

# CHILDREN'S CONSTITUTIONAL RIGHT TO COUNSEL IN DEPENDENCY CASES

by ERIK PITCHAL\*

Twelve-year-old Sam and his ten-year-old brother Patrick were fed up. Tired of being in foster care, living with a nice enough lady but one who was not committed to them for the long haul, and tired of waiting for their mother to kick her long-standing drug addiction once and for all, the boys were at their wits ends. A parade of caseworkers had come and gone through the private not-for-profit agency with which the New York City Administration for Children's Services had contracted for their care. Articulate, sharp, and street smart beyond their years, Sam and Patrick had settled on a plan for their future: they would live with their maternal aunt, Tanya.<sup>1</sup>

Tanya had lived with them and their mother for awhile before the boys entered foster care, and recently she had completed some college courses and achieved some stability in her own young life. She was planning to move to South Carolina, where there was extended family. Sam and Patrick realized that Aunt Tanya was their last best chance to leave a life with an ever changing cast of well enough meaning strangers; a childhood of waiting for their mother to find the strength to change and to heal.

It was a brilliant plan. The only trouble was that no one would listen. The caseworkers judged Aunt Tanya an inadequate resource. They distrusted her motives, found her desire to relocate selfish and contrary to the boys' best interests, and were deeply suspicious that the boys' mother – admitting that she would probably never rehabilitate sufficiently to care for them – supported this custody arrangement. The judge who placed the boys in foster care to begin with, and who reviewed their case in a ten-minute pro forma hearing once a year,<sup>2</sup> generally endorsed whatever the caseworkers presented — and the caseworkers intended to

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1. Throughout this Article, the identities of real people are protected with pseudonyms.

2. At the time of Sam and Patrick's case, New York law provided for a once-a-year "permanency hearing," the purpose of which was to determine the need for continued placement of the child in foster care and to review the service plan and compliance therewith by the parent and the agency. N.Y. FAM. CT. ACTS §§ 1055(b)(i) and (b)(ii) (McKinney 2005). Federal law requires states, as a condition for receiving federal financial support of child welfare programs, to provide twice-a-year reviews, which at that time New York satisfied with section 1055 in combination with administrative reviews by the public agency. *See* N.Y. SOC. SERV. LAW § 409-e (3) (McKinney 2005) (calling for review of a family service plan within ninety days after removal from the current home, then again one hundred and twenty days later and thereafter every six months). In 2005, the Family Court Act was amended to now require twice-a-year judicial permanency reviews. N.Y. FAM. CT. ACTS § 1089(3) (McKinney 2006).

endorse the status quo. Even if the boys' mother came to the hearing and petitioned for the judge to release them to her sister, there was no reason this judge would give particular credence to her views. That the boys had opinions of their own, and that they had information that showed those opinions to be sound and possibly more reasonable than the workers', would be unknown to the court.

The moment when Sam and Patrick's case was called, and when the judge heard the agency's plan and determined whether to accept it or reject it, was a constitutional moment. In that courtroom, in Kings County (Brooklyn), New York, Family Court, the liberty interests of these two children were squarely at issue. Would they remain in state custody? Would they be reunited with family (and extended family)? Would they be consigned to a life with strangers and exposed to the possibility of a series of placements in restrictive, residential settings? Would they face the well-known risks of long-term foster care: poor educational progress, poor health, deteriorating mental health, and, ultimately as young adults, unemployment, homelessness, and disconnection from society?<sup>3</sup> Their fate was in the hands of an unconscionably busy court, one handling over 40,000 filings of various types a year, where annual reviews of 30 or more children a day competed for attention on the calendar with new filings of petitions alleging serious child maltreatment.<sup>4</sup> And the state, represented in court by overwhelmed attorneys for the public agency and underpaid caseworkers for private contract social service agencies — workers whose turnover rates were so high that most of them knew little about the children whose lives were their daily charge — struggled to keep track of some 30,000 wards in New York City alone.<sup>5</sup>

Sam and Patrick had a procedural due process right to a lawyer. With well defined liberty interests at stake, with the risk of an erroneous decision high, and with the state's interest in a measure of dignity and access to justice outweighing the financial burden associated with a policy intervention to protect the children's interests, these children were rights holders of a constitutional dimension.<sup>6</sup>

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3. See generally Annie E. Casey Foundation, KIDS COUNT DATA BOOK 7-9 (2004), available at [http://www.aecf.org/publications/data/kc2004\\_e.pdf](http://www.aecf.org/publications/data/kc2004_e.pdf) (collecting research on poor outcomes for young adults who are former foster children).

4. Center for Court Innovation, NEW YORK CITY FAMILY COURT: BLUEPRINT FOR CHANGE 4 (2002), available at [http://www.communitycourts.org/\\_uploads/documents/blueprin.pdf](http://www.communitycourts.org/_uploads/documents/blueprin.pdf). In the early part of this decade, the five Family Courts in New York City combined handled over 200,000 case filings and over 20,000 child protection proceedings annually. Brooklyn, as the largest borough by population, probably accounted for more than 20% of the filings.

5. In fiscal year 2001, the foster care census in New York City was 30,858. New York City Administration for Children's Services ("ACS"), *ACS Update Annual Report 2005, Five Year Trend*, available at [http://www.nyc.gov/html/acs/downloads/pdf/stats\\_update\\_5year.pdf](http://www.nyc.gov/html/acs/downloads/pdf/stats_update_5year.pdf). By the end of fiscal year 2005, that number had declined to 18,968. *Id.* As of June 2006, there were 16,285 children in the custody of ACS. ACS, *ACS Update, June 2006, FY 2006*, available at [http://www.nyc.gov/html/acs/downloads/pdf/stats\\_monthly\\_update.pdf](http://www.nyc.gov/html/acs/downloads/pdf/stats_monthly_update.pdf).

6. See *infra* Part III (arguing that the children had a constitutional right to a lawyer because there was a well defined liberty interests at stake, the risk of an erroneous decision high, and the state's interest in a measure of dignity and access to justice outweighed the financial burden associated with a policy intervention to protect the children's interests).

Fortunately for them, New York State has long seen fit to provide lawyers to children who are the subjects of dependency proceedings.<sup>7</sup> I was Sam and Patrick's lawyer. And, presented with a clear directive from my clients<sup>8</sup> to get them out of that "crazy foster care system"<sup>9</sup> and reunite them with their Aunt Tanya, I used all the tools in my attorney arsenal to do so. I served discovery demands and interrogatories on the agency and showed up at the hearing with two banker's boxes of documents and lengthy notes for cross-examination of the caseworker. The judge was shocked, the agency attorney was not interested in a fight, and we settled the case. It took a few months of bureaucratic maneuvering to implement the agreement, but Sam and Patrick were soon on their way to South Carolina with their aunt. Tanya struggled financially for some time; the boys did not have a suddenly stable life filled with material comfort. But they were together, they were with family, and they had some measure of peace.

Over half a million children today are in foster care and under the jurisdiction of a family court somewhere in the nation.<sup>10</sup> In many jurisdictions, statute, court rules, or local practice have led to children being provided a court appointed attorney independent of the child welfare agency.<sup>11</sup> In others, however, there are no

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7. In New York, dependency proceedings are commonly referred to as "child protective" proceedings. They are governed by Articles 10 and 10-A of the Family Court Act. See N.Y. FAM. CT. ACT § 1011 (outlining the requirements of child protective proceedings).

8. There is considerable debate in the field of child advocacy as to the proper role of the child's attorney in dependency proceedings — whether the attorney should pursue goals in accordance with the client's expressed wishes (the client-directed model), in accordance with the attorney's own sense of what is in the child's best interests (the best interests or guardian ad litem model), or something in between. See, e.g., Bruce A. Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 *FORDHAM L. REV.* 1281, 1293 (1996) ("[L]awyers serve children best when they serve in the role as attorney, not as guardian ad litem."); Robert E. Shepherd, Jr. & Sharon S. England, "I Know the Child is My Client, but Who Am I?", 64 *FORDHAM L. REV.* 1917, 1942 (1996) (advocating lawyers to decide which model to follow based on present circumstances); Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 *N.D. L. REV.* 939, 944 (1995) (arguing that neither model is sufficient to ensure proper representation of the child's best interests); Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 *LOY. U. CHI. L.J.* 259, 279-80 (1995) (noting the lack of clarity in the child's lawyer role in many jurisdictions and favoring client-directed representation as the best guarantee of zealous advocacy). See also JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS* 46-48 (2d ed. 2001) (summarizing scholarly debate on proper role of children's attorney). New York law provides very little guidance on this question. The Family Court Act creates a system of children's lawyers, known as "law guardians for minors who often require assistance of counsel to help protect their interests and to help them express their wishes to the court." N.Y. FAM. CT. ACT § 241. In my view, Sam and Patrick were old enough and mature enough to form and express reasoned wishes about the salient issues in their legal case and thus were entitled to have a lawyer advocate zealously on their behalf and to achieve their goals.

9. Sam's language, in particular, was quite a bit more salty, but this quotation is an apt summary of their expressed feelings about foster care.

10. United States Department of Health and Human Services, Administration for Children and Families, *Trends in Foster Care and Adoption — FY 2000-FY 2004*, available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/trends.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends.htm).

11. Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the U.S. and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 *NEV. L.J.* 966, App. C. (2006) (compiling information on all 50 states' practice with respect to the appointment of counsel for children in dependency cases). See also YALE LAW SCHOOL, *REPRESENTING CHILDREN WORLDWIDE* (2005), available at

requirements for counsel to be appointed and none in fact are.<sup>12</sup> Even in those jurisdictions that require it, many children are represented by attorneys whose caseloads are so crushingly high that they cannot provide effective representation — they do not meet their clients (and if they do, they see them in the sterile confines of the local courthouse, or the attorney’s office, as opposed to the place where the child lives), they do not investigate the case, they do not identify their clients’ needs (or seek services to meet those needs), and they do not act like lawyers in court (no cross-examining witnesses, filing motions, or making arguments).<sup>13</sup>

In the first reported case in the country, *Kenny A. v. Perdue*, the Federal District Court for the Northern District of Georgia has ruled that children like Sam and Patrick have the constitutional right to a lawyer.<sup>14</sup> Decided in the context of the defendants’ motion for summary judgment in a suit alleging, among other things, that a plaintiff class of approximately 3000 foster children in metropolitan Atlanta was receiving ineffective assistance of counsel, *Kenny A.* stands for the proposition,

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[http://www.law.yale.edu/rcw/rcw/jurisdictions/am\\_n/usa/usa.htm](http://www.law.yale.edu/rcw/rcw/jurisdictions/am_n/usa/usa.htm) (providing information on all 50 states’ practice with respect to the appointment of counsel for children in dependency cases organized by state).

12. The federal Child Abuse Prevention and Treatment Act (CAPTA) requires each state, as a condition of receiving financing to support child abuse prevention programs and services, to ensure that all children in dependency cases be appointed a “guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both).” 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2006). This person is to “represent the child.” *Id.* Thus, one could argue that there is a federal statutory right to an attorney for children in dependency cases. However, it is questionable whether that right, even if it existed, could be enforced by children either in individual cases in dependency courts or by a class of children in federal court. *See, e.g.,* *Tony L. by and Through Simpson v. Childers*, 71 F.3d 1182 (6th Cir. 1995) (finding no private right of action under the Child Abuse Prevention and Treatment Act); *Eric L. by and Through Schierberl v. Bird*, 848 F. Supp. 303, 309 (D.N.H. 1994) (also finding no private right of action under the Child Abuse Prevention and Treatment Act). *But see* *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662, 683-84 (S.D. N.Y. 1996) (finding CAPTA to be privately enforceable), *aff’d*, *Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997).

13. Much of what is known about children’s attorneys’ caseloads is anecdotal. At the time I was Sam and Patrick’s lawyer, I was responsible for approximately 350 children with calendared court dates, and perhaps another 150 who were in foster care and would have a court date within the next 12 months, though it was not scheduled. My office only “counted” cases if there was a scheduled court date. In 2004, the California Administrative Office of the Courts, pursuant to state legislation, conducted a statewide study of workloads of attorneys practicing in dependency court. The study found a statewide average of 273 cases per attorney. Judicial Council of California, Administrative Office of the Courts, *Dependency Counsel Caseload Study and Service Delivery Model Analysis* (2004). The discovery process in *Kenny A.* revealed that children’s lawyers in Fulton County, Georgia, had caseloads of 450 and lawyers in DeKalb County had 200. *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1362 (N.D. Ga. 2005). In the summer of 2006, the ABA Center on Children and the Law, the Fordham Interdisciplinary Center for Family and Child Advocacy, and the National Association of Counsel for Children conducted a nationwide survey of attorneys who represent children in dependency cases. Howard Davidson and Erik S. Pitchal, *Caseloads Must Be Controlled So All Child Clients Can Receive Competent Lawyering* (2006) available at [www.fordhamadvocacycenter.org](http://www.fordhamadvocacycenter.org). The survey sought information concerning the attorneys’ caseloads and found that 24.9% of respondents have a caseload of between 100 and 199. *Id.* at 6. Of child advocacy specialists — attorneys who only represent children in dependency cases — the caseloads were even higher; 71.1% have a caseload greater than 100 and one-fifth have a caseload greater than 300. *Id.* at 7.

