law that provided a free trial transcript on appeal for defendants sentenced to death, but that required all other defendants to purchase the transcript themselves, irrespective of their ability to pay.\textsuperscript{184} The effect of the statutory classification was that defendants sentenced to death, and defendants who could afford a transcript, would have a trial transcript on appeal; but defendants who were not sentenced to death and who could not afford a transcript would have no trial transcript on appeal.\textsuperscript{185} Despite the arguably unequal interests at stake — between

\begin{footnotes}
\item 179. \textit{Id.} at 579.
\item 180. \textit{Id.}\n\item 181. The Court in \textit{Minnich} ruled that there were three primary differences in these interests. First, there was an important difference in the ultimate results: a financial interest in \textit{Minnich} versus a parental interest in \textit{Santosky}. \textit{Minnich}, 483 U.S. at 579-80. Second, there was an important difference in the parties' relationships in the two proceedings: a financial relationship in \textit{Minnich} versus a familial relationship in \textit{Santosky}. \textit{Id.} at 580-81. Finally, there was an important difference in the finality of judgment (a consideration at play in \textit{Santosky} in distinguishing \textit{Santosky} and \textit{Addington}, supra): a final judgment in a paternity case bars a subsequent case on that question, but a final judgment preserving parental rights is subject to a future new case to terminate parental rights at any time. \textit{Id.} at 582.
\item 182. \textit{Id.}
\item 183. 351 U.S. 12 (1956).
\item 184. \textit{Id.} at 19-20.
\item 185. \textit{Id.} at 14-15.
\end{footnotes}
the interest in life for those sentenced to death versus the interest in physical liberty for all others — the Court instead focused only on the issue of equal access to appeals. In a strongly worded opinion, the Court ruled that in criminal trials the state may “no more discriminate on account of poverty than on account of religion, race, or color.” The Court found no meaningful distinction between access to trial and access to appeal on the basis of poverty, even while recognizing that “a State is not required by the Federal Constitution to provide appellate courts or appellate review at all.”

Notably, the Court engaged in none of the discussions so carefully defining the underlying right to physical liberty that were so central in the cases at trial. The Court’s ruling thus did not turn on the underlying interest of the litigant (here, life and physical liberty), but rather on the right to equal access on appeal. Thus, just as Gideon and Boddie set the course to privilege the underlying right and the nature of the proceeding in determining the scope of access in the trial cases, Griffin set the course to privilege equality and procedure in determining the scope of access on appeal.

Following Griffin by 10 years, the Court in Rinaldi v. Yeager focused even more narrowly on the equal protection basis of Griffin’s holding, turning even less on the magnitude of the underlying interests and more on the demand for equal access to the appellate courts. Rinaldi involved a state statutory scheme that operated to require only those unsuccessful criminal appellants who were imprisoned to repay the costs of a state-provided trial transcript for their appeal; all other unsuccessful criminal appellants (i.e., those who were not imprisoned) were not required to repay the transcript fee. The underlying liberty interests in Rinaldi were even more prominent than those in Griffin. In Rinaldi, the classification itself treated those whose physical liberty was at stake differently than those whose physical liberty was not. Nevertheless, the Court focused on equality of access to the appellate courts, not the underlying interests, to rule that the statutory scheme violated the Equal Protection Clause.

The Court’s priority of equality in process hit its apex in Mayer v. City of Chicago, which extended the Griffin and Rinaldi holdings to a case that involved a fine, not incarceration. In Mayer, the Court held unconstitutional a state court rule that provided trial transcripts only to those defendants appealing felony

186. Id. at 12.
187. Id. at 17.
188. Id. at 18.
189. Gideon, 372 U.S. at 343-44.
190. Boddie, 401 U.S. at 376.
193. Id. at 310.
194. Id. at 308.
195. Id. at 308-09. The Court focused on the underlying liberty interests only to the extent that the interests themselves formed the basis of the unconstitutional classification. Thus, it was the fact of the interests for the purpose of the classification — not the magnitude of the interests — that drove the result. Id.
convictions, and not to those defendants appealing misdemeanor convictions. The defendant in that case, a medical student, was convicted of disorderly conduct and interference with police for which he was fined $500. Like the reasoning and language in Griffin and Rinaldi, the opinion in Mayer is rife with references to equal access to appeal, e.g.: "[f]or 'it is now fundamental that, once established ... avenues (of appellate review) must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." 

