

COMMENT: WHO WILL SPEAK FOR THE CHILDREN?: FINDING A CONSTITUTIONAL RIGHT TO COUNSEL FOR CHILDREN IN FOSTER CARE

January, 2007

Reporter

9 U. Pa. J. Const. L. 545

Length: 10580 words

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Highlight

For these are all our children. We will all profit by, or pay for, whatever they become.

- James Baldwin ¹

Text

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I. Introduction

Every year, states remove thousands of children from their birth parents due to abuse or neglect. ² If close relatives cannot provide adequately for them, the children enter the foster-care system, in which the state child-welfare agency, in conjunction with a family-court judge, finds alternative, or foster, homes for them. The agency sets a goal for the child to work toward: reunification with the birth parents, adoption, or independent living. ³ Foster homes are meant as stations along the way to that goal.

Family courts in each of the fifty states approve, and periodically review, foster-care placements. ⁴ A judge makes decisions whether and how to place the child in care. At review hearings, the judge can decide whether a current placement is acceptable, order changes, or otherwise provide for the child's basic needs. If state-law requirements are met, the judge will also hold a termination-of-parental-rights hearing. If parental rights are terminated, the child is free for adoption.

[*546] Foster-care proceedings are critical to the families whose fate they determine, yet they are almost always chaotic affairs. Judges have long dockets. Key players, including the subject child, are often absent from the courtroom - the hearings take place during the school day and can be traumatic. Social-work records can be troublingly incomplete.

¹ Concert program to benefit the Wiltwyck School for Boys (as quoted in Fox Butterfield, *All God's Children: The Bosket Family and the American Tradition of Violence*, at vii (1996)).

² See generally Laura A. Harper, Note, *The State's Duty to Children in Foster Care: Bearing the Burden of Protecting Children*, [51 Drake L. Rev. 793, 793 \(2003\)](#) (providing background on the foster care system).

³ Cf. Jane Ranum, *Minnesota's Permanency and Concurrent Planning Child Welfare System*, [26 Wm. Mitchell L. Rev. 687, 688-89 \(2000\)](#) (explaining the Minnesota child-welfare system's "permanency planning" in which if reunification with a birth parent is unlikely, the system will concurrently pursue adoption and other long-term placements).

⁴ See Harper, *supra* note 2, at 796 (describing typical statutory criteria in state foster-care systems).

Law guardians - counsel for the children in foster care - are often vital to informing the court of both the facts and the child's preferences regarding his or her placement. Law guardians speak for children in foster care, children who desperately need a voice.⁵

In this Comment, I ask whether there is a constitutional right to counsel for children in foster care, and if so where in the current federal constitutional jurisprudence such a right is located. Ultimately, this Comment calls on the Supreme Court to adopt a constitutional right to counsel for children in foster care, as recognized by a recent decision by the District Court for the Northern District of Georgia.⁶ Such a right is based in a procedural due process liberty analysis.

Part II will provide a short history of the child-welfare system. In Part III, I will argue that, from a policy standpoint, counsel for children in the foster-care system is a timely and extremely significant issue; children all over the country are suffering in inadequate placements, in part because they do not have effective representation in the family-court system. In Part IV, I will examine children's rights in foster care, beginning with a brief survey of federal statutory rights. I will then consider in detail the constitutional right to counsel for dependent children.⁷ I will evaluate the possible application of two [*547] sources of Fourteenth Amendment constitutional rights: procedural due process property and procedural due process liberty. I will then explain why the Supreme Court should adopt a constitutional right to counsel for children in foster care based on a procedural due process liberty analysis as the District Court for the Northern District of Georgia recently found in *Kenny A. ex rel. Winn v. Perdue*.⁸ The case was decided under the Georgia State Constitution and not the Federal Constitution. I will argue, however, that the *Kenny A.* court's reasoning regarding the Georgia Constitution should also apply to the question of the right to counsel under the Federal Constitution.

II. Background: The Child-Welfare System

⁵ Law guardians, however, can only be effective counsel where they have appropriate caseloads. In some counties in states across the country, law guardians cannot be effective lawyers because their caseloads are prohibitively burdensome. In some instances, they have never met their clients nor visited their placements. For example, a child-advocate lawyer in Georgia recently "testified that she had "failed to personally meet or speak with 90 percent of [her] own clients [because of her burdensome caseload]" and that there are cases where no one ever reviewed the medical, social service, education, or other records for a child, met with the foster care provider, or even met with the child." [Kenny A. ex rel. Winn v. Perdue, 356 F. Supp. 2d 1353, 1363 \(N.D. Ga. 2005\)](#) (internal citation omitted). In such cases, child clients effectively have no voice in the system that is raising them, a system replete with abuses and dangers.

⁶ *Id.*

⁷ This Comment will focus only on the right to counsel, which is squarely procedural due process, as opposed to substantive due process. The substantive due process rights of children in foster care derive from a line of Supreme Court cases granting rights to people in different types of civil institutions. Compare [Estelle v. Gamble, 429 U.S. 97, 103-04 \(1976\)](#) (holding that, because the state owes a duty to those whom it has placed in its custody, the Eighth Amendment prohibits the state from being deliberately indifferent to the health or safety of a prisoner), and [Youngberg v. Romeo, 457 U.S. 307, 324 \(1982\)](#) (holding that a developmentally disabled man involuntarily placed in a state mental institution had a right to "food, shelter, clothing, and medical care" as well as "reasonable safety" under the Due Process Clause of the Fourteenth Amendment), with [DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 \(1989\)](#) (holding that the Due Process Clause of the Fourteenth Amendment did not impose an affirmative duty on the state to act to preserve from harm the substantive due process interests of individuals not in state custody). Recent cases on the substantive due process rights of children in foster care include [Hernandez ex rel. Hernandez v. Texas Department of Protective and Regulatory Services, 380 F.3d 872 \(5th Cir. 2004\)](#); [Ray v. Foltz, 370 F.3d 1079 \(11th Cir. 2004\)](#); [Lewis v. Anderson, 308 F.3d 768 \(7th Cir. 2002\)](#); and [Nicini v. Morra, 212 F.3d 798 \(3d Cir. 2000\)](#) (en banc). See generally [County of Sacramento v. Lewis, 523 U.S. 833, 840-42 \(1998\)](#) (setting out the operative framework for substantive due process claims).