14. *Kenny A.*, 356 F. Supp. 2d at 1358.

following from the analysis of *Mathews v. Eldridge*,<sup>15</sup> that children who are the subjects of dependency proceedings have a procedural due process right to a lawyer.<sup>16</sup> This stunning decision, issued despite United States Supreme Court precedent that the class's parents do not even have the right to a lawyer when faced with the permanent termination of their parental rights,<sup>17</sup> has thus far gone unremarked upon in the academy. This Article is an attempt to add to the scholarly conversation about the nature and scope of children's due process right to counsel through an analysis of *Kenny A.*

Part I of this Article summarizes the *Kenny A.* litigation and provides the background context for the District Court's decision.<sup>18</sup> Part II presents the District Court's decision, summarizing the strengths of the Court's opinion and introducing some areas where it might have gone further. Part III adds to *Kenny A.* by presenting additional and alternative theories and arguments for why children have the right to a lawyer in dependency proceedings. This analysis is critical because advocates across the country have expressed interest in bringing litigation similar to *Kenny A.* in other jurisdictions, but the court's analysis may not be sufficient to prevail in future cases.<sup>19</sup> Moreover, scholars who seek to make the theoretical case for a broader construction of children's right to counsel (or children's rights in general) may wish to go beyond the analysis contained in the *Kenny A.* decision. The Article closes with some strategic thoughts in Part IV for how children's advocates might construct their next right-to-counsel lawsuit.

#### I. *KENNY A. v. PERDUE*: BACKGROUND AND CONTEXT

In June 2002, advocates from the national organization Children's Rights, together with local counsel in Atlanta, brought suit against Georgia state officials as well as two county defendants, Fulton and DeKalb, charging a litany of constitutional and statutory violations in the child welfare system.<sup>20</sup> The lawsuit, later certified as a class action, sought wide scale injunctive relief on behalf of approximately 3000 children from those two counties, which together constitute much of metropolitan Atlanta.<sup>21</sup>

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15. 424 U.S. 319, 334-35 (1976) (noting that due process generally requires consideration of three distinct factors: private interest that will be affected by official action; risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail).

16. *Kenny A.*, 356 F. Supp. 2d at 1360.

17. *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 32-33 (1981).

18. I was co-counsel for the plaintiffs in *Kenny A.* and remain in that role today, part of the team of class counsel who are monitoring and enforcing the defendants' compliance with a consent decree. All of the information about *Kenny A.* presented in this Article comes from the public record and none of it comes from any attorney work-product or other material otherwise covered by confidentiality rules.

19. See *infra* Part III and note 64 (discussing children's right to counsel in dependency proceedings).

20. *Kenny A.*, 356 F. Supp. 2d at 1355.

21. The certified class was defined as: "All children who have been, are, or will be alleged or adjudicated deprived who (1) are or will be in the custody of any of the State Defendants; and (2) have or will have an open case in Fulton County DFCS or DeKalb County DFCS." *Kenny A. ex. rel. Winn v. Perdue*, 218 F.R.D. 277, 305 (N.D. Ga. 2003).

*Kenny A. v Perdue* was similar to several other lawsuits brought by child advocates in various jurisdictions around the nation that claimed that the manner in which government agencies treated foster children violated their rights and required court-ordered remedies.<sup>22</sup> The legal claims included violations of children's substantive due process rights while in state custody and violations of the Adoption Assistance and Child Welfare Act of 1980, as amended by the Adoption and Safe Families Act of 1997.<sup>23</sup> The factual claims included allegations that children were physically and emotionally harmed while in foster care, due to: caseworkers with unsafe caseloads and inadequate training, overcrowded and under-trained foster homes, lack of treatment services, and antiquated management information systems, among many other systemic failures.<sup>24</sup> Georgia's child welfare system, like most states,<sup>25</sup> is run at the state level, and thus the named defendants included the governor, the commissioner of the state Department of Human Resources ("DHR"), and various officials in DHR's Division of Family and Children Services ("DFCS").

All of the plaintiffs were in foster care pursuant to orders of the state Juvenile Court. Under Georgia law, civil proceedings brought pursuant to allegations of child maltreatment are initiated in Juvenile Court with the filing of a deprivation petition.<sup>26</sup> Deprivation petitions allege that the parents or legal guardians of a child have neglected or abused the child and that the family requires state intervention.<sup>27</sup> Most, but not all, deprivation cases involve a request for a judicial order directing the removal of the child from her parents' custody and placement in foster care.<sup>28</sup>

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22. See, e.g., *Marisol A.*, 929 F. Supp. at 669 (alleging that city and state officials responsible for administering and monitoring the Administration of Children Services mishandled plaintiffs' cases and, through defendants' actions or inactions, deprived plaintiffs of their rights under the First, Ninth, and Fourteenth Amendments to the United States Constitution, under Article XVII of the New York State Constitution, as well as under numerous federal and state statutes); *Lashawn A. v. Dixon*, 762 F. Supp. 959, 960 (D.D.C. 1991) (alleging that the District of Columbia Department of Human Services' administration of the city's foster care system violated the class' statutory and constitutional rights); *Olivia Y. ex rel Johnson v. Barbour*, 351 F. Supp. 2d 543, 546-47 (S.D. Miss. 2004) (alleging that the Mississippi Department of Family and Child Services' administration of the state child welfare system violates the due process rights of those children in the system); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 480-81 (D.N.J. 2000) (alleging that the New Jersey Departments of Human Services and Youth and Family Services' administration of the state child welfare system violates the due process rights of those children in the system).

23. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in 42 U.S.C. § 601).

24. *Kenny A.*, 356 F. Supp. 2d at 1355, 1357.

25. New York and California are two notable examples of states with county-run child welfare systems, though even in those jurisdictions, the state supervises the local operations to a certain extent. See N.Y. SOC. SERV. LAW § 395 (McKinney 2006) (granting county government the responsibility for providing for child welfare) and CAL.WELF. & INST. CODE § 16500 (West 2006) (creating state and local spheres of influence in the administration of child welfare).

26. GA. CODE ANN. § 15-11-35(4) (West 2006). What Georgia refers to as "deprivation" is more commonly known nationally as "dependency."

27. GA. CODE ANN. § 15-11-38 (West 2006) (identifying who may make a petition in a juvenile proceeding).

28. GA. CODE ANN. § 15-11-55(a) (West 2006) (stating that in a juvenile proceeding, if the child is found to be deprived, the court may make one of several outlined orders of disposition best suited to the protection and physical, mental, and moral welfare of the child).

These placements are first done on a temporary basis and later, after a termination of parental rights hearing, could be permanent. In deprivation cases, the petitioning agency, DFCS, is represented by counsel, either a staff or a contract Special Assistant Attorney General (“SAAG”). Parents unable to afford counsel are assigned court-appointed attorneys. Similar schemes exist in virtually every jurisdiction in the country, with the exception that not all jurisdictions provide court-appointed counsel to parents.<sup>29</sup>

What was unique about the *Kenny A.* complaint was its allegation that the county defendants were providing inadequate and ineffective assistance of counsel to the plaintiff *foster children*.<sup>30</sup> In both Fulton and DeKalb Counties, the Juvenile Court included on its staff lawyers known as child advocate attorneys who were assigned to represent the interests of children in the course of deprivation proceedings, separate from the SAAGs’ duties and separate from parents’ counsel. At the time the lawsuit was filed, Fulton County had four child advocate attorneys on staff and DeKalb County had two.<sup>31</sup> Also at the time of filing, there were approximately 2000 children under the deprivation jurisdiction of the Fulton Juvenile Court, and approximately 1000 in DeKalb — a caseload of about 500 per child advocate attorney.<sup>32</sup> The complaint alleged that as a result of these workloads, the child advocate attorneys were unable to consult with their clients and were unable to provide adequate and effective representation.<sup>33</sup> Coming on top of the allegations against state officials recounting the horrifying conditions of the overall foster care system, the ineffective assistance of counsel claim told a story about children caught in the grip of an uncaring, unconstitutional vice where even their own putative advocates were unable to help them.

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29. The Supreme Court has declared that parents do not have a constitutional right to a court-appointed lawyer in termination of parental rights (“TPR”) cases. *Lassiter*, 452 U.S. at 32-33. *See also infra* notes 114-115 (stating that children have a greater liberty interest at stake in the initial dependency proceeding than their parents do because the risk of harm they face is irreparable). Since TPR hearings concern the permanent severance of the legal parent-child relationship, and initial dependency hearings concern something less than the permanent severance, it generally follows that if parents do not have the right to counsel in TPR cases they do not have the right to counsel in earlier dependency hearings either. Nevertheless, many states, including Georgia, New York, and California, provide court-appointed lawyers to indigent parents at the first stages of a dependency case. *See, e.g.*, GA. CODE ANN. § 15-11-6(b) (West 2006); N.Y. FAM. CT. ACTS § 262 (McKinney 2006); and CAL. WELF. & INST. CODE § 317 (West 2006) (all statutes providing legal counsel for indigent parties in juvenile court proceedings).

30. *Kenny A.*, 356 F. Supp. 2d at 1355.

31. *Kenny A. v. Perdue*, No. 1:02-CV-1686-MHS (N.D. Ga.) First Amended Complaint ¶ 100 (filed Jan. 3, 2003).

32. *Id.* *See also Kenny A.*, 356 F. Supp. 2d at 1357, 1362-63 (“[P]laintiffs cite evidence that child advocate attorneys’ caseloads in both Fulton and DeKalb Counties are substantially above the 100 individual clients at a time recommended by the [National Association of Counsel for Children]. . .”).

33. *Kenny A. v. Perdue*, No. 1:02-CV-1686-MHS (N.D. Ga.) First Amended Complaint ¶ 102 (filed Jan. 3, 2003). *See also Kenny A.*, 356 F. Supp. 2d at 1357, 1362-63 (“[P]laintiffs cite evidence that . . . excessive caseloads prevent [child advocate attorneys] from carrying out their basic professional responsibilities.”) In addition to the lack of funding and the high caseloads, discovery revealed that child advocate attorneys were not independent advocates because their employment was supervised directly by the judges before whom they practice.

## II. THE DISTRICT COURT'S OPINION

In the fall of 2004, following the close of discovery, Fulton and DeKalb Counties moved for summary judgment.<sup>34</sup> Though they raised several legal arguments, the heart of the defendants' motion was their contention that the plaintiffs had no right to counsel in deprivation proceedings at all, and thus no right to adequate and effective legal representation.<sup>35</sup> The plaintiffs responded that there is a right to counsel for children both in Georgia statute and in the Georgia constitution.<sup>36</sup> Thus, as a predicate to all other questions raised at summary judgment, the Court had to resolve the question of whether and to what extent children had a right to counsel in deprivation matters.<sup>37</sup>

The provision at issue was the Due Process Clause of the Georgia Constitution: "No person shall be deprived of life, liberty, or property except by due process of law."<sup>38</sup> Noting first that children are entitled to procedural due process under both the federal and Georgia constitutions whenever their liberty or property rights are at stake, the Court identified the threshold issue of whether children have such interests at stake in deprivation proceedings.<sup>39</sup> The Court answered this question in the affirmative.<sup>40</sup> The Court identified the interests as including "a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents."<sup>41</sup>

The Court went on to note that the child's interests are at stake at initial court proceedings on a deprivation petition — before she enters state custody — as well as at later stages, after she is in foster care.<sup>42</sup> Children not in state custody have

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34. *Kenny A.*, 356 F. Supp. 2d at 1353.

35. *Id.* at 1356-57. The defendants' other arguments were that plaintiffs had failed to demonstrate irreparable injury necessitating injunctive relief; plaintiffs had other remedies at law that were adequate, such as state bar disciplinary proceedings or individual malpractice claims for damages; and that the appropriate level of county funding for child advocate attorneys was a legislative function that should not be interfered with by the court.

36. *Kenny A.* was initially filed in state court. For strategic reasons, the defendants removed the matter to federal court soon after filing. After removal, for reasons that are beyond the scope of this paper, plaintiffs' counsel relied solely on state law for the ineffective assistance of counsel claim against Fulton and DeKalb Counties, and the Court's constitutional adjudication was similarly limited to the Georgia constitution only. Georgia has incorporated federal due process analysis and the *Mathews* framework into its approach to analyzing the state constitution's due process clause. GA. CONST. art I, § 1, ¶ 1.

37. The Court first ruled on the parties' dispute regarding children's statutory right to counsel, a matter requiring interpretation because there is no crystal clear code provision on the question. The Court read GA. CODE ANN. §§ 15-11-6(b) and 15-11-9(b) in combination with a state attorney general opinion to find a statutory right to counsel. GA. CODE ANN. § 15-11-9(b) gives children party status in deprivation cases, and § 15-11-6(b) provides that separate counsel must be provided to two parties when their interests conflict. The Georgia Attorney General had previously declared that there is "an inherent conflict of interests" between a child and his parent in a deprivation proceeding. *Kenny A.*, 356 F. Supp. 2d at 1358-59 (citing 76 Op. Ga. Att'y Gen. 131, 237 (1976)).

