Catch Up CAPTA: Amending CAPTA to Guarantee Children Legal Counsel in Dependency Proceedings

TAYLOR NEEDHAM*

TABLE OF CONTENTS

* © 2021 Taylor Needham. J.D. Candidate 2021, University of San Diego School of Law.

I. INTRODUCTION

Every year, over six-hundred thousand children are victims of child abuse and neglect in the United States.[1] As a result of this abuse, children can spend months or even years in the foster care system, where some are subject to further abuse.[2] Despite recent trends, many states continue to deny these foster children their Fourteenth Amendment due process right to counsel in dependency proceedings.[3] Foster children are the most vulnerable and personally impacted parties in dependency proceedings and deserve the same zealous legal advocacy as their parents and the State.

The source of this deprivation is the well-intentioned—but insufficient—Child Abuse Prevention and Treatment Act (CAPTA). CAPTA is one of several federal statutes that provide federal funding for abused and

1. *See* FIRST STAR INST. & CHILD.'S ADVOC. INST., A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN 8 (4th ed. 2019). In 2017, child protective service agencies received approximately 4.1 million referrals for abuse and neglect, but only 674,000 children were considered victims of abuse or neglect. *Child Abuse Prevention and Treatment Act (CAPTA) State Grants*, CHILD.'S BUREAU (May 17, 2012), https://www.acf.hhs.gov/cb/resource/capta-state-grants [https://perma.cc/UZ7Q-7MYR].

2. *See* Suparna Malempati, *The Illusion of Due Process for Children in Dependency Proceedings*, 44 CUMB. L. REV. 181, 189 (2013).

3. *See* FIRST STAR INST. & CHILD.'S ADVOC. INST., *supra* note 1, at 9–10. Since First Star Institute and the Children's Advocacy Institute (CAI) first started grading states twelve years ago, thirty-one states have improved the quality of legal representation they provide children in dependency cases. *Id.* at 7. However, six states received a "D" and five received an "F" in the most recent report. *Id.* at 23. These grades reflect not just whether the state requires representation but also the type and degree of representation they require. *See id.* at 17–19.

neglected children.[4] In exchange for federal funding, states must meet certain requirements.[5] The Act requires that all children in dependency proceedings be assigned a "guardian ad litem" (GAL) to advocate for the best interest of the child.[6] This GAL may be an attorney or an adult non-attorney, such as a court-appointed special advocate (CASA).[7] Given the option, some states have opted for the latter, which is arguably a violation of children's due process rights.[8]

First Star Institute and the Children's Advocacy Institute's latest edition of *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children* outlines the effect this provision has on children. The report grades states and the District of Columbia on the quality of legal representation it provides to children in dependency proceedings.[9] This report found that seventeen of the fifty-one state statutes allow inconsistent appointment and often deny discretionary appointment of legal counsel for abuse and neglect proceedings.[10]

---

4. *See* ROBERT C. FELLMETH & JESSICA K. HELDMAN, CHILD RIGHTS & REMEDIES 328–29 (4th ed. 2019).

5. 42 U.S.C. § 5106a(b). Note that the funding for CAPTA is minuscule compared to other child protection programs such as the Child Welfare Act. *See* FIRST STAR & CHILD.'S ADVOC. INST., SHAME ON U.S. 10 (2015). Poor funding and lack of federal enforcement have led to widespread non-compliance by states. *See id.* at 9–10. One solution is for Congress to "tie states' receipt of *all* federal foster care and child welfare funding to their compliance with *all* federal foster care and child welfare requirements and minimum standards" and require that the U.S. Department of Health and Human Services actively monitor and enforce such requirements. *Id.* at 10. For an in-depth look at how the "federal government enacts, monitors, interprets, funds, and/or enforces federal child welfare laws," see generally First Star & Child.'s Advoc. Inst., *supra*, at 3, 10.

6. 42 U.S.C. § 5106a(b)(2)(B)(xiii) ("[R]equiring that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings—(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child . . . .").

7. *Id.*

8. *See* FIRST STAR INST. & CHILD.'S ADVOC. INST., *supra* note 1, at 8–10.

9. *See id.* at 7. In addition to determining whether a state requires representation, the report also looks at the type of representation required, education and training requirements, confidentiality, whether the child is considered a party to the proceeding, and caseload standards. *Id.* at 17–19.

10. *See id.* at 7 ("From our current view: 34 of the 51 statutes (66%) require counsel for children in abuse and neglect proceedings.").

This Comment will address children's constitutional right to have legal counsel in dependency proceedings. Dependency proceedings include the entire dependency process, from the moment the child is removed from the parent's custody until the child returns home or ages out of the foster care system. This Comment will not address the constitutional rights of parents to have legal counsel[11] or the constitutional rights of children in private custody or other family law matters.[12] Nor will it address the type of legal representation that children should receive.[13]

While this Comment argues that all children have a constitutional right to legal counsel in dependency proceedings, it will focus on two illustrative states. This will allow for a more detailed analysis that can apply to other states. The states that continue to deny children their due process right to legal counsel fall into one of two categories: (1) states that give courts complete discretion to assign legal counsel, and (2) states that require courts to assign legal counsel in certain circumstances but in all other circumstances allow for complete discretion.[14] The analysis will focus on one state from each

---

11. The Supreme Court held that indigent parents do not have a categorical right to counsel in termination of parental rights proceedings. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–32 (1981); *see also infra* Section IV.B (discussing the *Lassiter* case). Thus, it is up to the discretion of state legislatures and courts to determine when to appoint legal counsel for parents in dependency proceedings. Vivek S. Sankaran, *Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1, 2 (2017). At least five states have relied on *Lassiter* to deny parents a categorical right to counsel. *Id.* at 15 (explaining that Nevada, Mississippi, Delaware, Montana and Wyoming courts have relied on *Lassiter* to deny parents an absolute right to counsel).

12. For more on the issue of children's right to legal counsel in private custody matters, see generally Amy E. Halbrook, *Custody: Kids, Counsel and the Constitution*, DUKE J. CONST. L. & PUB. POL'Y, 2016–2017, at 179 (arguing that children in private custody matters are entitled to legal counsel under the Due Process Clause).

13. While child advocates agree that children in dependency proceedings need legal counsel, there is a lot of debate as to what such representation should encompass. *See* Suparna Malempati, *Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings*, 11 U.N.H. L. REV. 97, 110 (2013). The two main views are the best-interest model and the client-directed model. *Id.* at 110–11. Under the best-interest model, the attorney advocates for what they believe is in the best interest of the child rather than the child's express desires. *Id.* at 111. Opponents of this view are concerned that attorneys will make decisions based on their personal values rather than what is objectively in the best interest of the child. *See id.* at 113–14. The client-directed model requires that the attorney assume the traditional attorney role and advocate for the child's express desires. *Id.* at 111. Critics of this model argue that children are too young and immature to advocate for their own wellbeing, and attorneys will have to advocate for positions that do not promote the best interest of the child. *See id.* at 117–18.

14. *See generally* FIRST STAR INST. & CHILD.'S ADVOC. INST., *supra* note 1 (providing an in-depth look at state laws governing counsel for children in dependency proceedings).

of these categories: Indiana as a category one state and Florida as a category two state.

Part II of this Comment will provide an explanation of dependency proceedings and the actors involved, as well as an explanation of the federal and state statutes that affect dependency proceedings. Part III will provide a brief overview of the history of children's constitutional rights and will argue *In re Gault* set the stage for providing legal counsel for children in dependency proceedings. Part IV of this Comment will examine the United States Supreme Court cases that govern the right to counsel in civil proceedings. This section will focus on *Mathews v. Eldridge* and *Lassiter v. Department of Social Services*. Part V will argue that under the *Mathews* analysis, children in Indiana and Florida—and by extension, all children in dependency proceedings—are entitled to legal counsel as a matter of due process under the Fourteenth Amendment. Lastly, Part VI proposes amendments to CAPTA requiring legal counsel for all children in dependency proceedings.

II. CONTEXT OF CHILDREN'S RIGHTS IN DEPENDENCY CASES

In order to understand the importance of foster children's rights to an attorney, it is necessary to understand the nature and process of dependency proceedings and how they differ from other civil proceedings. Additionally, it is important to understand the federal and state laws that govern juvenile courts.

A. Dependency Proceedings

States generally follow the same basic structure for dependency proceedings.[15] Initially, a state welfare agency will conduct an investigation based on reports from law enforcement, social workers, private citizens, schools, or other concerned parties.[16] If the agency determines that there was abuse or neglect, it files a petition with the state juvenile court.[17] If the state welfare agency removes the child from the home, the court must hold a detention hearing to determine if the child should remain in state custody

15. *See* Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, JUV. & FAM. CT. J., Fall 1998, at 17, 31 (discussing the "best interest" standard, a child-centered principle used by the modern dependency court).

16. Malempati, *supra* note 2, at 187.

17. *Id.* at 188; Ventrell, *supra* note 15, at 31.

or return to their parents during the pending proceedings to determine parental fitness.[18]

At the arraignment hearing, the parents can either admit or deny the allegations of abuse or neglect.[19] If the parent denies the allegations, then the case is set for an adjudication hearing.[20] As required by CAPTA, the State should assign the child a GAL.[21]

The adjudication hearing is conducted like a civil trial and adheres to most rules of civil procedure and evidence.[22] The parties may testify, cross-examine witnesses, and present expert testimony; however, there is no jury, and the State must prove the alleged abuse or neglect by a preponderance of the evidence.[23] If the State fails to prove the abuse or neglect, the case is dismissed, and the child returns to the custody of the parents. If the State does prove abuse or neglect, the court sets a disposition hearing.[24]

At the disposition hearing, the judge must approve a case plan for the parent and decide the child's placement. The goal of the case plan is to correct the issues that lead to removal so the parent and child can be reunited.[25] While the parent works on the case plan, the child may be placed with approved relatives, foster family care providers, foster care agencies,

---

18. *Dependency Case Process*, OFF. OF CRIM. CONFLICT AND CIV. REG'L COUNS., https://flrc2.org/dependency.html [https://perma.cc/9EJN-346J].

19. *Id.*

20. *Dependency Case Process*, *supra* note 18.