⁸ See [356 F. Supp. 2d at 1359-61](#) (finding a right to counsel for plaintiff foster children in deprivation and termination-of-parental-rights proceedings under the due process clause of the Georgia Constitution).

The term child-welfare system describes the "network of state and federal laws, civil courts, and social programs intended to protect children from abuse and neglect by their caretakers."⁹ It has its roots in the colonial period, when "local ... authorities had the power to seize vagrant and unruly children and indenture them to work for their keep."¹⁰ Throughout the nineteenth century, private charities removed poor, mostly immigrant children from homes they considered unsafe.¹¹

Federal involvement in child welfare began during the New Deal with the Social Security Act of 1935,¹² which provided funds for state foster care.¹³ Child abuse became a publicized issue in the 1960s, resulting [*548] in the 1974 Child Abuse Prevention and Treatment Act,¹⁴ which "tied eligibility for federal funding to ... state[] adoption of model legislation for reporting and investigating [child-abuse and neglect] charges."¹⁵

Under current law, when the family court makes a determination that the child cannot safely remain in his home, the state takes custody of the child and places her in foster care with a licensed foster parent or in a group home with more stringent supervision.¹⁶ Foster parents typically receive a stipend to provide care for the child, while a private agency supervises the family.¹⁷ The agency contracts with the state to oversee foster-care placements through caseworkers and, in some instances, to house children with special behavior and emotional needs.¹⁸

Though the purpose of the foster-care system is to provide temporary and safe accommodations for children whose parents are unable to care for them, the reality is troubling. As Laura Harper has explained, "many foster children suffer abuse and neglect in foster homes, in some cases much more severe than any they may have experienced in their [biological] homes."¹⁹ The National Foster Care Education Project found in 1986 and 1990 that foster-care abuse rates exceeded those for other children by tenfold.²⁰ Program inadequacy - the failure of the system itself to provide adequately for children's medical, psychological, and emotional needs - is also widespread.²¹

⁹ Barbara Bennett Woodhouse, *Child Abuse, the Constitution, and the Legacy of Pierce v. Society of Sisters*, [78 U. Det. Mercy L. Rev. 479, 479 \(2001\)](#). As mentioned, child-welfare proceedings take place in civil, rather than criminal, court. Social reformers thought domestic violence was a social-welfare problem, which required a social-welfare, rather than criminal, response. See Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, [2 U. Pa. J. Const. L. 95, 98-99 \(1999\)](#) (noting that social-welfare institutions, not criminal courts, have authority over the majority of child-abuse and neglect cases).

¹⁰ Woodhouse, *supra* note 9, at 479.

¹¹ See Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, *Future of Children*, Spring 1998, at 23, 25 (examining the precursors to today's foster-care system).

¹² Ch. 531, §401, [49 Stat. 620, 627 \(1935\)](#) (codified as amended at [42 U.S.C. §670](#) (2000)).

¹³ Woodhouse, *supra* note 9, at 479.

¹⁴ Pub. L. No. 93-247, [88 Stat. 4 \(1974\)](#) (codified as amended at [42 U.S.C. §§5101-07](#) (2000)).

¹⁵ Woodhouse, *supra* note 9, at 479-80; accord Schene, *supra* note 845, at 27, 29.

¹⁶ See Harper, *supra* note 2, at 795-96.

¹⁷ See *id.* at 796.

¹⁸ See Schene, *supra* note 11, at 30.

¹⁹ Harper, *supra* note 2, at 796.

²⁰ *Id.* at 796-97.

²¹ See *id.* at 797 (defining "program abuse" as the system's failure to provide safe, stable homes and "services to meet the child's medical, psychological, and emotional needs.")

Abuses in the child-welfare system are as old as the system itself,²² which shows "a remarkable immunity to reform."²³ These abuses persist "despite congressional attempts at reform."²⁴ A recent New York Times opinion column described unconscionable shortcomings in [*549] Mississippi's Division of Family and Children Services.²⁵ According to the agency, a nineteen-month-old baby was beaten to death by a father in DeSoto County.²⁶ Although national guidelines call for agency caseworkers to have caseloads of twelve to seventeen, some caseworkers in Mississippi have one hundred or more.²⁷ In one county, the average is 130.²⁸ Most shockingly, there is testimony in evidence collected by Children's Rights, an impact litigation group that is suing the state of Mississippi, that "a key official in the Department of Human Services ... said the state would 'not necessarily investigate' whether sexual abuse had occurred if a 'little girl' contracted a sexually transmitted disease."²⁹ In a New Jersey case that made national headlines in 2003, four brothers were discovered starving in a foster home.³⁰ New Jersey's Department of Youth and Family Services had visited the home thirty-eight times in four years, but no one had reported the malnourishment.³¹ By the time the children were removed, their "teeth had decayed" and their "stomachs were distended."³²

There are many explanations for the abuses. The child-welfare system is poorly organized and under-funded.³³ The private agencies that contract with the city are understaffed, and their employees are underpaid.³⁴ As a result, there is a remarkably high turnover of staff, resulting in a lack of continuity for the children with whom they work. Furthermore, "foster parents often receive inadequate training" to deal with the severe emotional and behavior problems of many of their wards.³⁵

As a result of these flagrant and systemic tragedies, dependent children and their advocates are "increasingly ... turning to the courts for protection,"³⁶ which makes the right to, and role of, counsel in dependency proceedings an essential issue.

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²² For an investigation into one particular long-lived lawsuit against New York City's foster-care system, see generally Nina Bernstein, *The Lost Children of Wilder: The Epic Struggle to Change Foster Care* (Vintage Books 2002) (2001).

²³ Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 *Harv. C.R.-C.L. L. Rev.* 199, 212 (1988).

²⁴ See Harper, *supra* note 2, at 798 (referring to the failures of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, [94 Stat. 500 \(1980\)](#), and its successor, the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, **111 Stat. 2115 (1997)**).

²⁵ Bob Herbert, Op-Ed, *Gross Neglect*, *N.Y. Times*, Mar. 13, 2006, at A21.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Children's Rights, *Why Our Work Matters*, <http://www.childrensrights.org/site/> PageServer?pagename=jacksonbrothers (last visited Oct. 23, 2006).