38. GA. CONST. art I, § 1, ¶ 1.

39. *Kenny A.*, 356 F. Supp. 2d at 1359-60.

40. *Id.* at 1360.

41. *Id.*

42. Under the definition of the certified class, children who are the subjects of deprivation proceedings in Fulton and DeKalb Juvenile Court are class members, regardless of whether they are in

liberty interests at stake because an erroneous decision to leave them with their parents “can have a devastating effect on a child, leading to chronic abuse or even death.”<sup>43</sup> An erroneous decision to remove a child, however, “can lead to the unnecessary destruction of the child’s most important family relationships.”<sup>44</sup> Once children are placed in state custody, their liberty interests are at stake for an additional reason: the “special relationship” created under such circumstances.<sup>45</sup>

Having declared that children who are subjects of a deprivation proceeding have fundamental liberty interests at stake, the Court then went on to determine what process is constitutionally required to protect those interests.<sup>46</sup> Noting that Georgia has adopted the *Mathews* three-prong test for analyzing procedural due process claims, the Court next applied that test.<sup>47</sup>

The first step of the *Mathews* analysis considers the scope of the private liberty interest at stake.<sup>48</sup> The *Kenny A.* court described two parts of the plaintiffs’ liberty interests. First are the “fundamental liberty interests in health, safety, and family integrity.”<sup>49</sup> The second part of the liberty interest is the more traditional notion of a physical liberty interest. Here, the Court cited evidence in the record from the plaintiffs’ claims against the *state*, noting that:

[F]oster children in state custody are subject to placement in a wide array of different types of foster care placements, including institutional facilities where their physical liberty is greatly restricted. Indeed, plaintiffs have pointed to evidence that foster children are often forced to live in such institutional settings because suitable family foster homes are not available.<sup>50</sup>

The Court did not cite the particulars of this evidence — the number or percentage of plaintiffs who are in such settings, for example.<sup>51</sup> Rather, the Court then went on to assert that the liberty interests at stake supported a right to counsel.<sup>52</sup>

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state custody or not. *See Kenny A.*, 218 F.R.D at 305 (defining the class as “[a]ll children who have been, are, or will be alleged or adjudicated deprived who (1) are or will be in the custody of any of the State Defendants; and (2) have or will have an open case in Fulton County DFCS or DeKalb County DFCS”).

43. *Kenny A.*, 356 F. Supp. 2d at 1360.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* *See also* Hood v. Carsten, 267 Ga. 579, 580-81 (1997) (applying the *Mathews* test to the Georgia constitution).

48. *Mathews*, 424 U.S. at 334; *see also Kenny A.*, 356 F. Supp. 2d at 1360 (applying the first prong of the *Mathews* test).

49. *Kenny A.*, 356 F. Supp. 2d at 1360.

50. *Id.* at 1360-61.

51. Such evidence was available and was in fact cited in the plaintiffs’ brief in opposition to the defendants’ motion for summary judgment. *See* Pl.’s Br. at 36 (noting that as of December 2003, 26% of Fulton foster children lived in congregate care settings) (filed Apr. 4, 2004).

The argument that the right to counsel attaches because *physical* liberty is at stake seemingly comes from *In re Gault*, 387 U.S. 1 (1967), in which the Supreme Court held that children charged with juvenile delinquency, who face the possibility of confinement, are entitled under the due process clause to a lawyer. In large measure, the Supreme Court relied on — and distinguished — *Gault* when it held, in *Lassiter*, that parents do not face a loss of physical liberty in TPR cases. *See infra* Part III (discussing *Lassiter v. Dep’t of Soc. Sev’cs.*, 452 U.S. 18 (1981)).

The second prong of the *Mathews* test considers the risk of an erroneous decision by the tribunal absent some additional or substitute procedural safeguards, and the likelihood that such safeguards would ameliorate the risk.<sup>53</sup> The *Kenny A.* court found that the risk of erroneous decisions in the Juvenile Court, absent counsel for children, to be unacceptably high, in part because of the “imprecise substantive standards” used in deprivation proceedings — “standards that leave determinations unusually open to the subjective values of the judge.”<sup>54</sup> The Court also cited evidence in the record that DFCS routinely makes errors about what is best for children who are in its custody.<sup>55</sup> The unstated implication was that without counsel for the child to serve as a check on DFCS, the Juvenile Court is likely to adopt the DFCS position and along with it, its erroneous conclusions about what to do with the child.

The Court then reviewed interventions other than the assignment of counsel to children to determine whether some other kind of procedural safeguard could adequately protect children’s liberty interests. Citizen review panels were deemed inadequate, because they only rely on facts presented by DFCS when recommending a course of action.<sup>56</sup> Court Appointed Special Advocates were rejected because they were noted to be “volunteers who do not provide legal representation to a child,” and they are not assigned in every case.<sup>57</sup> Finally, the Court rejected the defendants’ argument that the Juvenile Court bench is an adequate protector of children’s liberty interests, because “unlike child advocate attorneys, [they] cannot conduct their own investigations and are entirely dependent on others to provide them information about the child’s circumstances.”<sup>58</sup> The Court then declared that only counsel can protect against erroneous decision making.<sup>59</sup>

The third *Mathews* prong is an analysis and weighing of the Government’s interest, including the fiscal and administrative burdens of a proposed procedural safeguard.<sup>60</sup> The *Kenny A.* court found that the state’s interest in deprivation proceedings is to serve as *parens patriae* for children who are before the Juvenile Court on deprivation matters, and as such, “the government’s overriding interest is to ensure that a child’s safety and well-being are protected.”<sup>61</sup> Thus, far more than a mere litigant in a contested proceeding, the state in a deprivation case “wins” when the child is protected — even if that sometimes means an action is taken contrary to the recommendations of the state’s child welfare officials. The Court thus essentially posited that the state itself should need to have a safeguard in place as a check against itself, and that it is worth the fiscal and administrative price to

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52. *Kenny A.*, 356 F. Supp. 2d at 1361.

53. *Mathews*, 424 U.S. at 335; *see also Kenny A.*, 356 F. Supp. 2d at 1361 (applying the second prong of the *Mathews* test).

54. *Kenny A.*, 356 F. Supp. 2d at 1361 (citing *Santosky v. Kramer*, 455 U.S. 745, 762 (1982)).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Mathews*, 424 U.S. at 335; *see also Kenny A.*, 356 F. Supp. 2d at 1361 (applying the third prong of the *Mathews* test).

61. *Kenny A.*, 356 F. Supp. 2d at 1361.

have one. The only safeguard that would work, the Court concluded, was the assignment of independent counsel for the children.<sup>62</sup>

### III. MORE THAN *KENNY A.*: THE ROBUST BASIS FOR CHILDREN'S RIGHT TO COUNSEL IN DEPENDENCY PROCEEDINGS

*Kenny A.* takes a short and matter-of-fact approach to the first-impression question presented. While the decision was a resounding win for the plaintiffs in the particular case at hand,<sup>63</sup> several additional and more theoretical arguments for why children who have parents should also have lawyers are available — arguments not offered by the court in *Kenny A.*<sup>64</sup> In each of the three *Mathews* test prongs, the Court relied on arguments that were good enough to deny the defendants' summary judgment motion at the trial court level. The broader discussion of whether children ought to have the right to counsel requires further consideration.

#### A. *The Elephant in the Room: Lassiter v. Department of Social Services and the Scope of the Liberty Interest*

When one thinks of procedural due process in the context of dependency law, one has to think immediately of the two seminal on-point Supreme Court cases: *Lassiter v. Department of Social Services*<sup>65</sup> and *Santosky v. Kramer*.<sup>66</sup> *Lassiter*

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62. *Id.*

63. Several months after issuing its opinion, the Court directed the parties to engage in mediated settlement talks. Negotiations continued until early 2006, when separate agreements were reached between the plaintiffs and each of the two county defendants. On May 16, 2006, following a fairness hearing, the Court approved the agreements and entered them as so-ordered consent decrees. DeKalb County has agreed to have a total of nine child advocate attorneys on staff within 120 days of the entry of the consent decree and 11 by March 2007. DeKalb has also agreed to implement a maximum caseload of 130 children per lawyer. Fulton County agreed to increase its child advocate attorney staff to 12 lawyers, two investigators, and three support staff (all full-time) and to retain the Carl Vinson Institute of Government at the University of Georgia to do a workload study of its child advocate attorneys; the recommendations of that study will be presumptively binding on Fulton 180 days after it is published. Both counties have agreed to qualitative standards of practice and to the appointment of a neutral monitor, who will issue periodic compliance reports. Finally, each county now has established an office for its child advocate attorneys that is functionally and administratively independent of the Juvenile Court. Consent Decree Between Plaintiffs and DeKalb County, Georgia at 3-4, 6-8, *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005), No. 1:02-CV-01686-MHS Doc. 525 (Mar. 23, 2006), available at [http://www.childwelfare.net/activities/kennya/kenny\\_a\\_dekalb\\_consent\\_20060323.pdf](http://www.childwelfare.net/activities/kennya/kenny_a_dekalb_consent_20060323.pdf); Consent Decree at 6-7, *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353(N.D. Ga. 2005), No. 1:02-CV-01686-MHS Doc. 519-4 (Mar. 23, 2006), available at [http://www.childwelfare.net/activities/kennya/kenny\\_a\\_fulton\\_consent\\_20051213.pdf](http://www.childwelfare.net/activities/kennya/kenny_a_fulton_consent_20051213.pdf).

64. For a cogent argument as to why lawyers in dependency cases should not be provided to children who are too young to direct the lawyer, see Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 77 (1984) (referencing problems such as arbitrariness in outcomes of cases, and undermining legitimate parental interests as reasons why children who are too young should not be appointed counsel in child dependency cases) [hereinafter Guggenheim, *The Right to Be Represented*].

65. 452 U.S. 18 (1981) (discussing the Court's precedent regarding procedural due process and how it translates to dependency cases).

stands for the proposition that parents in termination of parental rights cases do not, by definition, have such a great liberty interest at stake that the state is required to provide free counsel.<sup>67</sup> While leaving parents the option, case-by-case, to make a pitch that in their specific circumstances a constitutional right to a lawyer does attach, in practice *Lassiter* eliminated the possibility of a national constitutional entitlement.<sup>68</sup> The very next year, perhaps recognizing that the *Lassiter* rule was too harsh, the Court increased the state's burden of proof in termination of parental rights ("TPR") cases to a clear-and-convincing standard, finding in *Santosky* that New York's preponderance-of-the-evidence standard was too low to safeguard adequately parents' procedural due process rights.<sup>69</sup>

In reviewing the scope of a child's liberty interest at stake in dependency cases, it is helpful to consider separately the child's interest before there has been a judicial finding of parental unfitness and after. Much changes in the relationship among the child, the parent, and state once this determination is made.

Starting at the beginning of a dependency case, when analyzing the scope of the child's liberty interest, one must immediately confront the rule in *Lassiter*.<sup>70</sup> *Lassiter* involved a parent who was facing the termination of her parental rights.<sup>71</sup> TPR hearings come at the very end of dependency proceedings, usually a year or more after an initial finding of parental unfitness.<sup>72</sup> Even with a judicial determination of unfitness, a parent may retain physical and legal custody of her child; if the child is placed in foster care, it is not a permanent placement and the parent maintains the possibility of having the child returned.<sup>73</sup> To grant a TPR,

66. 455 U.S. 745 (1982) (stating the required standard of clear and convincing evidence before a parental rights can be terminated).

67. *Lassiter*, 452 U.S. at 31-32 (finding that the Constitution does not "require the appointment of counsel in every parental determination proceeding").

68. *Id.*

69. *Santosky*, 455 U.S. at 747-48. Considering the lineup of justices in the majority and dissent in *Lassiter* and in *Santosky*, some have suggested that *Santosky* represents, if nothing else, a change of heart on the part of Justice Powell. See, e.g., Robert Wainger, *Santosky v. Kramer: Clear and Convincing Evidence in Actions to Terminate Parental Rights*, 36 U. MIAMI L. REV. 369, 378 (1982) (discussing possible rationales for Powell joining the majority decisions in both *Lassiter* and *Santosky*, cases that have seemingly divergent outcomes). Aside from Justice Powell, who was in the majority in both cases, the justices in the majority in *Lassiter* were in dissent in *Santosky*, and vice versa. (Justice Stewart, who wrote the majority opinion in *Lassiter*, retired and was replaced by Justice O'Connor, who voted with the dissenters in *Santosky*.) However, Justice Powell did not write an opinion in either case, so it is impossible to know what caused him to join the majority in both.

70. *Lassiter*, 452 U.S. at 31-32.

71. *Id.* at 20-21.

72. See SOUTH CAROLINA'S BAR CHILDREN'S COMMITTEE, GUIDE FOR LAWYERS APPOINTED IN CHILD PROTECTION CASES (2000), [http://childlaw.sc.edu/frmPublications/2004appointedinchildprotectioncases\\_9152004102901.pdf](http://childlaw.sc.edu/frmPublications/2004appointedinchildprotectioncases_9152004102901.pdf); VICTORIA WEISZ, NEBRASKA SUPREME COURT, 2005 REASSESSMENT OF COURT AND LEGAL SYSTEM FOR CHILD ABUSE AND NEGLECT AND FOSTER CARE (2006), <http://www.ccfl.unl.edu/outreach/judicialcommission/nsc/2005reassessment.pdf>; GENE C. SIEGEL, MICHELE ROBBINS, ARIZONA SUPREME COURT, TERMINATION OF PARENTAL RIGHTS BY JURY TRIALS IN ARIZONA, A SECOND YEAR ANALYSIS (2005), [http://www.supreme.state.az.us/dcsd/docs/tpr\\_jury\\_trial.pdf](http://www.supreme.state.az.us/dcsd/docs/tpr_jury_trial.pdf).