21. *Id.*; 42 U.S.C. § 5106a(b)(2)(B)(xiii) ("[R]equiring that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem . . . shall be appointed to represent the child in such proceedings . . . ."). Additionally, states that require legal representation will assign an attorney to indigent parents. *See* IND. CODE § 31–32–4–1 (2019) (stating that persons entitled to counsel include parents in "a proceeding to terminate the parent-child relationship"); FLA. STAT. § 39.013(1) (2019) ("Parents must be informed by the court of their right to counsel in dependency proceedings at each stage of the dependency proceedings. Parents who are unable to afford counsel must be appointed counsel."). According to Black's Law Dictionary, a person is indigent if the court finds that they are "financially unable to pay filing fees and court costs . . . ." *Indigent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

22. Malempati, *supra* note 2, at 188.

23. *Dependency Case Process, supra* note 18; JANE NUSBAUM FELLER ET AL., NAT'L CTR. ON CHILD ABUSE & NEGLECT, WORKING WITH THE COURTS IN CHILD PROTECTION 44, 60 (1992). This is a critical stage of the proceedings in which a child would require an attorney as opposed to a GAL. As a non-attorney, the guardian ad litem would have less expertise in cross-examination and presenting evidence. *See* FELLMETH & HELDMAN, *supra* note 4, at 342; *see also infra* Section V.B.2.b.

24. *Dependency Case Process*, *supra* note 18.

25. *See* FELLMETH & HELDMAN, *supra* note 4, at 328. Case plans often include parenting classes, psychological counseling, substance abuse rehabilitation, obtaining safe and adequate housing, or other programs depending on the basis for removal. *Id.* Parents will typically have twelve months to complete their case plan to regain custody of their child. *Id.*

or in institutional group homes.[26] Other issues the court must address are the child's health care needs, education, and contact with family members.[27] Federal law requires that courts hold a review hearing at least every six months to review the child's placement and the parent's case plan.[28] However, children can remain in foster care for months or even years, while their parent tries to complete the case plan.[29]

If reunification efforts fail or the parents meet certain requirements under the Social Securities Act,[30] the State may request a termination of parental rights hearing.[31] If the State can prove by "clear and convincing evidence" that the parents are "unfit," then parental rights are terminated.[32] After the parent's rights are terminated, the child becomes eligible for adoption and remains a dependent under the jurisdiction of the court until that child is adopted or ages out of the system.[33]

Note that throughout this process, the child should have a GAL.[34] In the dependency context, the duties of a GAL vary from state to state.[35] A

---

26. *Id.* In 2018, only 32% of foster children were placed with a relative. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT #26, at 1 (2019).

27. Malempati, *supra* note 2, at 189 (citing DONALD N. DUQUETTE & ANN M. HARALAMBIE, CHILD WELFARE LAW AND PRACTICE 357–58 (2d ed. 2010).

28. *Dependency Case Process*, *supra* note 18; 42 U.S.C. § 675(5)(B). Within twelve months of the child's removal, and every twelve months thereafter so long as the child remains in foster care, the court must hold a permanency hearing to review the child's long-term permanency plan. *Id.* § 675(5)(C). The court "determines whether and, if applicable, when the child will be: (i) Returned to [the custody of] the parent; (ii) Placed for adoption with the title IV–E agency filing a petition for termination of parental rights; (iii) Referred for legal guardianship; (iv) Placed permanently with a fit and willing relative; or (v) Placed in another living arrangement . . . ." 45 C.F.R. § 1355.20 (2011).

29. Malempati, *supra* note 2, at 189. According to the 2018 Adoption and Foster Care Analysis and Reporting System Report, approximately 54% of foster children had been in foster care for a year or more. *See* CHILD.'S BUREAU, *supra* note 26, at 2.

30. The State must file for termination of parental rights proceedings if the parent committed murder or voluntary manslaughter of another child, or "aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent . . . ." 42 U.S.C. § 675(5)(E).

31. FELLMETH & HELDMAN, *supra* note 4, at 328; *Dependency Case Process*, *supra* note 18.

32. FELLMETH & HELDMAN, *supra* note 4, at 328. *See* Santosky v. Kramer, 455 U.S. 745, 769 (1982) (holding a state must prove parental unfitness at a termination of parental rights hearing by at least clear and convincing evidence to satisfy due process).

33. FELLMETH & HELDMAN, *supra* note 4, at 328.

34. *See* 42 U.S.C. § 5106a(b)(2)(B)(xiii).

35. For example, Michigan, Alabama, and Colorado all require that the GAL be an attorney, while Arizona allows the GAL to be an attorney or a CASA. FIRST STAR INST.

GAL is a special guardian appointed by the court to prosecute or defend, on behalf of an infant or incompetent, a suit to which he is a party, and such guardian is considered an officer of the court to represent the interests of the infant or incompetent in the litigation.[36] As officers of the court, lay GALs are not subject to the same ethical rules as attorneys and do not have to advocate for the child's wishes.[37] Therefore, the type of representation a child receives turns on whether the assigned GAL is an attorney or a layperson, such as a CASA. A CASA is usually a non-attorney volunteer and therefore, cannot represent children in court as efficiently as an attorney.[38] Attorneys are trained to file legal motions, evaluate evidence, subpoena and cross-examine witnesses, engage in assured confidential communication with clients, file a writ, and otherwise appeal a court's decision.[39] Regardless of how well-intentioned they are, laypersons are limited in their ability to provide the same benefits as legal counsel.[40]

B. Child Abuse Prevention and Treatment Act

Congress did not address the issue of children's right to legal counsel in dependency proceedings until it passed CAPTA in 1974.[41] To qualify

---

& CHILD.'S ADVOC. INST., *supra* note 1, at 40, 44, 52, 91. Additionally, Connecticut and Georgia require that the GAL adhere to traditional rules of professional conduct by advocating for the child's interests, while Delaware only requires that the GAL make the child's interests known to the court. *Id.* at 55, 57, 65.

36. *See Guardian Ad Litem*, BLACK'S LAW DICTIONARY (11th ed. 2019).

37. Malempati, *supra* note 2, at 194. There is some debate as to whether forcing attorneys to follow traditional rules of confidentiality with children in dependency proceedings produces the best outcome. *See* Cindy S. Lederman & Susan Somers, *Let's Be Clear: Children in Florida's Dependency Court Already Have Attorneys*, MIA. HERALD (Jan. 23, 2018, 9:51 PM), https://www.miamiherald.com/opinion/op-ed/article196292789.html [https://perma.cc/J3UY-UBNW]. Cindy Lederman, a Florida circuit court judge, argues that when attorneys advocate for what the child wants rather than what would be in their best interest the child is ultimately harmed. *Id.* This speaks more to the issue of what type of legal representation a child should receive than the right to counsel. States that guarantee counsel can establish their own rules of conduct for attorneys that align with their concerns and beliefs about what is best for children in dependency proceedings.

38. FELLMETH & HELDMAN, *supra* note 4, at 342; *see infra* Section V.B.2.b. Arguably, the use of a lay GAL instead of an attorney GAL stems from the idea of *parens patriae*. *See infra* Section III.A. However, when a child is a party to judicial proceedings, and all other parties have legal representation, due process issues arise. *See* FIRST STAR INST. & CHILD.'S ADVOC. INST., *supra* note 1, at 10 (quoting Class Action Complaint for Declaratory & Injunctive Relief at 2, Nicole K. v. Marion County, No. 3:19-CV-00025-RLY-MPB (S.D. Ind. Feb. 6, 2019)).

39. FELLMETH & HELDMAN, *supra* note 4, at 342.

40. This is not to say that CASAs are obsolete. They serve an important function in the dependency system. *Id.* (noting that lay-CASAs monitor the placement and status of foster children). Rather, a child could have both a CASA/GAL and an attorney.

41. Malempati, *supra* note 2, at 186.

for federal funding under CAPTA, states must provide every child in dependency proceedings with a GAL that may be an attorney or a court-appointed advocate.[42] The Act does not provide any guidance for GALs aside from requiring that they: (1) "obtain first-hand, a clear understanding of the situation and needs of the child;" and (2) "make recommendations to the court concerning the best interests of the child . . . ."[43]

C. Social Security Act - Title IV Funding

Congress also provides federal funding for abused or neglected children under the Social Securities Act.[44] The largest source of such funding falls under Title IV-E.[45] Under the Act, eligible states can receive federal funding for foster care and adoption programs, including up to 50% reimbursement for administrative expenditures.[46] Under the new Child Welfare Policy Manual, the federal government will reimburse states for up to 50% of the cost of providing legal representation for children in child welfare proceedings.[47] Previously, the Child Welfare Policy Manual only allowed

42. 42 U.S.C. § 5106a(b)(2)(B)(xiii). CAPTA defines child abuse as "any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm." CAPTA Reauthorization Act of 2010, Pub. L. No. 111–320, § 142, 124 Stat. 3459, 3482 (2010).

43. 42 U.S.C. § 5106a(b)(2)(B)(xiii)(I)–(II).

44. *See* FELLMETH & HELDMAN, *supra* note 4, at 328. Additionally, the Act sets certain requirements for dependency proceedings. For example, courts must hold a review hearing at least every six months to determine the child's safety and the continuing necessity and appropriateness of their placement. 42 U.S.C. § 675(5)(B). The court must hold a permanency hearing within twelve months of the child entering foster care, and every twelve months thereafter. *Id.* § 675(5)(C). A child enters foster care when there is either a judicial finding of child abuse or neglect or sixty days after the child was removed, whichever is earlier. *Id.* § 675(5)(F). If the child has spent fifteen of the last twenty-two months in state care, the parents have abandoned the child, or the parent has been found guilty of specific listed offenses, the State must request a termination of parental rights hearing. *Id.* § 675(5)(E).

45. *See* FELLMETH & HELDMAN, *supra* note 4, at 329.

46. *See* 45 C.F.R. § 1356.60(c).

47. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE POLICY MANUAL 296 (2021); John Kelly, *In Major Reversal, Feds Will Now Help Pay Child Welfare Legal Fees*, THE IMPRINT (Dec. 20, 2018, 4:00 AM), https://imprintnews.org/child-welfare-2/major-reversal-feds-pay-legal-fees-children-parents/33204 [https://perma.cc/N8VR-35QL] ("A major barrier to funding legal representation in the child welfare system was basically just eradicated . . . ."); Mark Hardin, *Claiming Title IV-E Funds to Pay for Parents' and Children's Attorneys: A Brief Technical Overview*, A.B.A. (Feb. 25, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_prac

reimbursement for legal representation of child welfare agencies—not for children or their parents.[48]

D. Indiana State Law

Under Indiana state law, courts may appoint a GAL, CASA, or both to represent a child in a dependency proceeding.[49] State law specifies that the GAL does not need to be an attorney,[50] and the only requirement is that the GAL advocate for the best interest of the child.[51] The only persons entitled to legal representation in juvenile court are children charged with a delinquent act and parents in "proceedings to terminate the parent-child relationship."[52] Otherwise, courts *may* appoint counsel to represent a child in any other proceeding.[53] Courts may also appoint an attorney to represent the GAL.[54]

E. Florida State Law

Under Florida state law, courts are only required to appoint legal counsel for certain children in dependency proceedings. Children in dependency cases shall be assigned an attorney ad litem if the child resides in, or is being considered for placement in, a skilled nursing facility; is prescribed

---

ticeonline/january—december-2019/claiming-title-iv-e-funds-to-pay-for-parents-and-childrens-attor/ [https://perma.cc/59PD-KAY7]. Note that this policy change does not provide funding for all children in the welfare system, only the children that qualify for Title IV-E funding. Hardin, *supra*. Whether a child qualifies will depend on the financial circumstances of the parent or relative that had custody of the child. *Id.* The number of children who qualify varies from state to state and generally ranges from "less than 25% to over 75%" of children in the welfare system. *Id.*

48. *See* CHILD.'S BUREAU, *supra* note 47, at 296 ("[R]egulations at 45 CFR 1356.60(c) specify that Federal financial participation (FFP) is available at the rate of 50% for administrative expenditures necessary for the proper and efficient administration of the title IV-E plan." (citing 45 C.F.R. § 1356.60(c)). The administrative function specified at 45 C.F.R. § 1356.60(c)(2)(ii), preparation for and participation in judicial determinations, concerns the State agency's representation but not the provision of legal services to a child or parent. *Id.* at 277–78; *see also* 45 C.F.R. § 1356.60(c)(2)(ii). Only the State agency's participation in judicial determinations is an allowable cost. CHILD.'S BUREAU, *supra* note 47, at 277–78.

49. IND. CODE § 31-32-3-1(a) (2019) ("The juvenile court may appoint a guardian ad litem or a court appointed special advocate, or both, for the child at any time.").

50. *Id.* § 31-32-3-3 ("A guardian ad litem or court appointed special advocate need not be an attorney. . . .").

51. *Id.* § 31-32-3-6 ("A guardian ad litem or court appointed special advocate shall represent and protect the best interests of the child.").

52. *Id.* § 31-32-4-1.

53. *Id.* § 31-32-4-2(b).

54. *Id.* § 31-32-3-5 ("If necessary to protect the child's interests, the court may appoint an attorney to represent the guardian ad litem or the court appointed special advocate.").

a psychotropic medication but declines assent to the medication; has a diagnosed developmental disability; is being placed in, or considered for placement in, a residential treatment center; or is a victim of human trafficking.[55] Florida's Rules of Juvenile Procedure also allow courts to appoint an attorney to represent a child in any proceeding as permitted by law.[56] In addition to lay GALs and attorney GALs, Florida also has Child's Best Interest Attorneys (CBI), but they neither represent nor have a relationship with the child.[57] CBI attorneys are employed by Florida's Guardian Ad Litem Program to represent the individual GALs.[58]

Under Florida law, a GAL must provide courts with a written report of their findings regarding the allegations in the petition, a statement of the child's wishes, and their recommendations.[59] The Florida Rules of Juvenile Procedure also specify that the duties of a lay GAL do not include the practice of law.[60] Additionally, parents are entitled to legal counsel in dependency proceedings.[61]

Overall, dependency proceedings are subject to numerous state and federal requirements. These proceedings can prove difficult for an adult to navigate without legal counsel, much less a child.[62] Additionally, courts historically granted children minimal constitutional protections. However, in the last fifty years, courts started to recognize children as rights-based citizens.[63]

---

55. FLA. STAT. § 39.01305(3)(a)–(e) (2019).

56. FLA. R. JUV. P. 8.217(b) (2020).

57. GUARDIAN AD LITEM, FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS 7 (2015).

58. *Id.*; FLA. BAR STANDING COMM. ON THE LEGAL NEEDS OF CHILD., FLORIDA GUIDELINES OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES 4 (2014).

59. FLA. R. JUV. P. 8.215(c)(1) (2020).

60. FLA. R. JUV. P. 8.215(f) (2020) ("The duties of lay guardians shall not include the practice of law.").

61. FLA. STAT. § 39.013(1) (2019) ("Parents must be informed by the court of their right to counsel in dependency proceedings at each stage of the dependency proceedings. Parents who are unable to afford counsel must be appointed counsel.").

62. *See Lassiter*, 452 U.S. at 30. The Court acknowledged that termination of parental rights hearings are "not always simple, however commonplace they may be." *Id.* The proceedings may include expert medical and psychiatric testimony, and the parents are likely to be uneducated. *Id.* These factors can overwhelm a parent who does not have legal representation. *Id.*

63. *See* Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1, 3 (2005). *See generally In re* Gault, 387 U.S. 1 (1967) (recognizing children's constitutional

III. THE HISTORY OF CHILDREN'S RIGHTS

A brief review of the evolution of children's constitutional rights explains why some states continue to deny children the right to legal counsel in dependency proceedings. The concept of *parens patriae* that underlies the juvenile justice system has and continues to function as a double-edged sword.

A. Pre-In re Gault

Marvin Ventrell, former president of the National Association of Counsel for Children, described the evolution of children's rights as a change from "children as property, to children as welfare recipients, to children as rights-based citizens."[64] While there is some truth to this characterization, not all aspects of the juvenile justice system treat children as rights-based citizens.

Prior to the nineteenth-century, children were considered the property of their parents and had no right to government protections to prevent parental abuse.[65] The nineteenth-century marked the start of a reform movement, known as the House of Refuge movement, aimed at saving children.[66] However, the first movement of the House of Refuge, the Society for Prevention of Pauperism, was not concerned with rescuing children from parental abuse, but rather from a life of crime.[67] Reformers and the courts justified this intrusion into children's lives, and subsequently on parents' property rights, using the English doctrine of *parens patriae*.[68]

Under *parens patriae*, the State protects those who cannot care for themselves, like children.[69] Essentially, the State steps in and assumes the parental role in place of the child's actual parents. As far as states were concerned, all children living in poverty could potentially become criminals, and therefore the State had the authority and the obligation to intervene

---

rights as separate from their parents), *abrogated in part by* Allen v. Illinois, 478 U.S. 364 (1986).

64. Ventrell, *supra* note 63, at 3.

65. Ventrell, *supra* note 63, at 4 (citing MARY EDNA HELFER, RUTH S. KEMPE & RICHARD D. KRUGMAN, THE BATTERED CHILD 9, 11 (5th ed. 1997)); Ventrell, *supra* note 15, at 18; Malempati, *supra* note 2, at 183.

66. Ventrell, *supra* note 15, at 22 (noting the movement began with the Prevention of Pauperism, which "believed that poverty was a cause, if not the primary cause, of crime committed by children"); *see also* Amy E. Halbrook, *Custody: Kids, Counsel and the Constitution*, DUKE J. CONST. L. & PUB. POL'Y, 2016–2017, at 182.

67. Ventrell, *supra* note 15, at 22 ("There is no evidence that children were placed [in the House of Refuge system] as a result of caretaker cruelty.").

68. *See id.* at 23; Malempati, *supra* note 2, at 184; Halbrook, *supra* note 66, at 182.

69. *Parens Patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019).

on behalf of society.[70] The concept of *parens patriae* would carry over into the juvenile justice system.[71]

Starting in 1899, when Cook County, Illinois established the first juvenile court, children's legal status changed from children as property to children as welfare recipients.[72] Both society and the courts started viewing children as fundamentally different from adults and in need of rehabilitation rather than punishment.[73] The juvenile justice system provided rehabilitation and guidance to children under the doctrine of *parens patriae*.[74] Unfortunately, the courts also used the concept of *parens patriae* to deny children in the juvenile system the procedural rights available to their adult counterparts.[75] Under *parens patriae*, courts found formal procedures unnecessary and instead operated as "process-less tribunals" in which judges exercised broad discretion do to whatever they believed to be in the best interest of the child.[76] Naturally, the courts considered legal counsel for children unnecessary and even disruptive to this informal process.[77]

To summarize, courts denied children their constitutional rights because the state, acting under the doctrine of *parens patriae,* would act in the child's best interest. This ideology would dominate the juvenile justice system until the Supreme Court case *In re Gault*.

---

70. Ventrell, *supra* note 15, at 23.

71. Malempati, *supra* note 2, at 184.

72. Ventrell, *supra* note 15, at 26; Ventrell, *supra* note 63, at 3. Almost every state used this court as an example for their own juvenile justice systems. Ventrell, *supra* note 15, at 26.

73. Madison C. Jaros, *The Double-Edged Sword of Parens Patriae: Status Offenders and the Punitive Reach of the Juvenile Justice System*, 94 NOTRE DAME L. REV. 2189, 2191 (2019).

74. *Id.*

75. *In re Gault*, 387 U.S. at 17 ("Gault's sweeping statement that 'our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty,' is plainly not good law.").

76. Ventrell, *supra* note 63, at 11. This phenomenon can be attributed to children's lack of independent constitutional rights. The courts cannot violate an individual's rights if the individual has no rights to begin with. Once the Supreme Court recognized that children have constitutional rights in *In re Gault*, procedural safeguards become necessary to fair treatment.

77. *Id.* at 12.