³¹ *Id.*

³² *Id.*

³³ Harper, *supra* note 2, at 797.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 798.

III. The Importance of Counsel for Children in Foster Care

At first blush, the importance, or even appropriateness, of counsel for children in foster care might not be evident. As a matter of institutional competence, one might argue that the abuses illustrated above should be addressed either by the executive, since the child-welfare system is administered by an agency, or by the legislature, since the various state legislatures promulgated the statutes that provide for child-welfare agencies. Furthermore, a court in a dependency proceeding is charged with seeking the "best interests" of the child. Surely, one might argue, a court convened for the purpose of protecting a child will make a conscientious and informed social-welfare decision, regardless of the presence of counsel. Ideally, the family court achieves a balance between parents' constitutional rights to be free from undue interference in child rearing³⁷ and dependent children's rights to be free from harm.³⁸

Yet, in reality, effective representation is essential.³⁹ There are nearly half a million children living in foster-care placements across the country,⁴⁰ a number that taxes an under-resourced system. Family court judges have full dockets and feel pressure to move proceedings quickly. A city or state child-welfare agency, represented by counsel at a foster-care hearing, has similarly divided loyalties. The agency is concerned not only with the child's interest but also with the efficient functioning of its own bureaucracy. The court cannot rely on a city welfare agency to act in the child's best interest when a status-quo placement might be convenient for the agency. Moreover, the parent, who is often represented by counsel,⁴¹ has interests that do not necessarily align with the child's in a dependency proceeding.

Further, it is not enough for a state to assign an attorney; the state must assign an effective attorney. The National Association of Counsel [*551] for Children recommends that, in order to perform effectively, a child-advocate attorney should represent no more than a hundred clients at a time, assuming such an "attorney ... spends an average of 20 hours representing each child and will work 2000 hours in a year."⁴² As noted in *Kenny A.*, to be discussed at length infra, child advocate attorneys in DeKalb County, Georgia, each represented two hundred clients.⁴³ In Fulton County, every child advocate attorney represented nearly 450 children.⁴⁴ These children effectively had no voice in their foster-care proceedings, and consequently abuses abounded. In both settings, the

³⁷ A line of Supreme Court cases have come to stand for the proposition that parents have a fundamental right, rooted in Fourteenth Amendment substantive due process jurisprudence, to decisional autonomy regarding their children. See [Wisconsin v. Yoder, 406 U.S. 205, 214 \(1972\)](#) (holding that "a State's interest in universal education" must be balanced against parents' interests in their children's "religious upbringing"); [Pierce v. Soc'y of Sisters, 268 U.S. 510, 518 \(1924\)](#) (finding a fundamental right for parents to make decisions about private school attendance); [Meyer v. Nebraska, 262 U.S. 390, 399 \(1923\)](#) (establishing liberty of parents and guardians to control the upbringing and education of their children).

³⁸ Gelles & Schwartz, *supra* note 9, at 95-96.

³⁹ I use representation to mean the assistance of a lawyer. Some states allow nonlawyer volunteers to speak for dependent children. Any adult voice is certainly preferable to no adult voice on the child's behalf. But child welfare proceedings, despite their benevolent social-welfare purposes, are legal proceedings, where lawyers provide representation more effectively than others. I believe a child is best served by an attorney.

⁴⁰ Harper, *supra* note 2, at 793.

⁴¹ But see [Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 \(1981\)](#) (refusing to find a constitutional right to counsel for parents in termination-of-parental-rights hearings).

⁴² [Kenny A. ex rel Winn v. Perdue, 356 F. Supp. 2d 1353, 1362 \(N.D. Ga. 2005\)](#).

⁴³ *Id.*

⁴⁴ *Id.*

state foster-care agency, faced with "a shortage of family foster homes[,] ... placed children in inappropriate and overcrowded homes, [moved children multiple times,] and overused institutional placements." ⁴⁵

IV. Rights of Children in Foster Care

A. Statutory: CAPTA

The 1974 Child Abuse Prevention and Treatment Act ("CAPTA") ⁴⁶ "established a statutory right to representation, although not necessarily by counsel, for all children who are the subjects of child protection proceedings." ⁴⁷ Specifically, Congress made the receipt of federal funds contingent on the provision of a guardian ad litem ("GAL") for every subject child of abuse or neglect proceedings. ⁴⁸ Congress amended the statute in 1996 to clarify that the GAL could be an attorney, a Court Appointed Special Advocate ("CASA"), or both. ⁴⁹ The statute further specified that the purpose of the appointment is to obtain a clear understanding of the situation and needs of the child, and to make recommendations regarding the "best interests of the child." ⁵⁰ Congress provided "no further ... guidance [about the scope] or the purpose of the representation." ⁵¹

[*552] Although it was an important step, the passage of CAPTA did not result in the provision of counsel for all children in foster care. The statute did not guarantee "counsel," but rather "representation." When a child is not represented by an attorney, he is almost always represented by a CASA. "Almost every state ... has [a CASA] program," which trains laymen to be advocates for dependent children. ⁵² Though these are certainly important programs, ⁵³ whether lay advocates have the legal knowledge and advocacy skills to adequately represent the interests of abused or neglected children is an open question. ⁵⁴

Furthermore, CAPTA does not require effective assistance of counsel. Congress did not set a maximum caseload for GALs. As a result, in many states children have counsel, but due to the representatives' overwhelming number of clients they cannot be effective.

Besides caseload issues, CAPTA presents effective-counsel problems because it mandates a representative for the "best interests" rather than simply the "interests" of the child. This is an important distinction: A lawyer representing the interests of the child is a zealous advocate for the child's expressed wishes, representing the child the way he would an adult client. A lawyer representing the "best interests" of a child filters the child's wishes through the sieve

⁴⁵ [Id. at 1359 n.6.](#)

⁴⁶ Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, [88 Stat. 4 \(1974\)](#) (codified as amended at [42 U.S.C. §§5101-5119c \(2000\)](#)).

⁴⁷ Randi Mandelbaum, Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers, [32 Loy. U. Chi. L.J. 1, 1 \(2000\)](#).

⁴⁸ [42 U.S.C. §5106\(a\)\(1\)\(A\) \(2000\)](#).