73. NEW YORK CITY FAMILY COURT, FOSTER CARE APPROVAL & REVIEW (2006), [http://www.nycourts.gov/courts/nyc/family/faqs\\_fostercare.shtml#fc6](http://www.nycourts.gov/courts/nyc/family/faqs_fostercare.shtml#fc6).

though, is to permanently sever the legal ties between parents and their children. Quite clearly, then, the stakes are much higher in TPR proceedings than at any other phase of dependency. *Lassiter* says that despite those high stakes, *parents* do not have a constitutional entitlement to an attorney in a TPR hearing.<sup>74</sup> *Kenny A.* says that the scope of *children's* liberty interests in *all* phases of dependency proceedings is so broad that they must have a lawyer the entire time, from preliminary hearings all the way through TPR.<sup>75</sup> How can these rules be reconciled?

*Kenny A.* did not mention *Lassiter*, but the decision did make a narrow argument that in the first instance would seem to be a way to distinguish that case.<sup>76</sup> The *Lassiter* rule is predicated on the Supreme Court's finding that parents do not have a broad liberty interest at stake in TPR hearings because their *physical* liberty could not be affected by the outcome, an argument that relied in large part on *Gault*.<sup>77</sup> Tacking from this argument, *Kenny A.* noted that children face a risk of losing physical liberty in all stages of a dependency case, because, once taken into foster care, they could end up in restrictive mental health facilities.<sup>78</sup>

This narrow construction of children's liberty interest led to an incredibly broad remedy — the requirement to give a lawyer to every child at the moment a dependency case is filed. While the plaintiffs in *Kenny A.* discovered evidence that young children were sometimes placed in congregate care facilities, and while the state's use of such placements was greater than the national average,<sup>79</sup> few children, upon entering the system are immediately placed in a locked mental health facility or other genuinely restricted setting.<sup>80</sup> If the liberty interest at stake were truly just about limitations on physical movement, a more limited remedy could be constructed; the state could provide a lawyer to children only when seeking to place them in a restricted facility.<sup>81</sup>

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74. *Lassiter*, 452 U.S. at 31-32.

75. *Kenny A.*, 356 F. Supp. 2d at 1361.

76. *Lassiter*, 452 U.S. at 31-32 (finding that the Constitution does not "require the appointment of counsel in every parental determination proceeding").

77. *Id.* at 25-26.

78. *Kenny A.*, 356 F. Supp. 2d at 1360-61.

79. *Id.* at 1360.

80. If they have sufficient family-based placement resources, most child welfare systems opt to place children in the least restrictive setting possible immediately after the children enter the system. See LAUREL K. LESLIE, PUBLIC MEDICAL CENTER, NATIONAL INSTITUTE OF HEALTH, THE HETEROGENEITY OF CHILDREN AND THEIR EXPERIENCES IN KINSHIP CARE (2000), <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1550706> (finding that in a study of out-of-home placements in San Diego from 2000 to 2001, only 9% of children were placed in a restrictive environment); UNITED STATES GENERAL ACCOUNTING OFFICE, FEDERAL AGENCIES COULD PLAY A STRONGER ROLE IN HELPING STATES REDUCE THE NUMBER OF CHILDREN PLACED SOLELY TO OBTAIN MENTAL HEALTH SERVICES (2003), <http://www.gao.gov/new.items/d03397.pdf> (stating that in providing services to disabled children, federal and state agencies often promote placement in the least restrictive setting).

81. The Florida Supreme Court has held that children in foster care who are faced with commitment to a residential facility have the right to due process, including the appointment of an attorney. *M.W. v. Davis*, 756 So. 2d 90, 109 (Fla. 2000) (finding that as a matter of necessity, children deserve due process and a meaningful opportunity to be heard before being placed in a residential facility against his/her wishes).

Moreover, if the child's liberty interest is just about limitations on physical movement and the risk of placement in a locked facility, one might argue that the child's interests — before there has been a finding of maltreatment or parental unfitness — is coextensive with his parents' interests.<sup>82</sup> A parent who has not been found unfit is generally thought to be in the best position to make decisions about her children.<sup>83</sup> Certainly a parent, prior to any court involvement, would be thought to be the person most interested in keeping her child out of restrictive facilities, if she thought that such a placement was not appropriate for her child. And if she does think that her child needs to be in a locked mental hospital, then she has the right to consent to it.<sup>84</sup> Arguably, then, a young child who does not face imminent placement in a locked facility and whose parent has not yet been declared unfit does not have a liberty interest at stake in an initial dependency proceeding that requires the appointment of counsel.<sup>85</sup> If anyone should have a lawyer, it should be the parent.<sup>86</sup>

Thus, by concluding that the child is entitled to a lawyer when the Supreme Court has said the parent is not, and by doing so without mentioning *Lassiter*, it is possible that the *Kenny A.* court was implying that *Lassiter* was wrongly decided.<sup>87</sup> The *Kenny A.* result, however, is not truly dependent on such a declaration, and, in fact, it would be far stronger to navigate to the *Kenny A.* result while dealing more directly with the *Lassiter* problem, by noting the differences in degree and in kind between children's liberty interests and that of their parents.

Children have a greater liberty interest at stake in the initial dependency proceeding than their parents do because the risk of harm they face is irreparable.<sup>88</sup> Parents and children equally face the likelihood of trauma from separation, but the depth and pain of this trauma is arguably more acute, and the damage longer lasting, for the child.<sup>89</sup> As adults, parents are better equipped to understand the

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82. *Santosky*, 455 U.S. at 760 (stating that, "the State cannot presume that a child and his parents are adversaries").

83. See *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (rejecting an action by grandparents for visitation rights as an unconstitutional interference on a parent's right to raise her children). See also MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 30-34 (2005) (summarizing Supreme Court precedents holding that fit parents have the right to raise their children however they wish).

84. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (holding absent of a finding of neglect or abuse, parents have a substantial role in the decision to institutionalize their children).

85. See Guggenheim, *The Right to Be Represented*, *supra* note 64, at 135 (stating that under *Lassiter*, it can be argued that children who are institutionalized have a constitutional right to counsel).

86. See, e.g., Martin Guggenheim, *How Children's Lawyers Serve the State's Interests*, 6 Nev. L.J. 805, 805 (2006) (arguing against providing young children with lawyers in most legal proceedings).

87. That *Lassiter* was incorrect is hardly a new argument. See, e.g., Bruce Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 LOY. U. CHI. L.J. 363, 377 (2005) (discussing commentary that challenges the legitimacy of *Lassiter*).

88. See Jennifer Walter, *Averting Revictimization of Children*, 1 J. CENTER FOR CHILD. & CTS. 45, 49-51 (1999) (discussing generally the irreparable harm caused to children who enter the juvenile court system, including not asserting the children's rights, causing them to endure multiple placements, and failing to address children's emotional and physical needs).

89. See, e.g., *Nicholson v. Williams*, 181 F. Supp. 2d 182, 185 (E.D. N.Y. 2002) (noting that, "even relatively short separations may hinder parent-child bonding, interfere with a child's ability to relate well to others, and deprive the child of the essential loving affection critical to emotional maturity");

proceedings, the reasons for being in court, and the reasons for any court-imposed separation. While they may disagree with absolutely everything that is happening to them and their family, their cognitive awareness and understanding of the proceedings better enables them to survive the trauma. Their children, by contrast, suffer confusion and anxiety on top of everything else.

Once separated, the parent and the child experience life apart in completely different ways. The child, in state custody, is exposed to all the potential failings of the system, such as those alleged in the *Kenny A.* complaint. She may bounce and drift from foster home to foster home. She may live in overcrowded, unsanitary conditions. She may suffer neglect or even abuse at the hands of her substitute caretakers. She may have a caseworker who is inexperienced, under-trained, and unable to access necessary services for her. She may lose contact with friends and extended family members. She may be removed from her school, her church, and her community. Her health, mental health, and education needs may go unaddressed and she may deteriorate in each of these areas.<sup>90</sup> All of these tribulations can be painful to the parent as well, but only derivatively or empathetically so; they are, in contrast, actually *lived* by the child.<sup>91</sup> And all of these experiences occur in the *child's* sense of time, which is different than adults'. It is well accepted that children experience time much more slowly than adults, so that six months or a year can feel, to a child, like forever.<sup>92</sup>

If the child has greater liberty interests at stake in dependency cases, he also has interests that are different in kind from his parents'.<sup>93</sup> The questions at issue in such proceedings are usually not as binary as they may initially appear; at deeper levels of complexity, divergence in the positions of a child and her parent may emerge. For example, the threshold legal question in a dependency case is whether or not the parent neglected the child, and the petitioning agency will seek to prove

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Michael Wald, *State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 993-94 (1975) ("Removing a child from his family may cause serious psychological damage — damage more serious than the harm intervention is supposed to prevent."); JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN, AND ANNA FREUD, *THE BEST INTEREST OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 8-9 (1996) ("Children, then, are not adults in miniature. They differ from their elders in their mental nature, their functioning, their understanding of events, and their reactions to them."); *Failure to Protect Working Group, Charging Battered Mothers With 'Failure to Protect': Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 857 (2000) (noting that removing children who have witnessed domestic violence from their non-abusive mother re-victimizes children and increases their fear of abandonment). See also Mark D. Simms, Howard Dubowitz, and Moira A. Szilagyi, *Health Care Needs of Children in the Foster Care System*, 106 PEDIATRICS 809, 912 (October 2000) ("Removal from one's family, even an abusive one, is generally traumatic for children."); American Academy of Pediatrics Committee on Early Childhood, Adoption and Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145, 1146 (November 2000) (comparing adults' superior ability to cope with impermanence to children's inability to cope with disruptions and uncertainty).

90. See Simms et al., *Health Care Needs of Children in the Foster Care System*, *supra* note 89, at 911 (stating that while the majority of children enter the child welfare system with medical, health or developmental issues, these problems are often given in adequate attention while children are placed under foster care).

91. *Id.*

92. See, e.g., American Academy of Pediatrics Committee on Early Childhood, Adoption and Dependent Care, *Developmental Issues for Young Children in Foster Care*, *supra* note 89, at 1146.

93. *Lassiter*, 452 U.S. at 28.

that the answer is yes while the parent takes the position that the answer is no.<sup>94</sup> Only if the agency prevails will the court have jurisdiction to enter orders directing the parent to remediate.<sup>95</sup> The state may be more interested in the safety value and will argue for removal of the child; the parent may be opposed to all interventions and requirements. What is the child's position?

The child may have an interest in a limited form of state intervention short of removal and placement into foster care — an interest that is at odds with the parent's and that can only be vindicated with a judicial determination of dependency. For example, the child's right to remain with her intact biological family and her right to be safe<sup>96</sup> can both be protected with a judicial order that permits the child to remain at home but that also requires her parent to attend an outpatient substance abuse or other community-based social service program.<sup>97</sup>

There are many other examples of situations in which a parent's interest is not fully co-extensive with the child's, such as the scenario in *Mills v. Habluetzel*.<sup>98</sup> *Mills* concerned a one-year statute of limitations in Texas to establish paternity of a child born out of wedlock.<sup>99</sup> The Court held that this limitation violated the Equal Protection Clause because it in effect imposed a time restriction on children born out of wedlock to sue for child support (the establishment of paternity being a necessary predicate to a successful child support action); children born to married couples had no time limits to sue for support.<sup>100</sup> Writing a concurring opinion for herself and (in relevant part) for four other justices, Justice O'Connor noted the divergence in interests between mothers and their children:

The unwillingness of the mother to file a paternity action on behalf of her child, which could stem from her relationship with the natural father or, as the Court points out, from the emotional strain of having an illegitimate child, or even from the desire to avoid community and

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94. *Id.* at 20.

95. *Id.*

96. *But cf.* *Deshaney v. Winnebago Cty. Dep't. of Soc. Svcs.*, 489 U.S. 189, 202 (1989) (stating that the state had no constitutional duty to protect children from their parents' violence). If the child's parent were the sole decision maker about the child's fate, as is the case in all families absent some legal proceeding, then quite arguably the child would not have any independent constitutional right to be safe in her own home. However, with the filing of a dependency petition, the state has the power to bring the family before the judicial office for determinations about fundamental questions in the family's life, including where the child will live. While the filing of a dependency petition does not alone create a special relationship between the child and the state that gives the child heightened substantive due process rights, this action does provide a lawful basis for a government decision maker — the court — to intervene and render judgments. Once the state's statutory dependency scheme is invoked and a decision maker other than the parent is empowered to decide whether there is parental unfitness and whether the child is at risk, then it must be the case that the child has the concomitant right to actually be safe. The right is meaningless if it cannot be vindicated.