B. In re Gault *and Beyond*

The Supreme Court finally recognized children's constitutional rights in the landmark case *In re Gault*.[78] In *In re Gault*, police took a minor into custody for allegedly making lewd phone calls to his neighbor.[79] At the hearing, the minor did not have legal counsel, and there was no transcript or memorandum to record the substance of the proceedings.[80] Thus, the state court relied on its discretion, the disputed testimony of a probation officer, and the minor's parents.[81] There was no cross-examination, and the alleged victim did not appear in court or have any communication with the judge.[82] After just two hearings, the judge sentenced the minor, who was fifteen at the time, to be committed to the Arizona State Industrial School until he reached the age of twenty-one.[83] The minor's parents

78. *In re Gault*, 387 U.S. at 13. Prior to *In re Gault*, the Court hinted at limiting *parens patriae*. *See* Kent v. United States, 383 U.S. 541, 555 (1966). In *Kent*, the juvenile was transferred to adult court without a hearing. *Id.* at 546. The judge made no findings and did not provide a reason for the transfer. *Id.* The juvenile challenged the constitutionality of the juvenile waiver. *Id.* at 552. The Court noted that *parens patriae* was not "an invitation to procedural arbitrariness." *Id.* at 555. Nevertheless, the Court refused to grant children the same constitutional guarantees as adults. *Id.* at 556 ("This concern, however, does not induce us in this case to accept the invitation to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for which Kent was tried must be applied in juvenile court proceedings concerned with allegations of law violation.").

79. *In re Gault*, 387 U.S. at 4.

80. *Id.* at 5. When this case was decided, only about one-third of the states had statutes requiring legal representation for children in juvenile delinquency proceedings. *Id.* at 37–38. In contrast, two-thirds of jurisdictions currently provide legal counsel for children in dependency proceedings. *See* FIRST STAR INST. & CHILD.'S ADVOC. INST., *supra* note 1, at 7.

81. *In re Gault*, 387 U.S. at 35. The lower court argued that parents and probation officers would protect the child's interest in court, so legal representation was unnecessary. *Id*. The Court disagreed because probation officers serve as both arresting officers and witnesses against children in adjudicatory hearings. *Id.* at 35–36. Due to this conflict of roles, the probation officer cannot serve as the child's counsel. *Id.* at 36.

There is arguably a similar issue when the child's dependency proceeding representative serves as both the attorney and GAL. *See* Malempati, *supra* note 13, at 110. The author discusses how the attorney role requires giving a voice to the child's position while the GAL role requires advocating for the child's best interest. *Id.* Requiring one individual to fulfill both roles creates role confusion and ultimately leads to ineffective lawyering on behalf of children. *Id.*

Additionally, judges cannot adequately protect the child's liberty interests. As is the case with all judicial proceedings, a judge cannot play the role of advocate and impartial arbitrator. *See In re Gault*, 387 U.S. at 36; 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, 54 (2000).

82. *In re Gault*, 387 U.S. at 7.

83. *Id.*

subsequently appealed to the Supreme Court on the grounds that the minor was entitled to legal counsel at the hearing under the Due Process Clause.[84]

The Supreme Court held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[85] Additionally, the Court's holding made two significant changes to the juvenile delinquency system. First, the Court finally restricted the previously unlimited power of *parens patriae*. The Court recognized that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[86] The Court acknowledged the unique features of the juvenile justice system that classify juveniles as "delinquent" rather than "criminals" could coexist with constitutional principles.[87] Second, the Court bifurcated the juvenile justice system.[88] The Court was careful to limit the right to counsel to children in delinquency cases.[89]

However, the time has come for children in dependency proceedings to be given the same protections as their delinquency counterparts. It is a grave injustice that a child in juvenile court facing a week of incarceration or simply conditions of probation is entitled to legal counsel, but a child in a dependency court who may spend eighteen years in the foster care system moving from placement to placement is not. Foster children are

84. *Id.* at 10. In addition to the right to counsel, the parents also asserted the right to notice of charges, the right to confrontation and cross-examination, the privilege against self-incrimination, the right to a transcript of the proceedings, and the right to appellate review. *Id.*

85. *Id.* at 13.

86. *Id.* at 18. One critical factor in the Court's imposition of basic due process is its role in ascertaining the truth on a question of serious import, involuntary state sanctions. *See id.* at 20. Hence, the right to notice, present evidence, cross-examine witnesses, have attorney representation, have a transcript, and appeal were imposed nationally as a ground floor. *See id.* at 27–28.

87. *Id.* at 22. Specifically, the Court found no reason why requiring due process would impair the juvenile courts' ability to treat juvenile offenders separate from adults, continue to classify children as "juveniles" rather than "criminals," or keep juvenile information confidential. *Id.* at 22–25.

88. Originally, the courts did not distinguish between dependency and delinquency cases. Ventrell, *supra* note 63, at 14.

89. *In re Gault*, 387 U.S. at 13, 41 ("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."). However, despite the Court's holding, many children in the juvenile system receive inadequate representation. N. Lee Cooper, Patricia Puritz & Wendy Shang, *Fulfilling the Promise of* In Re Gault*: Advancing the Role of Lawyers for Children*, 33 WAKE FOREST L. REV. 651, 660 (1998). Some factors that may contribute to this issue are judicial encouragement to waive the right to counsel, lack of training, and high caseloads. *Id.* at 661–62.

also subject to state control, with a judge serving as their legal parents and deciding every detail of their life: who their parents will be, where they will live, whom they may see, and what school they will attend.[90] The judge also has the discretion to place the child in a group-home setting, where they could potentially face the same level of restricted freedom as the minor in *In re Gault* would face in a state industrial school.[91]

Denying children legal representation also mischaracterizes the nature of dependency proceedings. Dependency proceedings are not merely the parent versus the State. This view treats the child as chattel for both parties to fight for control of, a belief that *In re Gault* rejected.[92] Rather, dependency proceedings are a dispute between the parent, the State, and the child. Each has a similar but independent interest in the outcome.[93]

The court should not assume that the child's interests align with the interests of the parent and the State. Children may or may not want to return to the custody of their alleged abuser, and the court cannot assume that a parent accused of abuse or neglect will act in the child's best interest.[94] Courts may assume that states are acting in the best interest of the child, but the State and the child may disagree about what actions are truly in the child's best interest. If the justice system is premised on the idea that the "truth will emerge from the confrontation of opposing versions and conflicting data[,]"[95] then all three of these parties require adequate legal representation to advocate for their respective interests. Otherwise, judges cannot make fully informed decisions on what is in the best interest of the child.

IV. IS THERE A RIGHT TO COUNSEL IN CIVIL CASES?

Under the Fourteenth Amendment Due Process Clause, states cannot deprive an individual of "life, liberty, or property, without due process of

90. *See* FELLMETH & HELDMAN, *supra* note 4, at 328; Malempati, *supra* note 2, at 189 (citing DONALD N. DUQUETTE & ANN M. HARALAMBIE, CHILD WELFARE LAW AND PRACTICE 357 (2d ed. 2010)).

91. *See infra* Section V.A (discussing how group home placements restrict children's physical liberty).

92. *See In re Gault*, 387 U.S. at 13 (holding that children are persons protected by the Constitution).

93. Several courts have recognized that children have a separate interest apart from the state and their parents. *See* Kenny A. v. Perdue, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005) (recognizing children's liberty interest in their own safety and wellbeing and in family integrity); *In re* Dependency of M.S.R., 271 P.3d 234, 243 (Wash. 2012) (finding that children have liberty interests in dependency proceedings that are different from, but "at least as great as . . . the parent's").

94. Mandelbaum, *supra* note 81, at 56.

95. *In re Gault*, 387 U.S. at 21; *see also* Mandelbaum, *supra* note 81, at 28.

law . . . ."[96] In some cases applicable to children, such as *In re Gault*, due process of law requires the appointment of legal counsel.[97] The Supreme Court has never addressed the issue of children's due process right to legal counsel in dependency proceedings.[98] However, several cases have discussed the underlying principles.

A. Mathews v. Eldridge

In *Mathews*, the Supreme Court laid out the test for analyzing due process violations.[99] The plaintiff argued that the Due Process Clause required an evidentiary hearing before termination of Social Security disability benefits.[100] After reviewing its own precedents, the Court concluded that due process compliance requires consideration of three factors: (1) "the private interest that will be affected by the official action;" (2) "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 (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[101] Subsequent Supreme Court cases have added to these factors.

B. Lassiter v. Department of Social Services

The Supreme Court case *Lassiter v. Department of Social Services* is relevant to the issue of children's right to counsel in dependency proceedings. The case added a new element to the *Mathews* analysis for civil cases involving a right to counsel, known as the *Lassiter* presumption.[102]

In *Lassiter*, the Court terminated a mother's parental rights because she had not seen or expressed any concern for the child in several years.[103]

---

96. U.S. CONST. amend. XIV, § 1.
97. *In re Gault*, 387 U.S. at 41.
98. Halbrook, *supra* note 66, at 180.
99. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
100. *Id.* at 325.
101. *Id.* at 335.
102. *See Lassiter*, 452 U.S. at 26–27; Malempati, *supra* note 2, at 211–12; Lewis Tandy, Note, *Reevaluating the Path to a Constitutional Right to Appointed Counsel for Unaccompanied Alien Children*, 96 TEX. L. REV. 653, 661 (2018).
103. *Lassiter*, 452 U.S. at 23–24. At the time of the termination of parental rights hearing, Ms. Lassiter was serving a twenty-five to forty-year sentence for second-degree murder. *Id.* at 20.