⁴⁹ Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, sec. 107, §107(b)(2)(A)(ix), [110 Stat. 3063, 3073 \(1996\)](#) (codified as amended at [42 U.S.C. § 5106a\(b\)\(2\)\(A\)\(ix\) \(2000\)](#)).

⁵⁰ *Id.*

⁵¹ Mandelbaum, *supra* note 47, at 2-3.

⁵² Michelle Markowitz, Is a Lawyer Who Represents the "Best Interests" Really the Best for Pennsylvania's Children?, [64 U. Pitt. L. Rev. 615, 625 \(2003\)](#).

⁵³ See [id. at 626](#) (arguing that CASA programs provide better training than the Legal Aid organizations that supply GALs and law guardians in most states).

⁵⁴ See Mandelbaum, *supra* note 47, at 86.

of her own judgment before presenting a position to the court. Essentially, she presents her own opinion of what is in the child's best interests to the court.⁵⁵

There has been much scholarly debate on whether interests or "best interests" is the proper target for representation in dependency proceedings. Emily Buss has noted that "those who advocate the GAL [or best-interest] approach argue that children lack the maturity of judgment, even the cognitive capacity of decision making, necessary to assess ... their long-term interests."⁵⁶ In addition, "children are under tremendous pressure to [misrepresent] their own interests - pressure from their families, from the court process, and from [*553] the circumstances" that led them to court.⁵⁷ Lastly, those who prefer a GAL approach argue that, in a chronically inadequate and under-funded child-welfare system, courts need children's lawyers to present all available information; a best-interests lawyer would be in a better position to present the whole picture than a traditional advocate, who might withhold information adverse to her case.⁵⁸

Advocates of an interests, or "traditional lawyer," approach, emphasize "that it is the judge ... who is responsible for determining the child's best interests."⁵⁹ The ordinary adversarial model is designed to provide the judge with the necessary information to make that determination.⁶⁰ Further, "giving children a voice in the [courtroom] empowers [them]" to participate in the critical decisions being made.⁶¹ Most practitioners adopt some mix of the two approaches, reacting to the age and particular capacities of individual clients.⁶²

B. Constitutional Rights

1. Applying the Fourteenth Amendment to Children

Discussions of children's constitutional rights in scholarly literature virtually all begin with the landmark Supreme Court decision of *In re Gault*.⁶³ *Gault* announced that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"⁶⁴ and "the condition of being a boy does not justify a kangaroo court."⁶⁵ Speaking through Justice Fortas, the Court declared that juveniles are entitled to a variety of procedural protections.⁶⁶ Courts must

⁵⁵ See generally Emily Buss, "You're My What?": The Problem of Children's Misperceptions of Their Lawyers' Roles, [64 Fordham L. Rev. 1699 \(1996\)](#) (evaluating the pros and cons of both traditional interests-oriented lawyers and best-interest GALs); Markowitz, *supra* note 52 (critiquing the Pennsylvania GAL statute from a perspective favoring adversarial representation); Jean Koh Peters, The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings, [64 Fordham L. Rev. 1505 \(1996\)](#) (arguing that best interests are best determined through a traditional lawyer-client role).

⁵⁶ See, e.g., Buss, *supra* note 55, at 1702.

⁵⁷ *Id.* at 1702-03.

⁵⁸ *Id.* at 1703.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1703-04.

⁶¹ *Id.* at 1704.

⁶² Lawyers for Children, which represents many of Manhattan's foster-care children, interprets the New York statute to call for "interest" representation; the Legal Aid Society, which represents the rest, takes a "best interests" approach. Hal Silverman, Attorney in Charge of Litig., Lawyers for Children, Brown Bag Lunch at Manhattan Family Court (June 20, 2005).

⁶³ [387 U.S. 1 \(1967\)](#).

⁶⁴ [Id. at 13](#).

⁶⁵ [Id. at 28](#).

⁶⁶ [Id. at 33, 36-37, 49-50, 57](#).

provide them timely, written notice of allegations, counsel if liberty is at issue, protection from self-incrimination, and the opportunity to confront and cross-examine witnesses under oath.⁶⁷ Subsequent cases have added guarantees of a reasonable-doubt standard and protection against double jeopardy.⁶⁸

[*554] The ethos of *Gault*, with its sweeping dicta about the applicability of the Fourteenth Amendment to juveniles, seems to argue for broad procedural protection for children. The Supreme Court may have been careful to circumscribe its holding: "We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents."⁶⁹ Yet *Gault* clearly applies the Fourteenth Amendment to juveniles, which is an essential first step in locating a constitutional right to counsel for children in foster care. *Gault* and the jurisprudence of constitutional-criminal procedure have further relevance for children in foster care, because like juvenile criminal defendants, such children face a literal loss of liberty and the possibility of residence in a state facility.

Gault nevertheless produces a strange result: children in the juvenile-justice system have more constitutional guarantees of procedure than children in the child-welfare system. As demonstrated above, children in juvenile court are afforded virtually all of the constitutional protections afforded to their adult counterparts. But the Supreme Court has not yet recognized a constitutional right to counsel for children who are the subject of foster-care proceedings despite the grave liberty interests at stake.

2. Procedural Due Process Property Interests

Any constitutional right to counsel for children in foster care must be rooted in Fourteenth Amendment procedural due process. The Due Process Clause of the Fourteenth Amendment prevents states from "depriving any person of life, liberty, or property, without due process of law."⁷⁰ Procedural due process refers to the body of Fourteenth Amendment jurisprudence that expounds upon what specific adjudicative protections are invoked by "due process of law." As the Southern District of New York explained, "[a] court analyzing a procedural due process claim first must determine whether plaintiffs have a protected interest and, only then, must decide whether the deprivation of that interest met with the requirements of due process."⁷¹ The Supreme Court has said that "the requirements of procedural [*555] due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."⁷² Under current Supreme Court doctrine, locating a constitutional right to counsel via a property rationale is problematic.