97. The observation that neither the state nor the fit parent defending against a dependency petition is positioned to vindicate all of the child's rights is not a new one. *See* James Kenneth Genden, *Separate Legal Representation for Children: Protecting the Rights and Interest of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565, 575-76 (1976).

98. 456 U.S. 91, 99-102 (1982) (holding that equal protection of illegitimate children under a Texas paternity statute outweighed the state's interest in preventing stale and fraudulent paternity claims).

99. *Id.* at 92.

100. *Id.* at 99-100.

family disapproval, may continue years after the child is born. The problem may be exacerbated if, as often happens, the mother herself is a minor. The possibility of this unwillingness to file suit underscores that the mother's and child's interests are not congruent, and illustrates the unreasonableness of the Texas statute of limitation.<sup>101</sup>

Practitioners in dependency court are familiar with the rather common phenomenon of the "target child" in abuse cases.<sup>102</sup> In these cases, the state alleges that the parent is abusive towards only one child in a sibling group; the others are perfectly well cared for.<sup>103</sup> The parent frequently blames the so-called target child for placing her in her legal predicament, which only heightens the conflict and the isolation of the child from the rest of her siblings. The state of course seeks to remove the target child and place her in foster care, and in a heartbreaking display, the parent sometimes agrees, as part of a deal that allows the other children to stay at home. The target child often wishes to stay in her family and in many cases could stay there safely with the imposition of certain requirements, but when the state and the parent conspire to take her away, how can she vindicate her right to stay with her biological family? She can do so only with the assistance of independent counsel.

Once there has been a finding of parental unfitness, then surely any argument that the scope of the child's liberty interest is fully co-extensive with the parent's (thus obviating the need for independent counsel for the minor) must drop away, even if one accepted the argument that children should have no right to their own lawyer *before* such a finding of unfitness.<sup>104</sup> As the *Kenny A.* court rightly points out, a special relationship between the state and the child is created after the finding is entered.<sup>105</sup> This special relationship gives rise to a host of substantive rights that can best and in most cases *only* be protected with vigilant advocacy in the context of the ongoing juvenile court proceeding.<sup>106</sup> Moreover, *vis a vis* the parent, arguably once there has been a judicial determination that the parent has neglected

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101. *Id.* at 105 n.4 (O'Connor, J., concurring).

102. 2 AM. JUR. 2D *Proof of Facts* § 365 (2006).

103. *Id.*

104. Guggenheim, *The Right to Be Represented*, *supra* note 64, at 92. Critically, many parents themselves drop out of the proceedings after the initial finding of dependency and placement of the child into foster care. For some, this happens almost immediately. Others fall away after months or years of discouragement in the face of unfair treatment by the system. Still others become lost to substance abuse, mental illness, or other deep troubles that keep them from playing an active role in their children's lives or in court proceedings. When this happens, the only two parties before the court are the state and the child. It can hardly be said that in these instances, the child's interests are unitary with her parents' and that the parent can adequately protect the child's interests against the state.

105. *Kenny A.*, 356 F. Supp. 2d at 1360.

106. The alternative is for foster children to hire private attorneys to affirmatively sue the state ex post to vindicate substantive rights that were violated while the child was in state custody. Certainly, there are many such actions, brought under 42 U.S.C. § 1983, filed across the nation. They seek money damages and, in some cases, injunctive relief. It would be far more powerful, and a far superior public policy, for children to have access to ongoing independent counsel during their time in state custody who can intervene in the juvenile court to protect them in real time from current and imminent harms.

or abused the child, there is a valid inference that the parent is no longer a fully sufficient protector of the child's liberty interests.<sup>107</sup>

Among those well-established substantive rights that attach upon the creation of the special relationship are: the right to caseworkers who are adequately trained and supervised and who have a manageable caseload; the right to live in foster homes and other placements that have been adequately screened so as to ensure that children will be safe there; the right to live in a placement where the caretaker has been provided relevant information about the child's medical history and who is well matched to the child's needs (as opposed to random placements); the right to live with adult relatives as opposed to strangers, and the right to be placed with siblings; the right to services to support the foster placement and avoid disruptions and multiple moves among different placements; the right to timely and appropriate permanency planning; the right to appropriate and necessary mental health, medical, and education services; and, for teenage mothers in foster care, the right to be placed with her own children, absent a finding of unfitness against the minor parent.<sup>108</sup> Absent a class action lawsuit alleging systemic failures leading to widespread violation of these rights, the only way children in foster care can vindicate these rights is in dependency proceedings; indeed, for *individual* children who may have one or more of these rights violated, their individual dependency case is even more important, because individual relief in the class action context is highly unlikely.<sup>109</sup> And children cannot obtain adequate relief as against the state without counsel.

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107. For the sake of simplicity, I am, to a certain extent, collapsing the various possible procedural permutations into just two categories — (1) proceedings that take place before a finding of unfitness and before the child is placed in state custody; and (2) proceedings that take place after a finding of unfitness and after the child is placed in state custody. The reality is far more complex, because in most jurisdictions, a child can be placed in state custody on a temporary basis *pending* a determination of unfitness. Additionally, a child may remain at home *despite* a finding of unfitness. Obviously, my argument is that the child's right to counsel attaches as soon as the state files a dependency petition, for all the reasons cited in this paper. But I note the complexities here simply to point out that it might be possible to parse out various characteristics of the overall dependency procedural scheme to come to a narrower view of when children should receive counsel.

108. *Kenny A.*, 218 F.R.D. at 286; *see also Marisol A.*, 929 F. Supp. at 674-76 n.3 (noting that the plaintiffs were claiming constitutional rights to "protection from harm while in foster care, to conditions and duration of foster care consistent with the purpose of their custody," to not, "be deprived of entitlements created by New York State law without due process," and to, "associate with their biological family members"); *Taylor v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (extending the right of a child in a state mental facility to reasonably safe living conditions to a child in foster care); *Lashawn A.*, 762 F. Supp. at 992-94 (noting that plaintiffs were claiming liberty interests in "freedom from harm while in state custody, placement in the least restrictive, most appropriate foster care placements, and receiving care that is consistent with competent professional judgment").

109. Some of these rights may not be able to be vindicated without class-wide relief. For example, children may be harmed in a foster home because the home is overcrowded and mixes together children who should not be placed with each other. The causes of this overcrowding and poor placement selection are likely to be multiple, including systemic factors such as inadequate financial resources in the agency to recruit enough foster homes and to create and staff a sophisticated information management system. An attorney in an individual dependency case might seek and obtain an order directing the agency to move a child from a home for safety reasons, but that individual case cannot be a vehicle to force the state to recruit more foster homes. It is for this reason that federal courts have been generally unwilling to grant state defendants' motions to dismiss on *Younger* abstention grounds. *See Younger v. Harris*, 451 U.S. 37, 43-46 (1971) (discussing the limited ability of federal courts to interfere

As noted earlier,<sup>110</sup> the *Kenny A.* court relies on the *Gault* argument — that children have a significant physical liberty interest at stake in dependency hearings because of the risk of being placed in restrictive settings.<sup>111</sup> The power of this argument, as used in *Kenny A.*, is somewhat limited by its reference to specific evidence that is part of the record in *Kenny A.*<sup>112</sup> Noting that “plaintiffs have pointed to evidence that foster children are often forced to live in [restrictive] institutional settings because suitable family foster homes are not available,” the court concluded that foster children have a liberty interest at stake.<sup>113</sup> This begs the question: do foster children in systems where there is not a shortage of family foster homes not have an identical liberty interest? How can the scope of a constitutionally protected liberty interest be limited based on particular facts in a given case?<sup>114</sup>

Properly applied, the *Gault* argument has power and salience not because *these* children are at risk of inappropriate placements in restricted settings, but because *all* children in state custody are at the whim of state officials to decide where they will live at any given moment. Children have a physical liberty interest not because they may end up in a placement where they are not as free to come and go as they please; all children, by dint of minority, must necessarily be in the custody and control of some adult somewhere.<sup>115</sup> That some placements will have

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with state court matters in the American federalist system). Even though all foster children in a plaintiff class are involved in ongoing state dependency court proceedings, federal courts recognize that those dependency proceedings do not provide avenues for the kind of systemic, class-wide relief usually sought in federal civil rights actions. See *Kenny A.*, 218 F.R.D. at 285-86 (recognizing that state family court cannot issue injunctive relief as sought by the plaintiffs in federal court); *Marisol*, 929 F. Supp. at 688-89 (rejecting defendant’s motion to dismissed based on abstention theory that plaintiff children can reach the same results in state family court as in federal court); *Olivia Y.*, 351 F. Supp. 2d at 565-70 (finding that the relief sought by the plaintiffs could not be issued by the state family court); but see 31 Foster Children v. Bush, 329 F.3d. 1255, 1274-82 (11th Cir. 2003) (finding that the state family court offered the plaintiffs’ preferred relief and that ongoing litigation in state courts warranted invocation of the *Younger* abstention doctrine).

110. *Kenny A.*, 356 F. Supp. 2d at 1360.

111. *Id.* at 1360-61.

112. *Id.* at 1361.

113. *Id.*

114. One answer is, “see *Lassiter*,” which held that parents should be assigned counsel on a case-by-case basis. *Lassiter*, 452 U.S. at 32. It is as bizarre in *Kenny A.* as it was in *Lassiter* to think that the abstract value of liberty is so tethered to quotidian circumstances as to be reduced to an ad hoc calculus, as opposed to something so enshrined in our system of government as to be absolute.

115. See *Lehman v. Lycoming Cty. Children’s Svcs.*, 458 U.S. 502, 512 (1982) (declining to extend habeas corpus protections to minors for relief from state custody decisions); *Schall v. Martin*, 467 U.S. 253, 265 (1984) (recognizing that a minor child’s liberty interest in freedom from institutional restraints is less than that of an adult). Unlike the children in *Schall*, foster children have not been charged with any wrongdoing whatsoever. Though they are dependent by dint of their minority, and would have no cause of action against their parents should their otherwise fit parents choose to shuffle them around from home to home, when their parents — their protectors — are no longer able or available to protect them from the state, these children have a liberty interest with respect to the state and a claim against it. Some might say that it takes a village to raise a child, but no one can seriously claim that the state is a good parent, or that, over time, it is as vigilant in tending to children’s safety, permanency, and well-being the way that a fit parent would. Moreover, children who are adjudicated to be dependent remain under continuing jurisdiction of the dependency court until they are returned home to their parents’ full legal custody; or they are adopted; or they reach the age of majority. When a branch of the government

stricter rules than others is not nearly as relevant to the question of whether there is a liberty interest as the fact that foster children are subject to a decision making process that can be arbitrary and based on many factors other than what placement is best for the child at a given moment.

A salient feature of the foster care system at issue in *Kenny A.* was its lack of family foster homes; many, but not all, systems suffer from the same shortage.<sup>116</sup> A salient feature of *all* foster care systems, however, is that decisions about where children will live are made by caseworkers, agency officials, and judges — as opposed to parents, relatives, or people who have some lasting connection to them.<sup>117</sup> These decisions are made in an environment in which there are competing pressures. A bed taken by Foster Child A becomes unavailable to Foster Child B. Placement decisions are, validly or not, made based on a host of factors, including resource limitations. Children may be moved from placement to placement for reasons having nothing to do with what is best for that child, but because beds need to be freed for an incoming sibling group, or because the foster parent is retiring and moving out of state, or because the foster parent was late for court and the judge ordered the agency to move the child.

Liberty includes peace of mind, and freedom means having some measure of stability in the world around you. If liberty finds no refuge in a jurisprudence of doubt,<sup>118</sup> liberty is also unmoored when external government forces can make constant and wanton decisions about the fundamental question of where you will live. Children in foster care have a physical liberty interest at stake in ongoing dependency proceedings because these very questions about their lives are constantly at issue.

#### B. “This is a Courtroom?”: The Risk of Erroneous Decisions in Dependency Court

In its approach to the second prong of the *Mathews* test, the *Kenny A.* court analyzed the risk of erroneous decisions in dependency proceedings in the absence of counsel for children. As with the first prong, this part of the *Mathews* test, when applied to the dependency context, would seem to require some analysis of *Lassiter*. But as with the first prong, on the second prong too, there is none.

In weighing the *Mathews* factors, *Lassiter* held that a termination of parental rights proceeding is not so inherently complex that the lack of counsel for the parent results in an undue risk of an erroneous decision.<sup>119</sup> Instead of creating a blanket rule, the Supreme Court hedged and allowed that on occasion, the facts and circumstances of a particular case may be so complex that counsel would be required to avoid the risk of an incorrect outcome.<sup>120</sup> In essence, the Supreme

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has the continuing power to make decisions about a human being — a branch of government that typically does not make decisions without hearing input from all interested parties — it would seem that the people about whom those decisions are made have a due process right to be heard.

116. *Kenny A.*, 356 F. Supp. 2d at 1359 n.6.

117. PewFosterCare.org, A Child’s Journey Through the Child Welfare System, <http://pewfostercare.org/research/docs/journey.pdf>.

118. *Planned Parenthood of Southeast Penn. v. Casey*, 505 U.S. 833, 843-44 (1992).

119. *Lassiter*, 452 U.S. at 31-33.