The mother appealed, claiming that as an indigent parent, she was entitled to legal counsel at the termination of parental rights hearing under the Fourteenth Amendment Due Process Clause.[104] Before analyzing the *Mathews* factors, the Court concluded, based on precedent, that an "indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[105] Therefore, under the *Lassiter* presumption, courts may presume litigants who are not at risk of losing their physical liberty do not require appointed counsel.[106] Courts must analyze the three *Mathews* factors and set their net weight against this presumption.[107]

In its *Mathews* analysis, the Court recognized that parents in termination of parental rights proceedings have an extremely important interest in family integrity.[108] The State shares the parent's interest in an accurate and just decision, and also has a relatively weak pecuniary interest.[109] Additionally, the complexity of the proceedings and the incapacity of uncounseled parents could, in some cases, make the risk of erroneous deprivation high.[110] Therefore, the *Lassiter* presumption can be overcome when the parent's interest is at its strongest, the State interest is at its weakest, and the risk of erroneous deprivation is high.[111] However, the Due Process Clause does not require the appointment of counsel for indigent parents in all termination of parental rights proceedings.[112]

1. Kenny A. v. Perdue

The United States District Court for the Northern District of Georgia is the only federal court to find that children have a constitutional right to appointed legal counsel.[113] The court held in *Kenny A. v. Perdue* that foster children in dependency proceedings are at risk of losing their physical liberty and that the *Mathews* factors favor the appointment of legal counsel.[114]

---

104. *Id.* at 24.
105. *Id.* at 26–27.
106. *Id.*; Tandy, *supra* note 102, at 661.
107. *Lassiter*, 452 U.S. at 27.
108. *Id.*
109. *Id.*
110. *Id.* at 31. The Court highlights that many parents will likely be uneducated and have faced "uncommon difficulty in dealing with life." *Id.* at 30. Furthermore, forcing parents into disorienting legal proceedings can overwhelm them and impede their ability to represent themselves. *See id.*
111. *Id.* at 31.
112. *Id.* Despite its ruling, the Court concedes that appointing counsel for parents in dependency proceedings is "wise public policy . . . ." *Id.* at 33–34. In fact, the Court seems to imply that the states already providing legal counsel for indigent parents should continue to do so despite their holding. *Id.* at 34.
113. *Kenny A.*, 356 F. Supp. 2d at 1361.
114. *See id.* at 1360–61.

Unfortunately, this case is only binding in the Northern District of Georgia.[115] Other courts, like the Supreme Court of the State of Washington, consistently hold that children in dependency proceedings do not have a per se right to appointed legal counsel.[116] However, these courts fail to consider the significance of the child's interest and the higher risk of erroneous deprivation children face when compared to adults.[117]

---

115. The case was based on a complaint of violation of the Georgia Constitution. *Id.* at 1355. However, the court's reasoning focused on federal cases and principles. *Id.* at 1360. First, the court pointed out that children have due process rights under *both* the Due Process Clause and the Georgia Constitution, which use identical language. *See id.* at 1359; U.S. CONST. amend. XIV, § 1; GA. CONST. art. I, § 1, para. 1. Second, the court applied the *Mathews* analysis. *Kenny A.*, 356 F. Supp. 2d at 1360–61. Therefore, the case is applicable to federal due process analyses.

116. *See In re* Dependency of M.S.R., 271 P.3d 234, 245 (Wash. 2012) ("We hold the due process right of children who are subjects of dependency or termination proceedings to counsel is not universal."); *In re* Dependency of E.H., 427 P.3d 587, 598 (Wash. 2018) ("Under both the state and federal constitutions, the discretionary standard for appointment of counsel [under Washington state law] provides children with sufficient due process protection . . . .").

117. In the case of *In re Dependency of M.S.R.*, the court held that children's liberty interest in dependency proceedings are "at least as great as[] the parent's." 271 P.3d at 243. This view fails to adequately account for the physical and emotional risks that children face in the foster care system. By the court's own admission, children depend on others "to provide for their basic needs." *Id.* at 242. The parent faces the unimaginable loss of their child, but the child loses everything. The child is taken away from their home, family, friends and possibly school to go live with strangers. *See How Does The Foster Care System Work?*, IFOSTER, https://www.ifoster.org/how-does-the-foster-care-system-work/ [https://perma.cc/6JQJ-JJSB]. This is a much greater liberty interest than that of the parent.

The court also raises the issue of infant children. *In re Dependency of M.S.R.*, 271 P.3d at 245. A child who is non-verbal would not be able to communicate with an attorney, so they would not benefit from the added protection of counsel. *Id.* However, there is an alternative model of representation for non-verbal clients. *See* Lisa Kelly & Alicia LeVezu, *Until the Client Speaks: Reviving the Legal-Interest Model for Preverbal Children*, 50 FAM. L.Q. 383, 385 (2016). The authors discuss an alternative to the best-interest and substituted-judgment models, known as legal-interest advocacy. *Id.* Legal-interest advocacy requires the attorney to ensure that the child's legal rights are protected until the child is able to express their desires. *Id.* For example, children have a statutory right to be placed with relatives that meet certain standards instead of a non-related caregiver. *See* 42 U.S.C. § 671(a)(19). Imagine the parents of a one-month-old child are considering relinquishing their parental rights. The child is currently living with a foster family that wants to adopt her, but the social worker identified a relative that is able to take her in. A best-interest attorney might advocate for keeping the child with her foster family if they believe it is the best placement for her. *See* Kelly & LeVezu, *supra* note 117, at 400. However, a legal-interest attorney would have to look only at the rights the child is entitled to, such as reunification with her family and placement with a relative. *Id.* at 401. In doing so, the

V. WHY CHILDREN ARE DIFFERENT

Securing appointed legal counsel in civil cases is an uphill battle, but children in the dependency system are different from their adult counterparts. Not only do children in dependency proceedings overcome the *Lassiter* presumption, but the *Mathews* factors also strongly weigh in favor of providing legal counsel.

A. The Lassiter *Presumption*

The *Lassiter* presumption is the bane of securing a civil right to counsel for children in dependency proceedings.[118] Under the *Lassiter* presumption, the courts may presume that when a litigant is not at risk of losing their physical liberty, they do not require appointed legal counsel.[119] While the *Mathews* factors can rebut this presumption, courts often refuse to grant the right to legal counsel when there is no potential loss of physical liberty.[120]

Foster children in dependency proceedings, unlike most parties in civil litigation, do face the potential loss of physical liberty as required to overcome the *Lassiter* presumption.[121] The judge may place foster children in a variety of settings while they wait to be reunified with their parents or adopted.[122] Possible placements include approved relatives, foster family care providers, foster care agencies, or institutional group homes.[123] Approximately fifty-five thousand children, or 13% of all foster children, are in institutional

---

attorney would be protecting the child's liberty interest in family integrity. Therefore, attorneys are necessary even in cases pertaining to nonverbal children.

118. Tandy, *supra* note 102, at 661. The author highlights the difficulty of overcoming the *Lassiter* presumption in other types of proceedings, specifically immigration hearings for unaccompanied, undocumented children. *Id.* at 659–60. Undocumented children in deportation hearings cannot overcome the *Lassiter* presumption because the outcome of the hearing is not considered a deprivation of physical liberty. *Id.* at 666. Rather, the outcome of a deportation proceeding is whether the child is allowed to live freely in the United States or gets deported. *Id.* at 666–67.

119. *Id.* at 661; *Lassiter*, 452 U.S. at 26–27 ("[T]he 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.").

120. Tandy, *supra* note 102, at 661, 663.

121. Malempati, *supra* note 2, at 212.

122. *See* FELLMETH & HELDMAN, *supra* note 4, at 328.

123. *See id.* Many foster children will experience multiple placements. *Id.* at 337. Child advocates refer to these repeated placement changes as "foster care drift." *Id.* On average, children in long term foster care (at least thirty-six consecutive months in foster care) have five different placements, while children in short term foster care have three. *Id.* One potential consequence of foster care drift is "detachment syndrome." *Id.*

group homes, also known as "congregate care."[124] Congregate care refers to licensed group homes providing twenty-four-hour care for seven to twelve children, and licensed institutions providing twenty-four-hour care for twelve or more children such as child care institutions, residential treatment facilities, and maternity homes.[125] Such placements are considered more restrictive than a typical home-like foster placement.[126] Of course, children with specific needs can benefit from the increased supervision and structure of congregate care.[127] However, a 2015 executive summary published by the Children's Bureau found that 40% of children in group homes had no clinical indicators that would justify such placement.[128] Essentially, there were thousands of children in highly restrictive placements for no justifiable reason.

Placement in congregate care is analogous to two types of placements the Supreme Court considers a loss of physical liberty for children. First, the Court in *In re Gault* held that placing the minor in a State "Industrial School"—a juvenile detention facility—would be considered in state custody and away from his friends and family, and therefore constituted a loss of physical liberty.[129] Second, the Court held in *Parham v. J.R.*[130] that children, like their adult counterparts, have a substantial liberty interest in not being "confined unnecessarily for medical treatment . . . ."[131] Therefore,

124. *See Congregate Care, Residential Treatment and Group Home State Legislative Enactments 2014-2019*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 30, 2020), https://www.ncsl.org/research/human-services/congregate-care-and-group-home-state-legislative-enactments.aspx [https://perma.cc/3T7H-Q33G].

125. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., A NATIONAL LOOK AT THE USE OF CONGREGATE CARE IN CHILD WELFARE 1 (2015).

126. *See* Mary Dozier et al., *Consensus Statement on Group Care For Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association*, 84 AM. J. ORTHOPSYCHIATRY 219, 219 (2014); NAT'L CONF. OF STATE LEGISLATURES, *supra* note 124.

127. Claire Chiamulera, *Reducing Congregate Care Placements: Strategies for Judges and Attorneys*, A.B.A. (Sept. 5, 2018), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january-december-2018/reducing-congregate-care-placements—strategies-for-judges-and-a/ [https://perma.cc/T8GH-4BYK].

Congregate care is appropriate for children with extreme mental health needs and addiction issues. *Id.*

128. CHILD.'S BUREAU, *supra* note 125, at 7.

129. *In re Gault*, 387 U.S. at 27.

130. Parham v. J.R., 442 U.S. 584 (1979).

131. *Id.* at 600. The plaintiffs filed the action on behalf of children receiving treatment in Georgia state mental health facilities to challenge the commitment procedures

the civil commitment of a child to a mental health facility is a loss of physical liberty.[132] Congregate care is similar to both of these placements because the child is taken away from their home and confined to a highly regulated institution run by state actors. For this reason, placement in congregate care should also be considered a loss of physical liberty as required by the *Mathews* presumption.

Because foster children risk losing their physical liberty if the judge determines that they cannot return to their parents, the *Lassiter* presumption does not weigh against appointing legal counsel.[133] However, as the Court clarified in *Turner v. Rogers*, potential deprivation of an individual's physical liberty is necessary but not sufficient for the court to grant the right to legal counsel.[134] Therefore, the *Mathews* factors must also weigh in favor of foster children's right to appointed counsel.