The Supreme Court's decision in *Board of Regents v. Roth* explained that a property interest exists where an individual has a legitimate claim of entitlement grounded in nonconstitutional law, such as a state statute:

⁶⁷ *Id.*

⁶⁸ See *Breed v. Jones*, 421 U.S. 519, 531 (1975) (holding that the Double Jeopardy Clause, *U.S. Const. amend. V*, cl. 2, as applied through the Fourteenth Amendment Due Process Clause, barred prosecution of a juvenile both in juvenile court and as an adult); *In re Winship*, 397 U.S. 358, 364 (1970) (holding that the reasonable-doubt standard for proving a criminal charge against a juvenile is constitutionally required).

⁶⁹ *In re Gault*, 387 U.S. at 13.

⁷⁰ *U.S. Const. amend. XIV*, §1, cl. 3.

⁷¹ *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 677 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 372 (2d Cir. 1997) (per curiam), and superseded by statute, Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, sec. 107, §107, **110 Stat. 3063, 3071-74 (1996)** (codified as amended at *42 U.S.C. §5106a* (2000)), as recognized in *Hilbert S. v. County of Tioga*, No. 3:03-CV-193, 2005 U.S. Dist. LEXIS 29423, at 48-49 (N.D.N.Y. June 21, 2005).

⁷² *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972). For a discussion of what constitutes a liberty interest, see *infra* Part IV.B.3.

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.⁷³

Two years later, Judge Hufstедler of the Ninth Circuit explained this requirement more concretely:

An entitlement is a legally enforceable interest in receiving a governmentally conferred benefit, the initial receipt or the termination of which is conditioned upon the existence of a controvertible and controverted fact. Such an interest cannot be impaired or destroyed without prior notice to the beneficiary and a meaningful opportunity for him to be heard for the purpose of resolving the factual issue.⁷⁴

The Supreme Court has specifically declined to decide whether state child-welfare statutes give rise to a legitimate claim of entitlement to protective services,⁷⁵ "which would enjoy due process protection against state deprivation under ... Roth."⁷⁶

[*556] Lower courts have split on whether state child-welfare statutes give rise to property interests.⁷⁷ The variation in case outcomes results partly from a difference in views concerning whether such statutes ever can create property interests, partly from differences among the statutory schemes, and partly from differences concerning the stage of child-welfare proceedings.

⁷³ [Id. at 577](#); cf. [id. at 576](#) ("The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.").

⁷⁴ [Geneva Towers Tenants Org. v. Fed'd Mortgage Investors, 504 F.2d 483, 495-96 \(9th Cir. 1974\)](#) (Hufstедler, J., dissenting).

⁷⁵ One relevant case that predated [Roth is Goldberg v. Kelly, 397 U.S. 254 \(1970\)](#). Goldberg lays the theoretical framework for the argument that child-protective statutes do confer a legitimate claim of entitlement and therefore a property interest protected by the Fourteenth Amendment. Goldberg signaled in dicta that benefits previously thought of as "mere privileges" are afforded constitutional protection. [Id. at 262 n.8](#). The Court announced that persons have a right to due process with respect to governmental decisions that impose a "grievous loss" on them. [Id. at 262-63](#).

Goldberg seems to hinge on the fact that welfare benefits provide for fundamental human needs, such as "the means to obtain essential food, clothing, housing, and medical care." [Id. at 264](#). Children placed in foster care receive analogously essential benefits: the state provides food, clothing, housing, and medical care. As decisions are made at foster-care reviews, it is these fundamental benefits, deemed in Goldberg to be "property," which hang in the balance.

⁷⁶ [DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 n.2 \(1989\)](#); see also [Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2803 \(2005\)](#) (noting that DeShaney left open the question of whether restraining orders create an entitlement to police protection). DeShaney is a substantive due process case, whereas this comment is concerned with procedural due process. DeShaney is worth mentioning because the Supreme Court clearly held that the state has no affirmative duty to intervene to protect a child, even where the state is aware of abuse in the home. The case can therefore be distinguished from the situation where a child is already in foster care. Once the state has taken charge of a child voluntarily, different substantive due process rights accrue. See *supra* note 7.

⁷⁷ See [Marisol A. ex rel. Forbes v. Giuliani, 929 F. Supp. 662, 678 \(S.D.N.Y. 1996\)](#) (noting lower courts are divided on this question), *aff'd*, [126 F.3d 372 \(2d Cir. 1997\)](#) (per curiam), and superseded by statute, Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, sec. 107, §107, [110 Stat. 3063, 3071-74 \(1996\)](#) (codified as amended at [42 U.S.C. §5106a](#) (2000)), as recognized in [Hilbert S. v. County of Tioga, No. 3:03-CV-193, 2005 U.S. Dist. LEXIS 29423, at 48-49](#) (N.D.N.Y. June 21, 2005).

a. Circuit Split

Reading the decisions broadly, one could fairly assert that the Sixth and Eleventh Circuits, as well as district courts in the Southern District of Georgia, District of New Hampshire, Eastern District of Pennsylvania, and Southern District of Mississippi, all have held that there is a property interest in state child-welfare statutes.⁷⁸ For example, [*557] the Sixth Circuit held that there is such an interest in *Meador v. Cabinet for Human Resources*:

Kentucky law provides that "the cabinet shall arrange for a program of care, treatment and rehabilitation of the children committed to it," and that "the cabinet shall be responsible for the operation, management and development of the existing state facilities for the custodial care and rehabilitation of children" We find that these statutes give the Meador children an entitlement to protective services of which they may not be deprived without due process of law.⁷⁹

By contrast, the Seventh Circuit and, strangely, the Sixth Circuit, as well as the Western District of Michigan and Southern District of New York, have all refused to recognize a property interest in child-welfare statutes.⁸⁰ For example, in *Child v. Beame*, the Southern District of New York held that there is no property right in a child's interest in being adopted.⁸¹ To a certain extent, therefore, there is an irreconcilable circuit split on the question of whether finding a property interest is appropriate.

b. Statutory Distinctions

Differences in state statutes are another explanation for the disparity; some state child-welfare statutes may confer a "legitimate claim of entitlement," while others do not. In *Powell v. Department of Human Resources*, the District Court for the Southern District of Georgia held that "the [Richmond County Child Abuse] Protocol⁸² vests abused children with an entitlement to the procedures and protection mandated therein. Thus, an abused child may not be deprived of these procedures and protection without procedural due process."⁸³ Similarly, [*558] in *Taylor ex rel.*