The opinion is equally bereft of reasoning and language referencing the underlying interests of the litigant, with one single exception. In response to the city’s argument that when physical liberty is not at stake the defendant’s interest in a transcript is outweighed by the city’s fiscal interest — an argument that conjures the Mathews balancing test, used in access cases at trial — the Court wrote:

We add that even approaching the problem in the terms the city suggests hardly yields the answer the city tenders. The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. A fine may bear as heavily on an indigent accused as forced confinement. The collateral consequences of conviction may be even more serious, as when (as was apparently a possibility in this case) the impeccunious medical student finds himself barred from the practice of medicine because of a conviction he is unable to appeal for lack of funds.

This sounds like — and has been improperly interpreted as the kind of careful parsing of underlying interests that are the mainstay of the access cases at trial. But this alternative holding simply makes the point that the city would lose, even if the Court adopted its argument based on the underlying interests. The Court’s primary response to the city’s position is that the city’s position on the underlying interests was simply wrong:

[The city’s] argument misconceives the principle of Griffin ... Griffin does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way.

Thus, rather than revealing the relevance of the underlying interests at trial (as the city would have had it), the holding and alternative holding in Mayer underscore the priority of process over interests in the access cases on appeal.

197. Id. at 196-97.
198. Id. at 190.
199. Mayer, 404 U.S. at 193 (quoting Rinaldi, 384 U.S. at 310).
201. Mayer, 404 U.S. at 197.
Finally, in a pair of civil cases, the Court rounded out its approach to access on appeal and its priority of process. The rulings in these cases — which adopt the reasoning of the *Griffin-Rinaldi-Yeager* line of cases despite the variable underlying interests at stake — underscore the priority of process over the underlying interests in the access cases on appeal. Thus, in *Lindsey v. Normet*, the Court ruled that a double-bond requirement for appealing an adverse decision under a state eviction statute ran afoul of the Equal Protection Clause. In analyzing the requirement, the Court made no mention of the underlying interest, housing. Instead, the Court employed a standard equal protection test, concluding that the requirement was simply not related to a state purpose, and considered the requirement’s effect on equal access to the appellate process:

> [The state] has automatically doubled the stakes when a tenant seeks to appeal an adverse judgment in an [eviction] action. The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. The nonindigent . . . appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant in Oregon. The discrimination against [renters subject to eviction] is arbitrary and irrational, and the double-bond requirement . . . violates the Equal Protection Clause.

Similarly, in *M.L.B. v. S.L.J.*, the Court held that a record preparation fee on appeal of a case terminating parental rights violates the Equal Protection Clause and the Due Process Clause. Analyzing the aforementioned cases, the Court’s analysis focused first on equal access to appeal. But, given the lack of attention to the underlying interests in the access cases on appeal, the *M.L.B.* Court took a surprising turn and focused on the underlying interests. The Court aligned the appellant’s interest in the fundamental right to parent with the appellant’s interest in his professional prospects in *Mayer* and applied the *Mathews* balancing test to conclude that the record preparation fee was unconstitutional.