B. Mathews *Due Process Analysis*

A procedural due process challenge requires a two-step inquiry.[135] First, courts must determine whether the individual bringing the claim has

---

for persons under eighteen. *Id.* at 587. Specifically, child advocates argued that due process required that there be an adversary proceeding prior to commitment. *Id.* at 602.

132. *See id.* at 600–01. Despite finding that children had a liberty interest in freedom from bodily restraint and freedom from the "emotional and psychic harm" caused by institutionalization, the Court refused to require a hearing before an impartial tribunal prior to a child's commitment to a mental health facility. *Id.* at 597, 620.

In the dissent by Justice Brennan, he argues that children should receive the same, if not more, pre-commitment safeguards as their adult counterparts. *Id.* at 627 (Brennan, J., dissenting). Justice Brennan cites to the documented inadequacies of children's mental health facilities, the inherent uncertainties of psychiatric diagnosis, and psychiatrist's tendency to err on the side of caution to highlight the risk of erroneous commitment. *Id.* at 628–29. In order to avoid delaying treatment, Justice Brennan suggests postponing the hearing. *Id.* at 633.

133. *See Lassiter*, 452 U.S. at 26–27.

134. *See* Turner v. Rogers, 564 U.S. 431, 443 (2011). Turner claimed that he was entitled to counsel at his civil contempt proceeding because he faced potential incarceration. *Id.* at 435. In prior decisions, the Court only granted the right to counsel in cases involving potential incarceration, but the right to counsel did not exist in all such cases. *Id.* at 443. Any other interpretation would conflict with its holding in *Gagnon v. Scarpelli*. *Id.*; Gagnon v. Scarpelli, 411 U.S. 778, 789–90 (1973) (holding that criminal offenders facing revocation of probation and imprisonment do not have a categorical right to counsel at probation revocation hearings).

135. *See* Kerry v. Din, 576 U.S. 86, 90 (2015) ("The first question that we must ask, then, is whether the denial . . . deprived [defendant] of any [life, liberty, or property] interests. Only if we answer in the affirmative must we proceed to consider whether the Government's explanation afforded sufficient process."); Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.' . . . Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process.").

a life, liberty, or property interest at stake in the proceedings.[136] Without a life, liberty, or property interest, there is no Fourteenth Amendment Due Process claim.[137] Second, courts must determine what procedures the Due Process Clause requires.[138] This second step requires courts to apply the *Mathews* balancing test discussed above.[139] As to the first step, foster children have three liberty interests at stake in dependency proceedings: family integrity, health and safety, and freedom from bodily restraint.[140]

1. Liberty Interests

a. Right to Family Integrity

Dependency proceedings threaten a child's liberty interest in preserving family integrity. According to the Supreme Court, the Fourteenth Amendment Due Process Clause protects matters of family life.[141] However, the Court never ruled that children have a liberty interest in preserving family integrity.[142] Nevertheless, the right to family integrity for parents creates

136. *See Sullivan*, 526 U.S. at 59; Wilkinson v. Austin, 545 U.S. 209, 224 (2005).

137. *See Wilkinson*, 545 U.S. at 224 ("We need reach the question of what process is due only if the [defendants] establish a constitutionally protected liberty interest, so it is appropriate to address this threshold question at the outset.").

138. *See id.* ("A liberty interest having been established, we turn to the question of what process is due . . . .").

139. *See supra* Section IV.A; *see also Wilkinson*, 545 U.S. at 224–28 (applying the *Mathews* analysis to determine if the new prison policy that classifies prisoners for placement at a Supermax facility satisfied due process).

140. *See* Jacob Ethan Smiles, Comment, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*, 37 FAM. L.Q. 485, 493–94 (2003). Liberty interests arise from the Constitution, "guarantees implicit in the word 'liberty,'" and from expectations or interests created by state laws or policies. *Wilkinson*, 545 U.S. at 221.

141. *See, e.g.*, *Lassiter*, 452 U.S. at 27 (reiterating a parent's rights to the "companionship, care, custody, and management of his or her children" (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972))); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1976) ("[F]reedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause . . . . "); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing the essential right to "establish a home and bring up children"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

142. Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) ("While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, . . . it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests . . . .").

an equivalent right to family integrity for children. After all, children are part of the very family the Court has vigorously and repeatedly held to be within the protection of the Constitution,[143] and the Court has already recognized that children have individual liberty interests protected by the Constitution.[144] If the parent has the right to "companionship, care, custody, and management"[145] of their child, does this not create an equal right for the child to have the companionship and care of the parent? To be under the custody and management of the parent? To say that the Court does not treats the child like chattel, which is a paradigm the Court shifted away from in *In re Gault*.[146] Courts cannot protect children's rights without first acknowledging that such rights exist.

Furthermore, state and lower federal courts have already recognized the individual liberty interest of children in preserving family integrity.[147] In *Kenny A. v. Perdue* and *In re Dependency of M.S.R.*, courts recognized children have a liberty interest in preserving the parent-child relationship, as well as preserving their relationship with other family members, such as siblings, grandparents, and extended family.[148]

Lastly, Congress acknowledged a child's interest in family integrity through its child protection policies. First, there is a preference for either keeping the child with parents or placing them with family whenever possible.[149] Second, in 2008, Congress passed the Fostering Connections to Success and

---

143. *See* cases cited *supra* note 141.

144. *In re Gault*, 387 U.S. at 13 ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."), *abrogated in part by* Allen v. Illinois, 478 U.S. 364, 372 (1986).

145. *Lassiter*, 452 U.S. at 27 (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

146. *See In re Gault*, 387 U.S. at 17. The Court provides an overview of how the juvenile justice system evolved. *Id.* at 16–17. When discussing the doctrine of *parens patriae*, the Court notes that the common conception of the court and advocates was that children had a right to custody, not liberty. *Id.* at 17. To put it another way, the only right children had was the right to have someone take care of them. *See id.* Therefore, state intervention does not deprive a child of any procedural or constitutional rights because he or she has none. *Id.* The Court found these theoretical principles debatable and highlights the inherent danger of bypassing due process. *Id.* at 17–20. In doing so, the Court rejects the idea that children are chattel to be passed around from parent to state. Instead, they are individuals with rights who cannot be overlooked based on the archaic notion of *parens patriae*. *See id.* at 20.

147. *Kenny A.*, 356 F. Supp. 2d at 1360; *In re Dependency of M.S.R.*, 271 P.3d at 242–43.

148. *Kenny A.*, 356 F. Supp. 2d at 1360 (recognizing children have a fundamental liberty interest in "maintaining the integrity of the family unit and in having a relationship with his or her biological parents"); *In re Dependency of M.S.R.*, 271 P.3d at 242 (acknowledging that children are also at risk of losing their relationship with siblings, grandparents, aunts, uncles and other extended family).

149. 42 U.S.C. § 671(15)(B) (requiring that states make reasonable efforts to preserve and reunify families).

Increasing Adoptions Act which requires states receiving federal funding to make reasonable efforts to place siblings together or, if siblings are separated, to provide for frequent visitation and ongoing contact.[150] Lastly, in 2018, Congress passed the Family First Prevention Services Act allowing states to exceed the number of foster children allowed in a home in order to keep siblings together.[151] Taken all together, these policies show how Congress has recognized children's interest in maintaining family integrity that is separate from their parent's interest. Therefore, children have a liberty interest in family integrity that is both recognized by various courts and supported by acts of Congress that trigger a procedural due process analysis.

b. Right to Health and Safety

Dependency proceedings also threaten a child's liberty interest in physical and emotional safety. The Supreme Court ruled that children do not have a constitutional right to state intervention to protect them from their parents.[152] However, by choosing to interfere with the parent-child relationship—and thereby taking custody of the child—the State creates a "special relationship" with the child that entitles them to protection.[153]

In *Deshaney v. Winnebago*, social services investigated reports that Joshua Deshaney's father was abusing him, but the evidence was insufficient to

150. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No 110–351, 122 Stat. 3949 ("[R]easonable efforts shall be made . . . to place siblings removed from their home in the same foster care, kinship guardianship, or adoptive placement, unless the State documents that such a joint placement would be contrary to the safety or well-being of any of the siblings; and . . . in the case of siblings removed from their home who are not so jointly placed, to provide for frequent visitation or other ongoing interaction between the siblings, unless that State documents that frequent visitation or other ongoing interaction would be contrary to the safety or well-being of any of the siblings."); CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., SIBLING ISSUES IN FOSTER CARE AND ADOPTION 5 (2019).

151. Family First Prevention Services Act of 2018, Pub. L. No 115–123, 132 Stat. 256 ("The number of foster children that may be cared for in a home under subparagraph (A) may exceed the numerical limitation in subparagraph (A)(ii)(III), at the option of the State, for any of the following reasons . . . [t]o allow siblings to remain together."); CHILD WELFARE INFO. GATEWAY, *supra* note 150, at 3.

152. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989).

153. *In re Dependency of M.S.R.*, 271 P.3d at 243 (reiterating that children have no constitutional right to state intervention to protect them from harm until the State decides to intervene); *Kenny A.*, 356 F. Supp. 2d at 1360 (recognizing that once children are in state custody a "special relationship" is created that "gives rise to rights to reasonable safety").

bring Joshua under court custody.[154] The abuse continued until the father beat four-year-old Joshua so severely it caused permanent brain damage.[155] Joshua's mother sued the social services department claiming they deprived Joshua of his liberty without due process of law when they all failed to protect him from his father's abuse.[156]

The Court found that the State had no affirmative duty to protect Joshua under the Due Process Clause.[157] Joshua fell outside of the *Estelle-Youngberg* analysis because he was not harmed in state custody, nor was his father a state actor.[158] The Court acknowledged in a footnote that if the State had removed Joshua and placed him in a foster home operated by its agents, then there may have been an affirmative duty to act.[159] The Court also acknowledged that several courts had held that the *Estelle-Youngberg* analysis applies to foster children, but it refused to comment on the validity of such analysis.[160]

Under the *Estelle-Youngberg* analysis, states have an affirmative duty to ensure the safety and general well-being of prisoners and those involuntarily committed.[161] The right to personal security is a "historic liberty interest" under the Due Process Clause that cannot be extinguished even by lawful confinement.[162] A duty arises when states restrain the individual's freedom

---

154. *Deshaney*, 489 U.S. at 192.