120. *Id.* at 31.

Court held that a mother would have to defend against involuntary termination of parental rights on her own, without counsel, because there was nothing terribly complicated about the case and the trial court was unlikely to make a mistake.<sup>121</sup>

The *Kenny A.* court outlined some of the factors attendant in dependency proceedings that tend to undermine our confidence in the outcome: the wide discretion afforded the bench; the imprecise standards provided for by law; and evidence that the petitioner's positions are sometimes dangerously incorrect.<sup>122</sup> None of these factors are new. They all existed in 1982 and may actually have become less problematic in the intervening 20-plus years.<sup>123</sup> In light of this, and in light of *Lassiter*, we have to ask how *Kenny A.* could hold that there is something about all parts of the dependency process — including hearings at which permanent termination of parental rights was not even at issue — that renders too great a risk of erroneous decisions to withhold counsel from the *children*.

There is a hint in the *Kenny A.* decision that the court was fully aware of *Lassiter* and the obstacle it posed. This hint is found in the court's citation to, of all cases, *Santosky*.<sup>124</sup> The court cites *Santosky* for the point that dependency court proceedings are based on imprecise substantive standards that lead to subjective decision making and erroneous outcomes.<sup>125</sup> If the *Kenny A.* court understood *Santosky* to be Justice Blackmun's rebuke of the Court's decision in *Lassiter*<sup>126</sup> — and a reining back in of a Court too willing to tread on the rights of indigent civil litigants — then its citation to *Santosky* could be viewed as an implicit criticism of all that *Lassiter* stands for.<sup>127</sup> After all, one does not need to cite *Santosky* to make the point that dependency proceedings are riddled with imprecise rules and standards. In fact, *Santosky* itself was supposed to ameliorate that problem, by elevating the requisite showing to terminate parental rights to the clear and convincing evidence standard.

As with the first *Mathews* prong, in the second prong one need not determine that *Lassiter* was wrongly decided to find that the risk of erroneous decisions in dependency cases is so high that due process requires providing counsel for *children*. After all, the main distinguishing feature of *Kenny A.*, naturally, is that the plaintiffs there were children — and children cannot call witnesses, cannot cross-examine others' witnesses — cannot do *anything* that the Supreme Court seemed to think that Ms. *Lassiter* had been competent to do in the absence of counsel.

Sam and Patrick never came to Family Court when I was litigating their case. But I had many other clients who did come, several of whom testified in the

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121. *Id.* at 32-33.

122. *Kenny A.*, 356 F. Supp. 2d at 1360-61.

123. The effect of these problems may have been diminished by the increasing number of states that have adopted statutes and policies since *Lassiter* that provide for the appointment of counsel for both parents and children in dependency proceedings. See ASTRA OUTLEY, PEW COMMISSION ON CHILDREN IN FOSTER CARE, REPRESENTATION FOR CHILDREN AND PARENTS, <http://pewfostercare.org/research/docs/Representation.pdf> (discussing the development of state and federal law regarding the appointment and training of counsel for indigent clients).

124. *Kenny A.*, 356 F. Supp. 2d at 1361.

125. *Id.*

126. *Santosky*, 455 U.S. 745, 761-69 (1982).

127. *Kenny A.*, 356 F. Supp. 2d at 1361.

courtroom. Particularly for those children with whom I had a long-standing relationship before they ever came to court — children for whom I had spent lots of time describing, in words, what court was all about and who they would see there — setting eyes on the court for the first time was mind-boggling. More than one youngster, eyes bulging at the wonder of it all, blurted out, “*This* is the courtroom?” Whether from watching Judge Judy on television or from their own mind’s eye of fantastical construction, they had a far different expectation for what a courtroom would look like. Even the older adolescents were surprised — often at the dingy, disrespectful nature of the physical space. What they could not know was that many adults had the same reaction — to the physical space, to be sure, but more critically, to what happened there on a daily basis.

None of these children, even the 18 year olds, could fairly be expected to litigate a case without counsel.<sup>128</sup> *Lassiter* held that the presumption against assigning counsel to parents could be overcome in a case-by-case determination. The Court allowed that counsel might very well be required in instances in which, among other things, the “risks of error were at their peak.”<sup>129</sup> This did not describe Ms. Lassiter’s situation, as there were no expert witnesses or “specially troublesome points of law.”<sup>130</sup> The Court also relied on the facts that Ms. Lassiter had failed to attend a prior court hearing and had failed to communicate with a previously-retained lawyer of hers.<sup>131</sup>

Whether a witness is an expert or a layperson makes no difference to a child; the child-client is ill-equipped to appear pro se regardless. To a child, all points of law are troublesome. And a child-client could and should never be judged to have failed to “make an effort” to participate in the proceedings the way the Supreme Court judged Ms. Lassiter.<sup>132</sup>

Children are, by dint of their minority, typically seen as incompetent under the law.<sup>133</sup> They cannot sue on their own behalf, regardless of how sophisticated in fact

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128. Regardless of whether they have counsel or not, children should be included in the court process. Too often, they are physically excluded from the courtroom and even the courthouse, and for the judges presiding over dependency cases, the children are mere abstractions. See PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 41-44 (2004), available at <http://pewfostercare.org/research/docs/FinalReport.pdf>.

129. *Lassiter*, 452 U.S. at 31.

130. *Id.* at 32.

131. *Id.* at 32-33.

132. *Id.* at 33. It is quite obvious from the *Lassiter* decision that the Supreme Court was mightily unimpressed with Ms. Lassiter as a human being and wished to move things along for her child. The Court seemed to go out of its way to reference the fact that Ms. Lassiter had been convicted of murder and had tried to blame her mother for the crime. *Id.* at 33 n.8. The Court also found it important to note that Ms. Lassiter’s son was in a pre-adoptive home and “[h]e cannot be legally adopted, nor can his status otherwise be finally clarified, until this litigation ends.” *Id.* at 32 n.7. In fact, the Court refrained from formulating a “precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements,” seemingly because such an effort would take too long and the delay would harm the child. *Id.* at 32 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

133. Connie J. A. Beck & Linda E. Frost, *Defining a Threshold for Client Competence to Participate in Divorce Mediation*, 12 PSYCHOL. PUB. POL’Y & L. 1, 13, (February 2006) (noting that competency requires courts to stand in place of children in divorce proceedings); Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and their Status Under Law*, 10

they may be.<sup>134</sup> They generally cannot be held liable in tort for their actions (though their caretakers may be).<sup>135</sup> How could we ever expect them to appear pro se in litigation? Indeed, under current law and practice, children are not even noticed to appear in court, and in most jurisdictions, children are rarely seen in dependency court.<sup>136</sup>

They cannot rely on their parents, either. In cases when unfitness is alleged but unproven, children and their parents have overlapping, but divergent interests.<sup>137</sup> After cases have been ongoing for some time, their parents may drop out and default.<sup>138</sup> Besides, the parent may have her own battles to fight with the state that can fairly be expected to take priority for her. For example, a parent fighting for the return of her child may need to complete drug rehabilitation as a prerequisite. Because of a perverse federal funding structure, there is a shameful lack of adequate rehabilitation services available in many communities.<sup>139</sup> A parent at a permanency hearing may need to focus her attention with the court and the state to discussing the reasons why she has not yet enrolled in a drug program. Appearing pro se — because of *Lassiter* — she will not necessarily be in a position to also advocate for whatever needs her child, currently in foster care, may have. Even a skilled attorney representing the parent may not be able to cover all the issues in a busy court with an impatient bench. Only separate counsel for the child,

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U.C. DAVIS J. JUV. L. & POL'Y 275, 323 (Summer 2006) (recognizing that while there are exceptions, the general rule is that people under the majority age are legally incompetent).

134. Beck & Frost, *supra* note 133, at 13.

135. Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, And Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 862-63 (Spring 2006).

136. Recently enacted federal legislation requires states, as a condition of receiving federal foster care grants, to give foster parents the “right” to be heard in dependency proceedings and to receive notice of those proceedings. Safe and Timely Interstate Placement of Foster Children Act of 2006, Pub. L. No. 209-239, 120 Stat. 508, § 8(b). Foster children, however, are not required to be noticed or present for the proceedings under existing federal law or under the new legislation.

137. *Supra* notes 18-22.

138. See Guggenheim, *The Right to be Reprerented*, *supra* note 64. Conceivably, a more limited due process remedy would be possible — only provide a lawyer for the child once the parent defaults. Unfortunately, by that time, for too many children it is too late — they have already suffered grievous harm at the hands of the state. This policy would also require courts to manage on a regular basis the question of when the parent has “really” defaulted. It is common in dependency proceedings for a parent not to come to court for one or two appearances, but then to come again subsequently. It would seem to be more efficient to provide a lawyer to every child at the beginning, to address all issues as they arise. The lawyer might do well to work *with* the parent when possible and appropriate in trying to minimize bad outcomes for the child-client in foster care. For an excellent discussion of this idea, see Christine Gottlieb, *Children's Attorneys' Obligation to Turn to Parents to Assess Best Interests*, 6 NEV. L.J. 1263, 1264 (2006) (arguing that even in child welfare cases parents remain the best ones to gauge a child's interests). The child's attorney, having been assigned to the case from the start, can stand ready to modulate her involvement — her own intrusion, in a way — in response to the parents' level of involvement. The more active the parents are in protecting their children's legal and other interests, the less active the children's attorney ought to be and vice versa.

139. University of Illinois, Children and Family Research Center, *The Foster Care Strait Jacket: Innovation, Federal Financing, and Accountability in State Foster Care Reform* (2004) (noting that federal dollars that can be used for foster care placements are uncapped, whereas dollars that can be used to purchase services are strictly limited), available at [http://www.fosteringresults.org/results/reports/pewreports\\_03-11-04\\_straightjacket.pdf](http://www.fosteringresults.org/results/reports/pewreports_03-11-04_straightjacket.pdf) [hereinafter *Foster Care Strait Jacket*].

with full standing to participate, can guarantee that issues that are of priority *for the child* — she has not been taken to the eye doctor for over a year, for example — are heard and considered by the court.

There are other reasons why the risk of erroneous decisions in dependency proceedings is unacceptably high without counsel being assigned to the child. Notwithstanding the elevation, in *Santosky*, of the burden of proof in TPR cases to clear and convincing evidence, today's juvenile court remains a chaotic forum that, in too many jurisdictions, is burdened by crushing caseloads and emotional subject matter, from the initial appearance, to the dependency determination, to the TPR hearing some time later.<sup>140</sup>

Today's dependency court bench officers are the quintessential "managerial judges."<sup>141</sup> With 20 or more cases a day on the urban court's calendar, it is impossible to take testimony in each. Cases are managed through a combination of judge-directed negotiation and "conferencing" and parceling out to referees or other junior bench officers, or even to the judges' law clerks or staff attorneys.<sup>142</sup> Permanency hearings frequently consist of conversations among counsel and the parties, led to varying degrees of effectiveness by the judge.<sup>143</sup> The parties are all sworn, so that the informally provided information they offer is deemed to be "testimony," but there is no direct or cross-examination — it is just people talking. In order to present information, make arguments, or move for relief of any sort, it is necessary for counsel to engage in verbal jujitsu, generally interrupting someone else and not allowing any moment of silence, lest the court take silence for consent and move on to the next case.

Often, these conferences take place off the record, sometimes with only the lawyers present and not the parties. Though they are a critical source of information, the parties' presence in the courtroom is seen as something that delays the proceedings, because of their inability to communicate effectively or efficiently. Judges listen to the lawyers' view of things, make decisions, and then call the parties into the courtroom. Only then is the case called on the record, at which time the court reads out its order and nothing else. In this way due process is often sacrificed at the altar of efficiency.<sup>144</sup>

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140. Of course, this discussion is just as applicable to an argument in favor of a constitutional right to counsel for parents as it is my argument for counsel for children. Twenty-plus years later, it is safe to say that *Santosky* did not solve the *Lassiter* problem.

141. Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (arguing that the role of judges is shifting from that of an impartial arbiter to one that requires management of the controversy of the litigants).

142. *Id.* at 378.

143. *Id.* at 426-27.

144. *Id.* at 427-29. The conventional wisdom in busy urban dependency courts is that the administrative officials in charge of the courts reward judges who are "efficient" and punish those who are not. Rewards typically involve transfer out of the dependency court altogether, or re-appointment to the bench in general. Punishments typically involve extended tours in dependency court or banishment to undesirable locations within the jurisdiction. Ironically, it is unclear how much managerial judging really improves efficiency. Delays in the New York City court, for example, are rampant and notorious. See Martin Guggenheim and Christine Gottlieb, *Justice Denied: Delays in Resolving Child Protective Cases in New York*, 12 VA. J. SOC. POL'Y & L. 546 (2005) (examining delays in New York City Family Courts and the resulting harm to children). Informality also reigns in rural courts, even without high caseload pressures. There, the informality is generated from a slower pace of life and from peculiar

The high ratio of managing to adjudicating in dependency proceedings also implicates significant due process concerns.<sup>145</sup> “Unreviewable power, casual contact, and interest in outcome (or in aggregate outcomes) have not traditionally been associated with the due process decision-making model.”<sup>146</sup> When making decisions without a real evidentiary record, and issuing orders that are not based on a written or oral opinion, dependency courts protect themselves from any meaningful appellate review.<sup>147</sup> Because the orders are made following a hearing that is made out to be like a conversation more than a court proceeding — a conversation that is chaotic and free-flowing even in the best of circumstances — it can be difficult for even the most skilled advocate to intervene to ensure that all favorable information is made known to the court and to protect her client against poor judicial decisions. The lawyer must be willing to interrupt the conversation, make demands outside the normal flow of the conversation, and then object clearly for the record when the court seemingly summarizes the conversation — a summary that is actually a consent order. In other words, the lawyer must be willing to be viewed by the court as obstinate, defiant, and impolite.<sup>148</sup> It is difficult to conceive how an unrepresented party — a child at that — could make a meaningful contribution to such a proceeding.