Three aspects of the Court’s ruling stand out against the typology and analysis presented above. First, as a case involving access to appeal (not trial), *M.L.B.* stands out as prioritizing the underlying interests. Second, in aligning the right to parent with the putative right in *Mayer*, *M.L.B.* relies on an alternative holding in *Mayer* that was never designed to drive the Court’s conclusion in that case. Instead, as discussed more fully above, the Court in *Mayer* only discussed the underlying interests in order to refute the city’s position that interests mattered. The ruling was not based on the appellant’s interest in *Mayer*; the interest only

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204. 405 U.S. 56 (1972).
205. Id. at 74.
206. Id. at 77–78.
207. Lindsey, 405 U.S. at 79.
208. M.L.B., 519 U.S. at 121.
209. Id. at 121–22.
210. Mayer, 404 U.S. at 197.
came up in the opinion to show that it was not relevant. To the extent that *M.L.B.*
turned on the alignment of interests, then, it is out of step with the plain holding in *Mayer*. Finally, in *M.L.B.*, the Court's use of the *Mathews* balancing test sets it apart from the other cases on equal access to appeal. As discussed more fully above, the *Mathews* test has been used exclusively in the cases on access to trial; the cases on access to appeal have turned instead on the principle of equal access to appeal.

Despite the apparent dissonance between *M.L.B.* and the other cases on access to appeal, however, the priority of equality in process remained intact through the *M.L.B.* decision. Nowhere is this priority more clear than in the cases on the right to counsel on appeal.

2. The Right to Counsel on Appeal

The starting point for this analysis is, of course, *Douglas v. California*.\(^2\) The Court in *Douglas* ruled as unconstitutional a state law permitting the state appellate courts to make a determination whether to appoint counsel on appeal based on "an independent investigation of the record and [a determination] whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed."\(^2\) The Court turned to its analysis in *Griffin* and compared the right to a transcript on appeal to the right to counsel on appeal.\(^2\) The court stated, "In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'"\(^2\) Notably absent from the Court's reasoning and language is any reference to the underlying interest at stake, physical liberty. Thus, the Court wrote, "But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."\(^2\)

The Court's omission is particularly salient given that *Douglas* came down on the same day as *Gideon*, the case that set the course for the Court's priority of interests in right-to-counsel and access cases at trial. As noted above, the majority did not even cite *Gideon* in its opinion.\(^2\) It seemed to see the two cases as representing two entirely different lines of authority rooted in two different constitutional principles. Thus, the Court ruled on equal protection grounds:

The present case, where counsel was denied petitioners on appeal, shows that discrimination is . . . between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality

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212. *Id.* at 355 (quoting *People v. Hyde*, 331 P.2d 42, 43 (1958)).
213. *Id.*
214. *Id.* (quoting *Griffin*, 351 U.S. at 19 (1956)).
215. *Id.* at 357.
216. Notably, the *Gideon* Court does not cite *Douglas* either. The decisions' lack of recognition of each other — even as they came down the exact same day — underscores the conclusion that the Court saw these cases as standing for two entirely different propositions: *Gideon* for the demand for counsel at trial in a criminal case, and *Douglas* for the demand for equality of access to the appellate courts.
demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.217

The plain language and reasoning of the Court certainly does not limit the right to counsel on appeal to criminal cases or other cases where a fundamental interest is at stake. On the contrary, it opens the door wide for a claim of right to counsel on appeal in any civil matter.

Eleven years after Douglas, the Court had occasion to define the scope of the right to counsel on appeal in Ross v. Moffitt.218 The Court in that case held that the right to counsel applied to appeals as of right, but not to discretionary appeals.219 Like the opinion in Douglas, the opinion in Ross conspicuously did not define the right with reference to the interest at stake despite the fact that, by 1974, after Gideon and Argersinger, the right to counsel in any case where physical liberty was at stake was well entrenched in the Court's jurisprudence. Instead, the Court defined the scope of the right to counsel on appeal by reference to the equal access principles articulated in Griffin and Douglas.220 The careful parsing in Ross had nothing to do with the underlying rights at stake; rather, the careful parsing in Ross was directed at process — the distinction between an appeal as of right and a discretionary appeal.221 Thus, Ross, coming 11 years after Douglas and Gideon and on the heels of Gideon's affirmation and definition in Argersinger, solidified the priority of equality in process in the right-to-counsel cases on appeal.