⁷⁸ See *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 477 (6th Cir. 1990) (holding that Kentucky child-protection statutes give plaintiffs "an entitlement to protective services of which they may not be deprived without due process of law"); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 799-800 (11th Cir. 1987) (en banc) (holding that children in foster care may "state a claim based upon deprivation of a liberty interest ... when ... officials fail to follow" guidelines mandated by the Georgia foster-care and placement scheme); *Powell v. Dep't of Human Res.*, 918 F. Supp. 1575, 1580-81 (S.D. Ga. 1996) (finding that the Georgia Child Abuse Protocol "vests abused children with a[] [constitutionally protected] entitlement to procedures and protections mandated therein"); *Eric L. ex rel. Schierberl v. Bird*, 848 F. Supp. 303, 308 (D.N.H. 1994) (refusing to dismiss claims that the New Hampshire child-protection statute creates an entitlement to certain services); *Baby Neal v. Casey*, 821 F. Supp. 320, 335 (E.D. Pa. 1993) (mem.) (finding "an affirmative duty ... to provide ... adequate food, shelter, clothing, medical care and reasonable safety"), rev'd on other grounds sub nom. *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48 (1994).

⁷⁹ *Meador*, 902 F.2d at 476-77 (quoting *Ky. Rev. Stat. Ann.* §605.100 (LexisNexis 1999 repl.)).

⁸⁰ See *Tony L. ex rel. Simpson v. Childers*, 71 F.3d 1182, 1185 (6th Cir. 1995) (holding that property interests have no application to enforcement of child-protection statutes); *Doe ex rel. Nelson v. Milwaukee County*, 903 F.2d 499, 502 (7th Cir. 1990) (holding that Wisconsin child-abuse-reporting statutes do not vest plaintiffs with a constitutionally protected property interest); *B.H. v. Johnson*, 715 F. Supp. 1387, 1396-98 (N.D. Ill. 1989) (mem.) (finding no constitutionally protected liberty or property interest created by the Illinois child-welfare statute); *Child v. Beame*, 412 F. Supp. 593, 603-05 (S.D.N.Y. 1976) (finding that plaintiffs have no constitutionally protected property interest in permanent adoptive placement). For an explanation of the Sixth Circuit's distinction between *Meador*, where it recognizes the interest, and *Tony L.*, where it does not, see infra notes 87-88 and accompanying text.

⁸¹ *Child*, 412 F. Supp. at 605 (holding that neither federal nor state statutes on adoption confer an entitlement that amounts to a property right).

⁸² See *Ga. Code Ann.* §19-15-2 (2004) (mandating the creation of a similar protocol for each county).

⁸³ *Powell*, 918 F. Supp. at 1581. The court in *Powell* applied a Roth property analysis:

Walker v. Ledbetter, the Eleventh Circuit found that plaintiff foster children had a procedural due process claim based on entitlements conferred by [Section 49-5-3\(12\) of the Georgia Code](#).⁸⁴

But in Coker ex rel. Coker v. Henry, the United States District Court for the Western District of Michigan distinguished Michigan's child-welfare statute⁸⁵ from that of Georgia:

The Georgia statutory scheme required state officials to protect children in their custody, thoroughly investigate foster homes, supervise children in foster homes through visits made at regular intervals, and follow established guidelines. Indeed, reference to the Georgia statutory scheme ... reveals its terms are substantially more explicit and mandatory than those of the Michigan Child Protection Law. The Michigan Child Protection law does not prescribe and mandate compliance with specific procedures substantively limiting the discretion of state officers. It is not sufficiently explicit and mandatory and does not create a legitimate claim of entitlement.⁸⁶

The court thus concluded, feasibly, that the difference is based on the statutes themselves.

c. Distinctions Based on the Stage of Proceedings

Yet a third way to reconcile the body of cases concerns the circumstances under which the child brings the claim: perhaps a property interest does not exist during the initial investigation but rather accrues once the child has been placed in foster care. In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court made this distinction: "Had the state by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."⁸⁷ Underlying the property decisions may [*559] be a similar notion that a child does not have a property right to foster care when living in his biological parents' home without state supervision. Once the state gives foster care to a child, however, some courts might argue that it cannot deprive the child of the care without providing some sort of process. Therefore a child might not have a property interest in care at the initial hearing, when a judge decides whether to place the child in care, but might nevertheless have a property interest thereafter. This approach is consonant with the law's general hesitation to find an affirmative duty to act. The Court, in its substantive due process jurisprudence, has consistently refused to find state child-welfare agencies liable for failing to intervene in dangerous family situations.⁸⁸ It has, however, found the state liable where a child suffers abuse while in state care.⁸⁹

In determining whether the state law creates a protected liberty interest, the court must examine whether the state has imposed specific substantive limitations on the discretion of the state officers or employees such that their duties are of a mandatory character. If not, the plaintiff cannot have a legitimate claim of entitlement to the interest, but only a unilateral expectation of it.

Id. at 1580. This is clearly the language of the Roth property test. Yet, based on this analysis, the court concludes that dependent children have a liberty interest in the procedures and protections of the Richmond County Child Abuse Protocol. The court is mistaken. The Supreme Court's analysis of liberty in Roth discusses not statutory entitlements, but a broad, constitutionally-based definition of liberty. The court seemingly meant to conclude that the Georgia lawmakers imbued abused children with a property interest.

⁸⁴ [818 F.2d 791, 799 \(11th Cir. 1987\)](#). As the Powell court did, the court concludes that the children have a "liberty interest," yet bases the argument on a Roth property analysis of the relevant Georgia statute.

⁸⁵ Michigan Child Protection Law, [Mich. Comp. Laws §§722.621-.638](#) (2002 & Supp. 2006).

⁸⁶ [813 F. Supp. 567, 570 \(W.D. Mich. 1993\)](#) (mem.), aff'd, [25 F.3d 1047 \(6th Cir. 1994\)](#) (unpublished table decision).

⁸⁷ [489 U.S. 189, 201 n.9 \(1989\)](#).

⁸⁸ See generally [Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2803 \(2005\)](#) (finding that a wife did not have a property interest in police enforcement of the restraining order against her husband). [DeShaney, 489 U.S. at 191](#) (holding that the Fourteenth Amendment does not require a state or local government to protect its citizens from private violence not attributed to its employees).