Imprecise standards for decisions in dependency cases remain a problem more than 20 years after *Santosky*. The governing doctrine for almost all key decisions is the “best interests of the child.” A full analysis and exegesis of this standardless standard is beyond the scope of this paper,<sup>149</sup> but it is critical to observe that

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situations such as judges who are not even lawyers. In Mississippi, youth court referees are not always required to be attorneys. See Miss. Code Ann. § 43-21-111 (2006) (“The requirement that regular or special referees appointed pursuant to this subsection be attorneys shall apply only to regular or special referees who were not first appointed regular or special referees prior to July 1, 1991.”). It is also thought that some amount of the informality of dependency court emanates from social work values of cooperation and notions of therapeutic jurisprudence. For a feminist critique of the informality of dependency court, see Amy Sinden, “*Why Won't Mom Cooperate?*”: A Critique of Informality of Child Welfare Proceedings, 11 YALE J. L. & FEM. 339 (1999) (arguing for criminal procedure-like safeguards in child welfare proceedings under a feminist rubric).

145. Resnick, *supra* note 141, at 424-25.

146. *Id.* at 430.

147. *Id.* at 425-26.

148. Models of attorney compensation and appointment also contribute to a “don’t rock the boat” mentality among the dependency bar. Across the country, most attorneys who represent parents and children in dependency cases receive court appointments directly from the presiding judge. In some jurisdictions, there may be a panel of pre-screened attorneys, and the judges there are required to select from the panel. In either scenario, dependency court work typically constitutes a high percentage of these attorneys’ docket, though for many, it is their exclusive area of practice. Compensation rates are typically low, with a flat fee of \$500 to \$3000 per case as typical. Some jurisdictions pay an hourly rate, of anywhere from \$40 to \$75. The result is that attorneys have to take a lot of cases, and they become heavily dependent on these court appointments to make a living. Peters, *supra* note 8, at App. D (summarizing compensation schemes for several jurisdictions). Minimizing fights with the bench is a fiscal strategy.

149. For criticism of the best interests standard, see Guggenheim, WHAT’S WRONG WITH CHILDREN’S RIGHTS, *supra* note 83, at 38-43 (arguing that the best interests doctrine is “intensely value-laden,” and a parental rights doctrine is preferable); *Youmans v. Ramos*, 711 N.E.2d 165, 178 (Mass. 1999) (Lynch, J., dissenting) (arguing that best interests is a “standardless standard” and nothing prevents the court from granting visitation rights to a host of actors in a child’s life); Emily Buss, *Adrift*

dependency judges make the most important decisions in an ad hoc, chaotic environment without reference to any discernible, meaningful standard.<sup>150</sup>

Some kind of check for this vast power is required, and counsel for the child is the ideal solution. The state is already represented, and yet the dangers to erroneous decisions from managerial dependency judges continue unabated. Parents may or may not be represented, but they also may not participate in every case.<sup>151</sup> Some kinds of inefficiency may favor parents, particularly if they are trying to buy more time to complete a substance abuse program.<sup>152</sup> But the child is always part of the proceedings, and the child's attorney is frequently in the best position to seek enforcement of basic due process protections and to protect against erroneous decisions.

### C. *The State's Interest: More than Just Parens Patriae*

In discussing dependency proceedings and the plaintiffs' due process claims, the *Kenny A.* court identified the governmental interest as ensuring that children's overall safety and well-being are protected. This was said to flow from the state's role as parens patriae.<sup>153</sup> The court then referenced the conclusions it had already drawn with respect to the other *Mathews* prongs and concluded that the state's interest is identical to the child's, and that "[t]his fundamental interest far outweighs any fiscal or administrative burden that a right to appointed counsel may entail."<sup>154</sup> The court did not discuss or mention an estimate of the fiscal or administrative cost.

In considering the state's parens patriae interest, there is far more to say about why that interest favors appointment of counsel to children, considering that the state is already represented by counsel who, presumably, should and could seek to

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*in the Middle: Parental Rights after Troxel v. Granville*, 2000 SUP. CT. REV. 279, 312 (2000) (arguing that *Troxel* leaves children open to greater harm through litigation).

150. Appellate courts grant wide swaths of discretion to trial level dependency courts in assessing what is in the child's "best interests." See, e.g., *In re G.B.*, 588 S.E.2d 779, 785 (Ga. App. 2003) ("The primary consideration in a proceeding to terminate parental rights is the welfare of the child. In determining how the interest of the child is best served, the juvenile court is vested with a broad discretion which *will not be controlled* in the absence of manifest abuse.") (internal citations and quotation marks omitted) (emphasis added).

151. See, e.g., *Deshaney*, 489 U.S. at 202 (holding that there is no constitutional duty of the state to protect children); *Lassiter*, 452 U.S. at 31 (holding that parents do not have a constitutional right to counsel in dependency hearings). In addition to cases in which parents default, once a TPR has been successfully prosecuted, there really is no one other than the state to protect the child. When the child needs protecting *from* the state, she is alone.

152. The Adoption and Safe Families Act of 1997 has been criticized by many advocates as imposing too short a timeframe for parents to complete their service plans. Under ASFA, states are required, as a condition of federal funding, to file for permanent termination of parental rights once a child has been in foster care for 15 of the most recent 22 months, absent a documented compelling reason not to. Many experts note that it typically takes far longer than 15 months for a substance abuser to complete treatment, and that relapse is an expected and normal part of recovery, such that it is unfair to require a parent to complete drug treatment without relapse in shorter than 15 months. In states that have placed a priority on compliance with this provision of ASFA (and not all do), a parent may very well favor delays, if they enable her to avoid facing a TPR petition.

153. *Kenny A.*, 356 F. Supp. 2d at 1361.

154. *Id.*

vindicate that interest. The reason the state's attorney is an insufficient safeguard of that interest is that he is typically defending only one element of *parens patriae* interest, that of the state's interest in ensuring the well-being of *all* children in its care and custody, to the exclusion, frequently, of the state's *parens patriae* interest in protecting each *individual* child. Indeed, "[e]xperience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent."<sup>155</sup> Second, *society*, distinct from the state-as-government, has an even broader interest than mere protection of children — an interest in preserving the dignity of the parties that come before the governmental decision maker and preserving the dignity of the entire decision making enterprise. This social interest is completely unrepresented by the state's attorney, whose client is the agency, not society.

As part of their commitment to protecting and serving children, state child welfare agencies are interested in operating a system that is as cost-effective as possible. The reality is and always will be that government funds are limited, and social service agencies maximize their efficient use of each dollar. In many locales, government social service departments have elected to privatize their foster care services, allowing private agencies — which may be non-profit or for-profit — to recruit and train foster parents, supervise foster homes, and create and monitor service plans.<sup>156</sup> Governments seek to privatize child welfare services in large part out of a belief that doing so will save money.<sup>157</sup> Ironically, the evidence suggests that the contrary result is frequently true.<sup>158</sup>

Once the state has transferred control over these functions to the private sector, it is very difficult for the state to ever re-create the services on its own. The state then becomes beholden to its private vendors. Should one agency go out of business (for whatever reason), it can have significant ripple effects throughout the government department and the other contractors, all of whom must scramble to find the replacement foster homes and services. Thus, it is generally in the state's interest to keep its contractors in business, and happy.

This interest conflicts with the needs of individual children on a regular basis. Around the time I was appearing on Sam and Patrick's case, I was also representing a set of teenage twin boys, Darren and Vincent. The twins, who had been freed for

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155. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 189 U.S. 347 (1967), and *Berger v. New York*, 188 U.S. 41 (1967).

156. See generally MADELYN FREUNDLICH & SARAH GERSTENZANG, AN ASSESSMENT OF THE PRIVATIZATION OF CHILD WELFARE SERVICES (2003) (providing an overview through case study of the privatization of child welfare services). See also Scott McCown, Op-Ed, *Privatize Protective Services? Let's Not*, FT. WORTH STAR-TELEGRAM, May 15, 2005, available at [http://www.cppp.org/files/4/CPS%20Op%20Ed%20\(3\).pdf](http://www.cppp.org/files/4/CPS%20Op%20Ed%20(3).pdf) (arguing against privatization of Texas' child welfare because it lacks market incentive and is better supervised by the public).

157. FREUNDLICH & GERSTENZANG, *supra* note 156, at 1-6.

158. *Id.* at 251-56; see also Florida Office of Program Policy Analysis and Government Accountability, *Child Welfare System Performance Mixed in First Year of Statewide Community-Based Care*, Report No. 06-50 (June 2006), at 2, available at <http://www.oppaga.state.fl.us/reports/pdf/0650rpt.pdf> (noting 10.59% annual increase in funding to child welfare system from 1998 to 2004, during which system privatized; meanwhile, Florida saw an increase in the rate of children being subjected to abuse or neglect multiple times and an increase in the rate of children re-entering foster care having been discharged to their families once already).

adoption for many years, were placed in two different residential treatment centers. An adoptive resource had been finally identified — the now-adult daughter of a former foster family and her husband. In planning for the transition from the RTCs to this new family, Darren and Vincent had spent considerable time on weekend visits. At Thanksgiving, the facilities announced that the boys would not be able to spend the holiday with their adoptive resource, which of course the boys had been eagerly anticipating. The reason was that they had already spent 30 days “out of program” that calendar year. Out of program refers to any time spent away from the facility, regardless of purpose — whether on a home visit, or a college visit, or a visit with an adoptive resource, or on run-away. Under the facilities’ contracts with the city child welfare agency, the city would pay the per diem amount per child for a maximum of 30 days of out of program time. On the thirty-first day, the facility would not be paid, though it would still be obligated to hold the bed for the child’s return. Not wanting to lose the per diem, the facilities in question in this case announced that Darren and Vincent could not spend Thanksgiving with their future family.

The city initially concurred with its agents’ position. It took dozens of phone calls to increasingly senior officials to have an exception to policy approved. Other than the children’s attorney, there was absolutely no one else whose job it was to fight on their behalf. As the boys’ parents’ parental rights had long ago been terminated, there was no party involved other than the children and the state. And the state — through the city child welfare agency and its private contractors — took the flagrantly anti-child position that the twins should be held captive on the RTC campus for Thanksgiving.

An argument can be made that overall it serves the interests of *all* foster children to have a policy that caps paid out of program days at 30 — that the cap is a necessary incentive to create a market for specialized, private foster care placement providers. However, it cannot be seriously argued that the policy worked in any way other than to the detriment of the specific children at issue in this case. There are dozens of similar examples in which the state’s interest as a government agency with a limited budget conflicts with the legal interests of individual children.

Properly understood, the *parens patriae* interest of the state must encompass *both* the broad interest in protecting all children — the interest that drives the state to create private markets for specialized services and to keep the contractors who work in that market happy — *and* the more child-specific interest of protecting children who may not be served well by the broader policies. Stated another way, as strong as the state’s market interest is, the state also has an interest in market *inefficiencies*. That is to say, the state has a pressing interest in establishing a process by which case-by-case exceptions to the prevailing market rule can be made. Because children are not widgets, and because broad policies that create generally efficient conditions across the class of all children may work to hurt some individual children, the state’s *parens patriae* interest must be large enough to cloak even those individuals who would otherwise be hurt by the general rule. Strange as it might seem, it is precisely *because* the state frequently is in counterpoise to the interests of individual children that the children have a due process entitlement to be have those interests pressed before the tribunal by competent, independent counsel.

This point is illustrated with respect to other state policies besides the 30-day out of program limit. For example, Congress has established a system of federal financing of foster care through the IV-E program.<sup>159</sup> Among other things, IV-E requires states to create a "state plan" that meets dozens of federal requirements in order to qualify for federal matching money.<sup>160</sup> In order to monitor states' compliance with these requirements, the Department of Health and Human Services conducts occasional Child and Family Service Reviews, in which states are measured against a variety of quantitative and qualitative performance measures.<sup>161</sup> If the state fails to meet all the important measures, they risk of the federal government withholding their funds.<sup>162</sup>

One of the outcome measures assesses whether states are timely reunifying children with their birth parents.<sup>163</sup> This measure requires that for all foster children who are reunified with their parents in a given year, 76.2% or more should have been reunified within 12 months from the time the child first entered foster care.<sup>164</sup> In order to pass this quantitative measure, states have an incentive to take the steps to get children back home quickly.<sup>165</sup> This measure serves to further a general federal policy regarding the importance of timely family reunification.<sup>166</sup> All the states have adopted this policy and in so doing have essentially asserted the *parens patriae* interest that it is good for children to be reunified with their families within 12 months of placement in foster care.<sup>167</sup> Policies and procedures at the front lines are written to encourage practice that will lead to compliance with the standards.