Priority of equality in process was also clear in a series of opinions from the early 1980s to the early 1990s that ruled on the right to counsel in a variety of appeal-like contexts and bound the right to process, not interests. Thus the Court ruled that an appellant had no constitutional right to counsel in filing a writ of certiorari for discretionary appeal at a state high court,222 that a prisoner had no constitutional right to counsel in a post-conviction proceeding,223 and that a prisoner had no right to counsel on appeal from a state habeas trial court judgment.224 The question in each of these cases was whether the right to counsel

218. 417 U.S. 600 (1974). The Court considered two different claims to the right to counsel on appeal just three years after Douglas in Anders v. California, 386 U.S. 738 (1967) and Entsminger v. Iowa, 386 U.S. 748 (1967). In those cases, criminal defendants claimed that, though represented in name by counsel on appeal, the quality of representation fell short of the requirements in Douglas. In Anders, the appellate attorney failed to file a brief; in Entsminger, the attorney waived the defendant's right to a full transcript. Anders and Entsminger are unlike Ross in that they do not define the scope of the right to counsel on appeal; rather, they define the quality of representation demanded by Douglas. See also Evitts v. Lucey, 469 U.S. 387, 395 (1985) (holding that a criminal defendant is entitled to effective assistance of counsel on the first appeal as of right).
220. Id. at 606-10.
221. Id. at 612-15.
on appeal in *Douglas* and *Ross* extended to the type of process, or appeal, at issue. Notably, in at least two of these cases, the interests at stake were different: *Murray v. Giarratano*\(^{225}\) involved a death-row inmate’s request for counsel in a post-conviction proceeding, while *Pennsylvania v. Finley*\(^{226}\) involved the exact same request for a prisoner not on death row. Nevertheless, the Court in each of these cases resolved the right to counsel by reference to the process, not the interests. Thus, like *Douglas* and *Ross*, these cases turned on principles of equality and questions of process, not on the underlying interests at stake.

Finally, and most recently, the Court, in *Halbert v. Michigan*,\(^{227}\) ruled unconstitutional a state judge’s denial of appointed counsel to an indigent appellant who had pleaded nolo contendere at trial.\(^{228}\) The judge, like several other judges in the state, had routinely denied appointed counsel on appeal to similarly situated appellants on the basis of a 1994 state constitutional amendment that provided that any appeal by an appellant who pleaded not guilty or nolo contendere at trial was discretionary.\(^{229}\) The amendment thus denied this class of appellants an appeal as of right, which was otherwise available under state law, and, according to these judges, also denied them a right to appointed counsel on appeal under *Ross*.\(^{230}\)

Like the Court in the other decisions on right to counsel on appeal, the *Halbert* Court again focused first on principles of equity and process in holding that the denial of counsel violated the Due Process and Equal Protection Clauses. Although the Court acknowledged and affirmed the approach in *M.L.B.*, the plain language of the opinion reads like a *Ross*-like parsing of the stages of appeal, not the careful comparison of interests in the cases on access and counsel at trial. Thus, the Court thoroughly reviewed the appellate procedure in Michigan and attempted to align the procedure set out in the constitutional amendment with the procedure in either *Douglas* or *Ross*. The Court concluded, “Petitioner Halbert’s case is framed by two prior decisions of this Court concerning state-funded appellate counsel, *Douglas* and *Ross*. The question before us is essentially one of classification: with which of those decisions should the instant case be aligned? We hold that *Douglas* provides the controlling instruction.”\(^{231}\) This process-based comparison is nothing like the comparisons of interests in the cases at trial.

Moreover, the Court’s inattention to the underlying interest in *Halbert* is illustrated by the fact that the underlying interest in *Halbert* is in fact different than the underlying interests in *Douglas* and *Ross*. The interest in *Halbert* is a physical liberty interest that in some important sense had been affirmatively relinquished by the defendant through his plea at trial. In other words, the defendant’s incarceration in *Halbert* was brought on by his own act. It does not matter for constitutional purposes that Halbert received a longer sentence than he anticipated under his plea, for the Court has clearly ranked any deprivation of physical liberty, irrespective of length, as triggering a fundamental interest. That is, Halbert’s


\(^{227}\) 125 S. Ct. 2582 (2005).