Under current Supreme Court jurisprudence, it is not clear whether children have a property interest in foster care. Read together, the lower court decisions either signal a circuit split, variation among state statutes, or a bright-line moment in the proceeding when a property interest accrues. It is not property so much as liberty that is at stake when a child enters foster care and when a foster-care placement is reviewed because, "in a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." ⁹⁰

3. Procedural Due Process Liberty Interests

Under Supreme Court doctrine, a liberty interest can also trigger due process protections. ⁹¹ A liberty interest need not be grounded in nonconstitutional law, as required for a property interest; it can be based in the Constitution itself. ⁹² As the Supreme Court recently explained, "[a] liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty.'" ⁹³ "Liberty" refers to many different freedoms and rights, including the right to be free [*560] from bodily restraint, the right to contract, the right "to engage in any of the common occupations of life, [the right] to acquire useful knowledge," and the right to "enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." ⁹⁴

With *Kenny A. ex rel. Winn v. Perdue*, the Northern District of Georgia became the first federal court to announce that children have "a fundamental liberty interest at stake in deprivation and [termination-of-parental-rights] ⁹⁵ proceedings." ⁹⁶ The court stated that the subject child's liberty interest includes "[an] 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." ⁹⁷ The court argued that an erroneous decision that a child is not being abused or neglected can have the most serious effect on a child, leading to chronic abuse or even death. Conversely an erroneous decision that a child is being abused or neglected would lead to the unnecessary destruction of the child's most important family relationships. ⁹⁸

The court also pointed out that foster-care proceedings pose a literal threat to a child's physical liberty. ⁹⁹ In fact, child-welfare bureaucrats in some states, including Georgia, routinely place normal children in institutions designed

⁸⁹ [*Griffith v. Johnston*, 899 F.2d 1427, 1438 \(5th Cir. 1990\)](#) (holding that, when children are in foster care, the state has an affirmative duty to provide for their basic needs and is liable for failure to do so).

⁹⁰ [*Bd. of Regents v. Roth*, 408 U.S. 564, 572 \(1972\)](#).

⁹¹ See [*id.* at 571-72](#) (stating that one of the great constitutional concepts is that procedural due process protects against "deprivation of liberty beyond the sort of formal constraints imposed by the criminal process").

⁹² See [*id.* at 577](#).

⁹³ [*Wilkinson v. Austin*, 545 U.S. 209, 221 \(2005\)](#).

⁹⁴ [*Meyer v. Nebraska*, 262 U.S. 390, 399 \(1923\)](#).

⁹⁵ A child-welfare agency brings an action for termination of parental rights when the agency believes it is in the child's best interests to free him for adoption. If the agency is successful, the parents' rights are terminated and a caregiver approved by the state may adopt the child. See Gelles & Schwartz, *supra* note 9, at 97.

⁹⁶ [*356 F. Supp. 2d 1353, 1360 \(N.D. Ga. 2005\)*](#). See generally Herbert, *supra* note 25, at A21 (lambasting the state of Mississippi for not devoting enough resources to protecting children in the state).

⁹⁷ [*Kenny A.*, 356 F. Supp. 2d at 1360](#).

⁹⁸ *Id.*

⁹⁹ [*Id.* at 1360-61](#) ("Foster 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.").

for children suffering from emotional or behavioral problems "because suitable family foster homes are not available."¹⁰⁰ Such a situation clearly invokes due process protection. It is precisely such a threatened loss of liberty that distinguishes foster care from other civil contexts in which the Supreme Court has refused to recognize a constitutionally protected right to counsel. For example, in *Lassiter v. Department of Social Services*, the Supreme Court refused to find a universal constitutional right to counsel for parents in termination-of-parental-rights proceedings, holding instead that the right to counsel could be determined on a case-by-case basis.¹⁰¹ **[*561]** Because of the inherent discretion in awarding counsel on a case-by-case basis, a case-by-case right to counsel is barely preferable to no right to counsel at all.

In *Lassiter*, petitioner Abby Gail Lassiter's son was removed by Social Services and placed in foster care for want of proper medical care.¹⁰² A year after the boy went into care, Lassiter was sentenced to twenty-five to forty years for second-degree murder.¹⁰³ A couple of years later, the Department brought a petition to terminate Lassiter's parental rights to her son because she had not made the minimal efforts towards reunification required by state law.¹⁰⁴

The trial court terminated Lassiter's parental rights.¹⁰⁵ The state court of appeals affirmed, and the North Carolina Supreme Court denied certiorari.¹⁰⁶ The Supreme Court of the United States "granted certiorari to consider the petitioner's claim under the Due Process Clause of the Fourteenth Amendment" that she was entitled to counsel as an indigent in a termination-of-parental-rights proceeding.¹⁰⁷

In refusing to find such a constitutionally-protected right to counsel for all indigent parents, the Supreme Court explained in dicta that a liberty-interest analysis precludes such a right:

The Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.¹⁰⁸

It is on the grounds of physical liberty that a child's interest in a termination-of-parental-rights hearing, or any other type of foster-care proceeding, is distinct from his parent's interest. True, a parent's right to her child is fundamental, and the Supreme Court recognized the gravity of termination in *Lassiter*. Referring to termination of parental rights, the Court wrote, "If the State prevails, it will have worked a unique kind of deprivation. A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one."¹⁰⁹

¹⁰⁰ [Id. at 1361.](#)

¹⁰¹ [452 U.S. 18, 31 \(1981\).](#)

¹⁰² [Id. at 20-21.](#)

¹⁰³ [Id. at 20.](#)

¹⁰⁴ [Id. at 20-21.](#)

¹⁰⁵ [Id. at 24.](#)

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ [Id. at 26-27.](#)

¹⁰⁹ [Id. at 27](#) (internal citations omitted).