155. *Id.* at 193.

156. *Id.*

157. *Id.* at 201 ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. . . . Under these circumstances, the State had no constitutional duty to protect Joshua.").

158. *Id.* However, the State may have acquired a duty under state tort law by voluntarily choosing to protect Joshua from a harm they did not create. *Id.* at 201–02. The Court did not address this issue because the plaintiff's claims were based solely on the Due Process Clause. *See id.* at 202.

159. *See id.* at 201 n.9 ("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.").

160. *See id.* Both the Second and Eleventh Circuit have acknowledged that the *Estelle-Youngberg* analysis could apply to foster children. *See* Taylor v. Ledbetter, 818 F.2d 791, 794–97 (11th Cir. 1987) ("The liberty interests in this case is analogous to the liberty interest in *Youngberg*. . . . [I]f foster parents with whom the state places a child injure the child, and that injury results from state action or inaction, a balancing of interest may show a deprivation of liberty."); Doe v. N.Y. City Dep't of Soc. Servs., 649 F.2d 134, 141 (2d Cir. 1981) ("When individuals are placed in custody or under the care of the government, their governmental custodians are sometimes charged with affirmative duties, the nonfeasance of which may violate the constitution.").

161. *See Deshaney*, 489 U.S. at 198–99.

162. Youngberg v. Romeo, 457 U.S. 307, 315 (1982) (citing Ingraham v. Wright, 430 U.S. 651, 673 (1977)). Nicholas Romeo was severely mentally impaired. *Id.* at 309. When his mother could no longer care for him, she put him in a state facility. *Id.* However, Nicholas sustained numerous injuries both from his own actions and from other residents.

through "incarceration, institutionalization, or *other similar restraint of personal liberty* . . . ."[163] State intervention through the dependency proceedings restrains a child's personal liberty by removing them from their home and placing them in a foster care setting from which, short of running away, they cannot leave.[164] If a State has a duty to ensure the safety of prisoners in its custody, then it should also have a duty to children—who have done nothing wrong—in its custody.[165] Both groups are removed from their daily lives by state action and placed in environments regulated by state actors.

c. Right to be Free from Bodily Restraint

Lastly, dependency proceedings threaten a child's right to be free from bodily restraint. The right to be free "'from bodily restraint[]' lies 'at the core of the liberty protected by the Due Process Clause.'"[166] The most obvious restriction is placement in an institution or group home that provides twenty-four-hour care for children in a structured environment.[167] As discussed in the *Lassiter* presumption, the Court in *In re Gault* found it irrelevant that the juvenile was being sent to a "receiving home" rather than a traditional prison because he was still taken away from his family

Id. at 310. His mother sued the facility officials, claiming they violated Nicholas's Eighth and Fourteenth Amendment rights by failing to ensure his well-being. *Id.* The Court held that Nicholas had a liberty interest in "personal security" and freedom from bodily restraint. *Id.* at 316.

163. *Deshaney*, 489 U.S. at 200 (emphasis added).

164. *See generally* Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976).

165. *Know Your Rights: Prisoners' Rights*, ACLU, https://www.aclu.org/know-your-rights/prisoners-rights/ [https://perma.cc/9KRB-TVDW]; *Prisoners' Rights*, CORNELL L. SCH., https://www.law.cornell.edu/wex/prisoners%27_rights [https://perma.cc/2EXQ-QCTH]; Rudy Estrada & Jody Marksamer, *The Legal Rights of Young People in State Custody: What Child Welfare and Juvenile Justice Professionals Need to Know When Working with LGBT Youth*, CHILD WELFARE, Mar.–Apr. 2006, at 179–82.

166. *Turner*, 564 U.S. at 445 (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)). *See also, e.g.*, Reno v. Flores, 507 U.S. 292, 315 (1993) (O'Connor, J., concurring); *Youngberg*, 457 U.S. at 316; *Ingraham*, 430 U.S. at 673–74.

167. *See supra* Section V.A.

and friends and physically confined to state custody.[168] Hence, any "institution of confinement" would constitute bodily restraint.[169]

These three liberty interests trigger a due process analysis. After establishing that there are liberty interests at stake, the next inquiry is what procedure due process requires.[170] An analysis of the three-prong *Mathews* balancing test determines if the factors weigh in favor of appointed legal counsel.

2. Mathews *Balancing Test*

a. The Private Interest That Will Be Affected by the Official Action

The first prong of the *Mathews* balancing test is the private interest that will be affected by the dependency proceedings.[171] The private interests affected are the same three liberty interests that triggered due process: family integrity, health and safety, and freedom from bodily restraint.[172]

Dependency proceedings threaten family integrity by separating children from their family and friends.[173] If the State files for a termination of parental rights hearing, the parent could lose custody of the child permanently.[174] For this reason, the child's interest in family integrity deserves substantial weight.

Additionally, the foster care system is a threat to children's health and safety in two ways.[175] First, if courts erroneously determine that the child does not need to be removed from the family, or erroneously returns the child to their parent's custody, the child is at risk of suffering further

---

168. *See In re Gault*, 387 U.S. at 27.

169. *See id.* The Washington Supreme Court even suggested that any physical removal of the child from the parents is an afront to physical liberty because the child becomes a ward of the State, and parents have no say in their future placements. *In re Dependency of M.S.R.*, 271 P.3d at 242.

170. *See supra* Section V.B.

171. *Mathews*, 424 U.S. at 335.

172. *See* Smiles, *supra* note 140, at 493–94; *Turner*, 564 U.S. at 445.

173. *See, e.g.*, Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1165–66 (2019).

174. *See supra* notes 30–33 and accompanying text.

175. This Comment focuses on the physical and mental abuse that children may face in foster care. However, some child advocates also believe the court system itself can further traumatize children by mimicking the dynamic of an abusive relationship through "rejection, degradation, and isolation." Alicia LeVezu, *Alone and Ignored: Children Without Advocacy in Child Abuse and Neglect Courts*, 14 STAN. J. CIV. RTS. & CIV. LIBERTIES 125, 131 (2018) (citing Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 587 (1999)). Giving children a voice and empowering them in court can have a therapeutic effect. *Id.* Requiring legal counsel that has to listen to and advocate for the child's opinion is one way to empower them.

abuse and neglect.[176] Second, if courts remove the child and place them in an unsafe foster placement, the child is also at risk of further abuse and neglect.[177]

Lastly, as discussed above, children may be placed in a wide range of settings, including restrictive group homes that severely limit their physical freedom.[178] With these important liberty interests in mind, the next step in the *Mathews* balancing test is to determine if a lay GAL is sufficient to protect these interests, or if guaranteed legal counsel would provide further safeguards.[179]

b. The Risk of Erroneous Deprivation of Such Interest Through the Procedures Used, and the Probable Value, if Any, of Additional or Substitute Procedural Safeguards

The second prong of the *Mathews* balancing test requires courts to analyze whether the current procedures are sufficient to protect the important interests identified in the first prong, or if additional safeguards are necessary.[180] The Court stated in *Mathews* that procedural "due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions."[181] Therefore, Indiana and Florida's GAL procedures are insufficient to protect children's liberty interests in family integrity, health and safety, and freedom from bodily restraint generally.[182]

As an initial matter, there is a significant risk that a court will make erroneous decisions during dependency proceedings. Courts must determine

176. *See Malempati*, *supra* note 2, at 209; *infra* notes 182–86 and accompanying text.

177. According to the National Child Abuse and Neglect Data System (NCANDS), in 2018, an estimated 1,770 children died as a result of abuse or neglect from their parent or primary caregiver. CHILD WELFARE INFO. GATEWAY, CHILD.'S BUREAU, CHILD ABUSE AND NEGLECT FATALITIES 2018: STATISTICS AND INTERVENTIONS 2 (2020). This is an 11.3% increase from 2014. *Id.* Of these 1,770 deaths, 80.3% were perpetrated by parents, 14.6% by nonparents, including foster care providers, and 5.1% by unknown perpetrators. *Id.* at 5. Sadly, this number underrepresents the true number of child deaths due to variance in state reporting system, inaccurate determinations of death, and lack of coordination among state agencies. *Id.* at 2–3.

178. *See supra* Section V.A.

179. *See supra* Section IV.A.

180. *Mathews*, 424 U.S. at 335.

181. *Id.* at 344.

182. *See* FIRST STAR INST. & CHILD.'S ADVOC. INST., *supra* note 1, at 62, 74 (grading Florida's GAL procedures a "C" and Indiana's GAL procedures an "F").

what actions would be in the best interest of the child, which is a subjective standard that can lend itself to abuse.[183] The Supreme Court recognized in *Santosky v. Kramer* that termination of parental rights hearings require judges to make subjective determinations on what would be in the best interest of the child, and such subjective determinations "magnify the risk of erroneous fact-finding."[184] Such erroneous decisions can have dire consequences. For example, in Indiana, a foster mother was charged with the murder of the twenty-one-month-old girl in her care.[185] Additionally, a mother in Florida murdered her two-year-old son, who was erroneously returned to her after she lied about completing her counseling program.[186]

Given the potential danger to children that stems from erroneous decisions in dependency proceedings, it is crucial that courts are well informed about the child's circumstances, liberty interests, and desires in order to act in the child's best interest. Why is a lay GAL not sufficient to protect the child in these cases? In Indiana and Florida, both the State and the parents will have their own attorney.[187] This puts the child with a lay GAL at a severe disadvantage; attorneys have better legal training and must follow the rules of ethics.[188] A Washington study found that children in dependency proceedings that were represented by a stated-interest attorney, rather than a best-interest advocate such as a CASA, were more likely to receive

---

183. *Kenny A.*, 356 F. Supp. 2d at 1361 (citing Santosky v. Kramer, 455 U.S. 745, 762 (1982); Malempati, *supra* note 2, at 209.