\(^{228}\) *Id.* at 2587.

\(^{229}\) *Id.* at 2585.

\(^{230}\) *Id.* at 2586.

\(^{231}\) *Halbert*, 125 S. Ct. at 2590 (2005).
interest in physical liberty did not somehow increase when he unexpectedly received a longer sentence than he anticipated; for constitutional purposes, it remained the same — an interest that he had affirmatively relinquished. In contrast, the physical liberty interest in 

Douglas and Ross was an interest that the defendants in those cases only relinquished involuntarily, by contesting the charges against them in a criminal trial.

A court preoccupied with the underlying interests — like the Court in any case ruling on access or the right to counsel at trial — would certainly have examined these interests carefully. In fact, the Court did consider carefully the volitional nature of the relinquishment of an underlying right in Bearden. As discussed supra, the Court in Bearden distinguished between the actual probationer in the case, who was unable to pay a fine as a condition of continued probation (and thus to avoid incarceration), and a counter-factual probationer, who simply choose not to pay the same fine (and thus to subject himself to incarceration). The Court ruled that the former probationer could not be imprisoned for his failure to pay the fine, while the latter probationer could be imprisoned.

The Court’s consideration of the volitional nature of the act in Bearden says nothing necessary about the interests in Halbert. Rather, it only serves to illustrate that the Court does engage in very careful parsing of the underlying interests at trial — even to the point of considering their volitional nature. That the Court did not engage in such parsing in Halbert illustrates the lack of attention the Court gives to the underlying interests when considering the right to counsel on appeal.

Whether we examine the Court’s actual language and reasoning in Halbert, or whether we consider the Bearden-like analysis that is notably not there, one thing is clear: Halbert continues and buttresses the priority of equality in process in the cases on the right to counsel on appeal.

The Court’s priority of equality in process on appeal, and its priority of interests at trial, means that a more direct path to a categorical constitutional right to counsel just may be through a Civil Douglas claim to right to counsel on a first appeal as of right, not a Civil Gideon claim to right to counsel at trial. Because of the priority of equality in process on appeal, a Civil Douglas claim would avoid the careful parsing and exacting comparisons of rights that are the mainstay of those access and right-to-counsel claims at trial. More importantly, a Civil Douglas claim would altogether avoid the “Lassiter presumption” that privileges the interest in physical liberty above all else. Instead, a Civil Douglas claim would focus on equal access and the protected process (i.e., the first appeal as of right) — factors more amenable to a claim based on an underlying interest in, say, the right to parent.

To be sure, the cases on the right to counsel on appeal have all, as a matter of fact, dealt with some variation on the underlying interest in physical liberty. While

232. Bearden v. Georgia, 461 U.S. 660, 668-69 (1983). But see Alabama v. Shelton, 535 U.S. 654, 658 (2002) (holding that the right to counsel at trial attached whenever a sentence of probation might lead to an actual deprivation of liberty — as when a probation violates the terms of probation and is thus subject to incarceration — notwithstanding the fact that a probation violation is volitional, in some meaningful sense).


234. Id. at 672.
that interest has not been a turning point in those cases, as discussed supra, litigants claiming a right to counsel on appeal would do well to demonstrate a fundamental interest (such as the right to parent), even as their claim would not turn on that interest.

III. CIVIL RIGHT TO COUNSEL ON APPEAL CASES

Civil Douglas claims have some limited history, but the mere handful of rulings has yielded decidedly mixed results. But perhaps because these cases have all preceded M.L.B. and the Court's conglomerated analysis, these cases rely on reasoning somewhat at odds with the approach in M.L.B. and with the typology set out in the previous section.