[*562] But the Court's right-to-counsel jurisprudence was contingent upon a physical threat to liberty, which is absent for the parent in a termination-of-parental-rights context. The child, by contrast, faces the requisite loss of liberty. A child entering foster care might not be placed in a single-family home. A child may well enter a congregate-care facility or state hospital, wherein his liberty would indeed be restricted.¹¹⁰

In *Kenny A.*, the Northern District of Georgia noted that "a child's liberty interests continue to be at stake" beyond the initial proceeding.¹¹¹ When the child is in state custody, a "special relationship" exists, which establishes "rights to reasonably safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm."¹¹² "Thus," the court concludes, "a child's fundamental liberty interests are at stake not only in the initial deprivation hearing but also in the series of hearings and review proceedings that occur ... once a child comes into state custody."¹¹³

4. *Mathews v. Eldridge*: Determining What Process is Due

Once a liberty interest has been established, a court must then ask "what process is constitutionally required to safeguard those interests."¹¹⁴ The Georgia court in *Kenny A.* applied the test outlined by the Supreme Court in *Mathews v. Eldridge*, which weighs three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹¹⁵

The *Kenny A.* court concluded that the plaintiff foster children have a constitutional right to counsel under the due process clause of the Georgia Constitution, which mirrors that of the Federal Constitution.¹¹⁶

[*563] As to the first prong, the private interest affected, the Court reiterated "the child's fundamental liberty interests in health, safety, and family integrity," and the risk of institutional placement.¹¹⁷ The court concluded that these liberty interests are sufficiently grave to merit "a due process right to counsel in [abuse and neglect] proceedings."¹¹⁸

Second, the court found that there is a sufficient risk of erroneous deprivation of the private liberty interest to satisfy the *Mathews* test.¹¹⁹ The court pointed out that the standards employed by juvenile courts in deprivation

¹¹⁰ It would be possible to make the child's right to counsel contingent on the outcome of a foster-care proceeding. Most people would probably view placement in a state hospital or aggregate-care facility as more of a restriction on liberty than placement in a single-family home. Awarding counsel on the basis of outcome would parallel Sixth Amendment jurisprudence. See, e.g., [Scott v. Illinois, 440 U.S. 367, 373 \(1979\)](#) (holding that there is no right to counsel if there is only the chance of imprisonment, but there is a guarantee if imprisonment actually occurs).

¹¹¹ [Kenny A. ex rel. Winn v. Perdue, 356 F. Supp. 2d 1353, 1360 \(N.D. Ga. 2005\)](#).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ [Mathews v. Eldridge, 424 U.S. 319, 335 \(1976\)](#).

¹¹⁶ [Kenny A., 356 F. Supp. 2d at 1360](#).

¹¹⁷ *Id.*

¹¹⁸ [Id. at 1361](#) (emphasis added).

¹¹⁹ *Id.*

proceedings provide wide latitude for judicial discretion, and thus for subjectivity.¹²⁰ Such imprecise standards enhance the risk of erroneous fact-finding.¹²¹ The court also noted strong empirical evidence that the Georgia Department of Family and Children's Services routinely "makes erroneous decisions ... that affect the safety and welfare of foster children."¹²²

The court next assessed the probable value that appointment of counsel would entail. The court rejected defendants' argument that juvenile judges, CASAs, and citizen-review panels serve as adequate protection and concluded that "only the appointment of counsel can effectively mitigate the risk of significant errors" in child welfare proceedings.¹²³ The court based this finding on the characteristics of each of these groups. First, a juvenile court judge, unlike a lawyer, cannot conduct his own investigation and is thus dependent on facts presented in the courtroom.¹²⁴ The judge's opinions, therefore, "are only as [reliable] as the information provided to [him]," largely by child welfare agencies.¹²⁵ Next, the court concluded that CASA representation is inherently limited by the fact that CASAs are not lawyers [*564] and cannot provide legal representation for their charges.¹²⁶ Furthermore, CASAs are appointed in few cases and cannot be counted upon for system-wide representation.¹²⁷

Lastly, the court weighed the government's interest, including the function involved and the fiscal and administrative burdens entailed.¹²⁸ The function at issue is that of the state as *parens patriae*, or the role of the state in caring for those who cannot care for themselves.¹²⁹ Essentially the doctrine is based in the notion that "the state has a legitimate interest in protecting ... individuals [who cannot] protect themselves."¹³⁰ The court held once again that only through legal representation throughout foster-care proceedings can the government effectively exercise its *parens patriae* power.¹³¹ The court held that "it is in the state's interest, as well as the child's, to require the appointment of a child advocate attorney" and that "this fundamental interest far outweighs any fiscal or administrative burden that a right to appointed counsel may entail."¹³²

¹²⁰ *Id.*; see also [In re Z.B., 556 S.E.2d 234, 238 \(Ga. Ct. App. 2003\)](#) ("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.").

The latitude afforded family court judges in Georgia is typical of states across the country. As noted above, social reformers wanted family court (and juvenile-justice court) to be a service-based, civil program, rather than a criminal court. See *supra* note 9. There is thus an inherent tension between the flexibility necessary to accommodate a social-service approach on one hand and the danger of judicial arbitrariness on the other.

Interestingly, the judicial subjectivity the court points to in order to support a liberty interest is the same subjectivity that weighs against the legitimacy of the claim of entitlement necessary for a property interest. See *supra* note 86 and accompanying text.

¹²¹ See [Kenny A., 356 F. Supp. at 1361](#) ("Imprecise substantive standards that leave determinations unusually open to the subjective values of the judge serve to magnify the risk of erroneous factfinding." (internal quotation marks omitted)).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* (citing Black's Law Dictionary 1144 (8th ed. 2004)).

¹³⁰ *Id.* (quoting [Blackburn v. Blackburn, 292 S.E.2d 821, 825 n.5 \(Ga. 1982\)](#)).

¹³¹ *Id.*

¹³² *Id.*

The child advocate has a strong argument in alleging a liberty interest that invokes due process protections. The Supreme Court has defined liberty broadly, and the Kenny A. court convincingly argued that children facing, and in, foster care have a liberty interest that mandates constitutional protection. It is less clear whether foster-care statutes create a legitimate claim of entitlement sufficient to satisfy Roth and thus qualify as property meriting constitutional protection. The Supreme Court should recognize this liberty interest as the Kenny A. court did. The reasoning is sound and consistent with the Court's current jurisprudence. Furthermore, the policy imperative must be heeded. Children all over the country are suffering in inadequate and inappropriate childcare placements. Mandating counsel will not fix broken foster-care systems - surely that requires action by the various state legislatures - but it is an essential and legally-cognizable step.

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