As good as it might be in the aggregate, the 12-month reunification policy is not good for all children. And to a certain extent, the state recognizes this fact, by setting the outcome measure benchmark at 76.2% instead of 100%.<sup>168</sup> Nevertheless, when individual caseworkers are deciding whether to recommend to the court that an individual child be sent home, they are not reviewing the

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159. University of Illinois, Children and Family Research Center, *supra* note 139, at 2.

160. *Id.* at 3.

161. *Id.* at 2-3.

162. *Id.* at 3.

163. *Id.* at 3, 6.

164. U.S. Dep't. of Health and Human Servs., Administration for Children, Youth, and Families, *Information Memorandum – National Standards for Child and Family Service Reviews*, No. ACYF-CB-IM-01-07 (Aug. 16, 2001), available at [http://www.acf.hhs.gov/programs/cb/laws\\_policies/policy/im/im0107.htm](http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/im0107.htm).

165. They also may have a disincentive to reunify them once they have been in foster care more than a year. This outcome measure is an example of an "exit cohort" analysis, and the federal government has been criticized for using exit cohort data instead of entry cohort data. See Mark Courtney, Barbara Needell, and Fred Wulczyn, *National Standards in the Child and Family Services Review: Time to Improve on a Good Idea*, Joint Center for Poverty Research Working Paper 341 at 10 (Jul. 24, 2003) (critiquing current national standards and recommending that children's services monitoring include entry cohort data), available at <http://www.jcpr.org/wpfiles/needell.pdf?CFID=1490386&CFTOKEN=61896366>. Lest one think the only incentives have to do with reunification, a similar measure monitors how quickly states discharge foster children to adoption.

166. *Id.* at 6.

167. *Id.* at 8-9.

168. *Id.* at 9.

aggregate data to see if this case will push the state over the 76.2% mark or not.<sup>169</sup> They *are*, however, affected by the knowledge that that mark exists and that failure to meet the mark will have financial repercussions on the agency and maybe even their job; and they are following policies and procedures that push them in the direction of reunification.

It is good to have state policies that, through systems of incentives and disincentives, push bureaucracies to act in ways consistent with norms and values enshrined in law and regulation. Using such systems may be the only way to hold agencies accountable to the public and to our elected leaders. However, the state must also care about each individual child and must ensure that the right decision is made for each child as an individual. Because the bureaucratic pressures are set up to care only about the aggregate, the state is an imperfect guardian for the interest of each child as an individual and alternative structures must be built in to the primary structure to allow for a check against the general policies and practices.

Another way to characterize the state's interest in protecting individual children, even as it is also interested in protecting all children together, is society's interest in having a dignified, orderly decision making process in which all interested parties are able to have their views expressed cogently and zealously to the court.

That dignity as a social value should find animation in due process jurisprudence is not a new claim.<sup>170</sup> The constrained, bureaucratic balancing test the Supreme Court created in *Mathews* has been justly criticized for elbowing out more lofty, human values that we might ordinarily associate with due process.<sup>171</sup> Just as the fighting issue in *Mathews* — whether or not Mr. Eldridge had a disability — might properly be seen as one “having a substantial moral content” that is “of considerable social significance,”<sup>172</sup> we might also view the issues in dependency cases — where should this child live, are his medical needs being met, and so forth — as touching on the basic value of human dignity. Society has intervened in the most private of realms, the family, on grounds that a child is being neglected or abused by her own parents. The dependency petition itself is a moral claim. Constructing a process to adjudicate that petition, and all subsequent

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169. *Id.*

170. See, e.g., Jerry Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-52 (1976) (criticizing *Mathews* for failing to include the values behind due process in the administrative review analysis and arguing for the inclusion of an individual dignity component).

171. *Id.* Some states have explicitly made dignity a constitutional value. The Montana Constitution specifically guarantees the right to dignity: “The dignity of the human being is inviolable.” MONT. CONST. art II, § 4. The California Supreme Court has added a fourth prong to its version of the *Mathews* test: “the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official.” *People v. Ramirez*, 599 P.2d 622, 628 (Cal. 1979) (holding that “when a person is deprived of a statutorily conferred benefit, due process analysis must start not with a judicial attempt to decide whether the statute has created an ‘entitlement’ that can be defined as ‘liberty’ or ‘property,’ but with an assessment of what procedural protections are constitutionally required in light of the governmental and private interests at stake”). Mashaw presents his values approach as an alternative to the utilitarian balancing approach the Court took in *Mathews*. Advocates, of course, are stuck with *Mathews*, and are forced to shoehorn dignity arguments into the *Mathews* framework.

172. Mashaw, *supra* note 170, at 51.

proceedings, in a way that allows all relevant parties to be heard and to participate meaningfully is of equal moral importance. The provision of quality counsel to an otherwise unrepresented party is essential to this process.<sup>173</sup>

Having an advocate who is charged, under the rules of professional responsibility, with giving voice to the client's goals, beliefs, and wishes is critical for full exercise of due process rights. A full discussion on the proper role of counsel for children in dependency cases — the extent to and manner in which a lawyer should take direction from a young child — is beyond the scope of this paper.<sup>174</sup> It would seem to conflict with any reasonably articulated vision of dignity to deny a child aged seven or older the opportunity to identify his goals for dependency litigation and instruct his lawyer accordingly.<sup>175</sup> Those views might be rejected by the court for any number of reasons, but to refuse the child the opportunity to express them, and the opportunity to be told why they have been rejected, is callous, cruel, and completely inconsistent with American values.<sup>176</sup>

I had another case before the same judge who heard Sam and Patrick's case. This case involved a fifteen-year-old girl, Beatrice, who had been in foster care for about five years at the time I was assigned to represent her. Her mother had long suffered from schizophrenia, and she did not take medication. Beatrice desperately wanted to go home. She was from an insular, ultra-orthodox Jewish community and she felt stigmatized by being in foster care — in most instances, this community avoided foster placements of its children by taking care of their own. Beatrice's mother was not really able to parent her, but there was a reasonable argument that Beatrice would not be unsafe at home, and that appropriate services could be provided to ensure that her basic needs would be met. So, I planned to oppose the city's request to extend her foster care placement for another year.

The city thought I had lost all sense of rationality because I fought this case so hard. No one could understand how I could "support" sending a child home to a severely mentally ill mother. Assuming that they recognized that with an articulate, intelligent 15-year-old client I could hardly be expected to advocate for a position contrary to her wishes, I believe what they meant was that they could not understand why I would spend so much time and expend so much effort fighting what was destined to be a losing battle.

My advocacy for Beatrice was not about winning. I knew we would lose. I told her as much. That was not the point. My advocacy for Beatrice was about giving her a measure of dignity — the dependency law version of her proverbial day in court. The city bore the burden of proof to demonstrate the continued need for foster care placement, and I intended to put them to their proof. What Beatrice wanted the caseworkers, the lawyer for the city, the judge, and all the random court

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173. *In re Mental Health of K.G.F.*, 29 P.3d 485, 494 (Mont. 2001) (holding that because mentally ill patients are statutorily afforded the right to counsel when facing commitment orders, they are necessarily afforded the right to raise allegations of ineffective assistance of counsel).

174. *Supra* note 8 for a general discussion.

175. Guggenheim, *The Right to be Represented*, *supra* note 64, at 91.

176. Charles Robert Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 39 SYRACUSE L. REV. 1293, 1314 (1988) ("Taking the child's preference into account, even if it ultimately is overruled, constitutes the difference between being and nothingness that is central to dignity.").

personnel who might hear a snippet of the proceeding — what she wanted the whole world to know in the way only a miserable 15-year-old could — was, essentially, “I am here, I am in foster care, and it stinks something rotten.” To his great credit, the judge listened carefully and respectfully. In granting the city’s motion, he rebuked the caseworkers for having written off Beatrice’s mother and for having paid insufficient attention to Beatrice’s views and needs. He directed them to redouble their efforts to work with the family and make reunification a reality. In short, the case ended with my client’s dignity intact, even if the litigation outcome was preordained.

*Mathews* requires an assessment of the fiscal and administrative costs of any proposed due process protection. What is the fiscal price tag for dignity? It is a value that defies quantification. One might argue that there is a measure of cost savings to the state to provide lawyers for children if through their advocacy efforts the lawyers are able to reduce the time their clients stay in foster care. One might also argue that in advocating for medical, mental health, social work, and education services — services that the state might not otherwise voluntarily provide — children’s lawyers cost the state money.<sup>177</sup> Measuring a lawyer’s impact on case outcomes, let alone the attendant fiscal consequences, seems overwhelmingly complex, given the multiple confounding variables at work, though there are research examples.<sup>178</sup>

Without counsel, access to justice is denied and both the dignity of the citizen and the dignity of the citizenry suffers.<sup>179</sup> In dependency proceedings, the state has initiated an action to invade the private family sphere. Children cannot rely on the state or their parents for full protection of their interests in these circumstances. The key decisions about the child will be made by the *government* — the court.<sup>180</sup> A system that allows the government to make decisions about individuals as

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177. On the other hand, dollars spent on quality services to foster children today are probably outweighed by the dollars that would be spent later on homeless shelters, public benefits, Medicaid, and incarceration if foster children are not adequately cared for when young.

178. In 2000, the Washington State Office of Public Defense instituted a pilot project to create a more organized system of representation for parents in dependency proceedings in selected counties. Several research studies have been done on this program. Two key impacts have been documented: there has been an increase in family reunifications (while the reunification rate declined statewide during the same time period), and the rate of continuances granted because the parent’s attorney was not ready was 59% lower in the pilot counties than statewide. Northwest Institute for Children and Families, *DEPENDENCY AND TERMINATION PARENTS’ REPRESENTATION PROGRAM EVALUATION REPORT* (2005); National Council of Juvenile and Family Court Judges, *IMPROVING PARENTS’ REPRESENTATION IN DEPENDENCY CASES: A WASHINGTON STATE PILOT PROGRAM EVALUATION* (2003); Washington State Office of Public Defense, *DEPENDENCY AND TERMINATION PARENTS’ REPRESENTATION PILOT: EVALUATION* (2002).

179. Hon. Robert W. Sweet, *Civil “Gideon” and Justice in the Trial Court (The Rabbi’s Beard)*, 52 *THE RECORD* 915, 927 (1997) (arguing that despite the price of providing counsel to impoverished litigants, the resulting “erosion of faith in the judicial system” from failing to do so is a greater societal cost).

180. Providing counsel to children as part of a three-party action thus should not raise concerns about the child being granted elevated status vis à vis her parents. That the Constitution requires the provision of counsel to children in dependency cases in no way leads to the conclusion that children should be entitled to free and easy access to lawyers whenever they disagree with their parents’ view. See Michael Wald, *Children’s Rights: A Framework for Analysis*, 12 *U.C. DAVIS L. REV.* 255, 257 (1979) (dividing claims made under the rubric of “children’s rights” into four categories).

fundamental as where a person will live and, if incapable of caring for himself, who will care for him without allowing that person reasonable access to the state actor decision maker is, by any definition, oppressive and tyrannical.

#### IV. AFTER *KENNY A.*: WITHER CHILDREN'S RIGHT TO COUNSEL?

As should be evident from the prior discussion, the court's opinion in *Kenny A.* covers the basics of the multi-prong analysis required by *Mathews* but leaves a lot unaddressed. In future cases seeking to establish and vindicate children's right to counsel in dependency cases, lawyers for plaintiffs should be careful about relying too heavily on *Kenny A.* As a district court opinion, of course, it is non-binding as precedent. More importantly, the arguments the court used just might not work elsewhere around the country.<sup>181</sup>

Though criticized, *Mathews* has been widely accepted by courts and repeatedly applied by the Supreme Court, so advocates have no choice but to filter arguments through its rubric. That does not mean, however, that *Mathews* arguments should be limited to mechanical, bureaucratic calculations. Procedural due process is among the most fundamental rights guaranteed by the Constitution and good advocacy must appeal to the values and morality that underlie this concept.

In future cases asserting children's right to counsel in dependency proceedings, advocates should demonstrate the importance of access to the courts for children who are the subjects of those proceedings. The "opportunity to be heard" is such a basic concept that it can be easily overlooked, but it is critical to argue that children have this right as much as adults do, in situations in which the government has lawfully invaded the family's traditional role and taken over the decision-making authority with respect to the children.

It is also important for advocates to carefully and methodically explain why no other person or party is able to adequately protect children's access to the court and opportunity to be heard in dependency proceedings. Some may claim that the state adequately represents the child; others may claim that the parents do. As I argue here, neither of these claims is accurate, but they must be effectively rebuffed in order to make the case for a constitutional right to counsel.

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181. This is especially true because fundamentally, the case was decided on state law grounds. While the analysis was done under federal precedent — *Mathews* — by a federal court, it was in fact a Georgia case. However, similar cases brought under other state due process provisions may fare equally well, should the due process jurisprudence in those venues be broader and more protective of individual liberty than the federal and Georgia case law.