For example, the court in In re Joseph T. 235 held that appellants had no constitutional right to counsel on appeal of an order depriving them of their parental rights. 236 This decision — nine years before the Court ruled in Lassiter that a right to counsel at a criminal trial may also apply at a civil trial 237 — turned on the distinction between criminal and civil appeals and ruled that the right to counsel on appeal did not attach to civil appeals. 238 Similarly, the courts in In re Sade C., 239 which came down 14 years after Lassiter, ruled that appellants had no constitutional right to counsel on appeal of an action terminating parental rights. 240 The New Hampshire Supreme Court in State v. Westover 241 incorrectly combined principles from Gideon and Douglas to conclude that an appellant who received a fine, but no loss of physical liberty, had no constitutional right to counsel on appeal. 242 This reading of Gideon and Douglas is rather surprising in 1995, when Westover came down, given the distinct doctrinal evolutions in those cases since 1963 and given the Lassiter ruling that the right to counsel may attach in certain civil cases. 243

Notably, these cases denying the right have relied upon an unduly narrow interpretation of Douglas — that the right to counsel on appeal attaches only to criminal appeals, where physical liberty is at stake. This interpretation cuts against the typology of holdings and reasoning set out supra: it privileges questions of interests on appeal, where the Court has instead privileged questions of equality

236. Id. at 126.
238. In re Joseph T., 25 Cal. App. 3d at 126 (“We view a proceeding to adjudicate the dependency status of a child as a true civil cause, comparable in essentials to a child custody controversy between parents, except that the controversy is not between parents but one between a parent (or parents) and the state as parens patriae.”) (quoting In re Robinson, 8 Cal. App. 3d 783, 785-86 (1970)).
240. In re Sade C., 13 Cal. 4th at 981-93 (The issue in In re Sade C. was whether appellants had a right under Anders to a particular quality of representation on appeal. The court answered this question in the negative, based on its holding that an appellant in a civil action had no constitutional right to counsel on appeal at all.).
242. Id. at 1347 (“We conclude that, because a defendant facing no loss of liberty does not have a right to appointed counsel at trial, he does not have such a right at the appellate level, where the constitutional concerns are lessened.”).
and process. But this interpretation also cuts against a fundamental principle of *Lassiter*, that a right to counsel originally defined by the interest in the fundamental right to physical liberty (or limited to the criminal context) may, under certain circumstances, also apply to similarly weighty interests (or to weighty civil cases).

In contrast, the court in *Reist v. Bay County Circuit Judge* ruled that an indigent parent was entitled to appointed counsel in appealing a denial of parental rights. The *Reist* court analyzed the issue with primary reference to the principles in *Douglas* and *Ross*, as well as the procedure-based definition that those cases gave to the right to counsel on appeal — an approach that is more consistent with the typography of cases set out *supra*.

This line of state court cases is not tremendously helpful in predicting the success of a Civil Douglas claim for two reasons. First, the rulings are inconsistent, and they are based on different interpretations of the Court's right-to-counsel cases. But more importantly, all of these cases precede the Court's articulation of its conglomerated equal protection-due process approach in *M.L.B.* and the affirmation of that approach in *Halbert*. If *Lassiter* left any doubt, *M.L.B.* and *Halbert* conclusively destroyed any civil-criminal dichotomy in access and right-to-counsel cases. After these cases, it is simply clear that neither access nor right to counsel turns on the civil-criminal dichotomy.

Instead, as described above, the trial cases turn on the priority of interests, and the appellate cases turn on the priority of equality in process. Based on these trends, the Court is more likely to grant a civil right to counsel on appeal, where the cases turn on principles of equality and process, than a civil right to counsel at trial, where the cases turn on the underlying interests. Thus, the doctrinal path to Civil Douglas is clearer and better paved than the path to Civil Gideon.

**CONCLUSION**

Civil Douglas, as a constitutional theory toward the right to appointed counsel in civil cases, is but one piece of a much larger, more diverse Civil Gideon movement. But to the extent that a portion of that movement continues to litigate with the hopes that state or federal courts will someday overturn *Lassiter* just as the Court overturned *Betts* forty six years ago, Civil Douglas offers the doctrinal path of least resistance toward our ultimate goal: that poor litigants in civil actions will have a categorical constitutional right to appointed counsel.

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244. *Id.*
246. *Id.* at 64.
247. *Id.* at 59-64.