184. *Santosky*, 455 U.S. at 762. There are several factors that increase the risk of erroneous factfinding in termination of parental rights proceedings. *Id.* First, courts possess an unusual amount of discretion to weigh the facts. *See id.* Second, the parents will likely be poor, uneducated minorities, which makes the proceedings vulnerable to cultural or class bias. *Id.* at 763. Third, the State is much better suited to assemble a case against the parent than the parent is to mount a defense. *Id.* The State has access to funding, experts, and public records. *Id.* Additionally, the primary witnesses will likely be state employees. *Id.*

185. *Foster Mother Charged in Toddler's Death in Gary*, ABC 7 CHI. (May 7, 2017), https://abc7chicago.com/news/foster-mother-charged-in-toddlers-death-in-gary/1962789/ [https://perma.cc/5DLP-8HRB]. The child's biological mother expressed her concern to the court after noticing bruises on her other three children who were in the same foster house, but the court did nothing to protect them. *Id.*

186. Christopher O'Donnell, *Foster Care Failures Uncovered in Death of 2-Year-Old Jordan Belliveau*, TAMPA BAY TIMES (Jan. 6, 2019), https://www.tampabay.com/news/publicsafety/foster-care-failures-identified-in-state-report-on-the-death-of-2-year-old-largo-boy-20190116/ [https://perma.cc/Z5NK-S3G6].

187. IND. CODE § 31-32-2-5 (2019) ("A parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship."); FLA. R. JUV. P. 8.515(a)(1) (2020) ("At each hearing, the court shall advise unrepresented parents of their right to have counsel present . . . .").

188. *See* Malempati, *supra* note 2, at 194; FELLMETH & HELDMAN, *supra* note 4, at 342. In contrast, Florida only requires a background check and thirty hours of pre-certification training to be certified as a GAL. GUARDIAN AD LITEM, *supra* note 57, at 11.

"active representation."[189] Overall, children were more likely to be mentioned, have their well-being discussed, their preferences relayed and argued for, and were present at hearings more often than children with lay advocates.[190] Additionally, the American Bar Association recommends that children in dependency proceeding receive "quality legal representation" and acknowledges that a best-interest advocate is not a valid substitute for a trained attorney.[191]

Other provisions in Indiana and Florida state laws do not rectify the representational imbalance that results from denying children legal counsel. The fact that Florida and Indiana may provide the GALs an attorney does not protect the child's liberty interest.[192] This is especially apparent in termination of parental rights hearings.[193] For example, imagine a case in which the child wants to reunite with their parent, but the GAL feels that termination of parental rights would be in the child's best interest. In Florida, the GAL has to make courts aware of the child's wishes but can disagree and advocate for the opposite.[194] Even if the GAL did agree with

189. LeVezu, *supra* note 175, at 161. For the purpose of this Comment, Washington is considered a category two state. *See* FIRST STAR INST. & CHILD.'S ADVOC. INST., *supra* note 1, at 149. Recall that category two states require legal representation in certain cases, and in other courts have discretion to appoint an attorney. *See generally id.*

190. LeVezu, *supra* note 175, at 158. The study also found that 15% of children had no advocate after the initial hearing. *Id.* at 151. Of these children, 72% had their well-being completely ignored by the court and other parties. *Id.* Ignoring the child's well-being and preferences can be detrimental to the judge's decision. *See* Mandelbaum, *supra* note 81, at 55. Like the state, the judge is supposed to make a decision based on the best interest of the child. *See id*. If the judge only hears arguments from the state and the parent, they may not get all the information they need to make a proper decision. *Id.*

191. MODEL ACT GOVERNING THE REPRESENTATION OF CHILD. IN ABUSE, NEGLECT, AND DEPENDENCY PROC. § 3 cmt. (AM. BAR ASS'N 2011) ("This act recognizes the right of every child to have quality legal representation and a voice in any abuse, neglect, dependency, or termination of parental rights proceeding, regardless of developmental level. . . . A best interest advocate does not replace the appointment of a lawyer for the child. A best interest advocate serves to provide guidance to the court with respect to the child's best interest and does not establish a lawyer-client relationship with the child.").

192. *See* IND. CODE § 31-32-3-5 (2019) ("If necessary to protect the child's interests, the court may appoint an attorney to represent the guardian ad litem or the court appointed special advocate."); GUARDIAN AD LITEM, *supra* note 57, at 7 ("There is no attorney-client relationship between the [Child's Best Interest] Attorney and the child . . . .").

193. *See* GUARDIAN AD LITEM, *supra* note 57, at 15 ("A GAL must always be appointed to the child when a termination of parental rights petition has been filed or a decision to pursue a goal of adoption has been made.").

194. *See* FLA. R. JUV. P. 8.215(c)(1) (2020) (requiring the GAL to file a written report that includes a statement of the child's wishes). To be clear, this Comment does not

the child, they are not trained to cross-examine witnesses or present evidence at the same proficiency as the attorneys representing the State and the parent.[195] Furthermore, the GAL's attorney is going to advocate for what the GAL wants—to terminate the parental rights. In doing so, the attorney would cross-examine witnesses and present evidence effectively, but that does not protect the child's liberty interest in family integrity.[196] Recall that in Florida, the Best Interest Attorney does not have a relationship with the child.[197] Essentially, the child has no legal counsel advocating for their liberty interests.[198]

Additionally, the proposed additional safeguard—guaranteed legal counsel—provides further protections. Attorneys reduce the amount of time a child spends in the foster care system, and thereby protect the child's identified liberty interests.[199] Two major studies shed light on this issue: (1) the QIC Project and (2) the Palm Beach Study.

---

presume that a GAL will never advocate for the child's interest or that a GAL's opinion on what would be in the child's best interest is erroneous. The issue is that without legal representation, the child cannot adequately present their case to the court to help the judge come to the fair and adequate ruling.

195. *See Lassiter*, 452 U.S. at 46 (Blackmun, J., dissenting). The Court discusses the potential unfairness that arises when one party has representation and the other does not in *Turner v. Rogers*. *See Turner*, 564 U.S. at 447. One of the three factors that persuaded the Court not to appoint counsel for defendants in child support civil contempt proceedings was the fact that the opposing custodial parent may not be represented by counsel. *Id.* at 446. Therefore, providing counsel for the defendant would create an "asymmetry of representation" that would make the proceedings less fair overall. *Id.* at 447. The impact this imbalance could have on families played an important role in the court's analysis. *Id.* The same representation imbalance is happening in dependency proceedings where a child is only guaranteed a GAL, but the parents and the State have an attorney. *See supra* Section V.B.2.b.

196. *See generally* LeVezu, *supra* note 175 (arguing that the inclusion of children's voices in dependency hearings is critical to ensure the protection of a child's interest).

197. *See* GUARDIAN AD LITEM, *supra* note 57, at 7.

198. *See id.*; *see also* 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) (proposing that young children are too young to direct their own attorney and therefore the child's attorney becomes a third party litigant in the case).

199. *See* ANDREW E. ZINN & JACK SLOWRIVER, EXPEDITING PERMANENCY: LEGAL REPRESENTATION FOR FOSTER CHILDREN IN PALM BEACH COUNTY 1 (2008); DONALD N. DUQUETTE ET AL., CHILDREN'S JUSTICE: HOW TO IMPROVE LEGAL REPRESENTATION OF CHILDREN IN THE CHILD WELFARE SYSTEM, at ix, 18 (2016). *But see* Robert Kelly & Sarah Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference? A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 J. FAM. L. 405, 451 (1983) (finding that the presence of an attorney guardian ad litem had no positive impact on dependency proceedings).

Almost ten years after Congress passed CAPTA, a study was conducted in North Carolina to assess the impact of an attorney guardian ad litem on dependency proceedings. To the authors dismay, the study revealed that attorneys had no impact on preventing removal or increasing reunification. *Id.* at 438, 441. Additionally, the presence of an attorney

In 2009, "the U.S. Children's Bureau named the University of Michigan Law School the National Quality Improvement Center on the Representation of Children in the Child Welfare System (QIC-ChildRep)."[200] QIC-ChildRep gathered information on child representation throughout the country to create the QIC Best Practice Model of Child Representation (QIC Model) for attorneys.[201] In a study in Washington, children represented by QIC Model attorneys were 40% more likely to find permanency placements than the control group.[202]

The Palm Beach Study in Florida found similar results. The study examined the impact of the Legal Aid's Foster Children's Project (FCP) on the nature and timing of children's permanency outcomes in dependency proceedings.[203] The program implemented four key activities: "(1) the filing of legal motions, (2) the filing termination of parental rights petitions and recruitment of adoptive homes, (3) attendance at staffings and case planning meetings, and (4) service advocacy."[204] Chapin Hall found that children represented

---

delayed the reunification process. *Id.* at 447. The authors attribute these finding to three key factors: (1) role confusion, (2) lack of training, and (3) the expectation that cases would not take a significant amount of the attorney's time. *Id.* at 453. Role confusion made it difficult for attorneys to focus on a clear goal and could lead to tension between attorneys and judges that disagreed about the attorney's role. *Id.* at 451. The issue of role confusion still persists today, but it can be remedied if states provide proper guidance for attorneys serving as guardians ad litem. *See* Malempati, *supra* note 13, at 110. The two second factors are less of an issue today with the developments in child advocacy law and practice.

The author also raises the issue of adding another bureaucratic layer to the dependency process. *Id.* at 120. A similar argument was made by social workers in the Palm Beach Study. S*ee* ZINN & SLOWRIVER, *supra*, at 20. The issue of added bureaucracy slowing down dependency proceedings is a valid concern. However, more recent studies have shown that attorney guardians ad litem increase reunification and permanent placement. *See id.* at 1; DUQUETTE ET AL., *supra*, at viii–ix. Additionally, getting rid of due process requirements for the sake of efficiency is all too reminiscent of the pre-*In re Gault* mindset. *See In re Gault*, 387 U.S. at 55.

200. DUQUETTE ET AL., *supra* note 199, at vii.

201. *Id.*

202. BRITANY ORLEBEKE ET AL., EVALUATION OF THE QIC-CHILDREP BEST PRACTICES MODEL TRAINING FOR ATTORNEYS REPRESENTING CHILDREN IN THE CHILD WELFARE SYSTEM 81, 84 (2016).

203. ZINN & SLOWRIVER, *supra* note 199, at 1.

204. *Id.* at 2. Note that the first two elements of the FCP—(1) filing legal motions and (2) filing termination of parental rights petitions and recruitment of adoptive homes––are legal services that are better left to an attorney rather than a lay GAL. However, it is also important to note that not everyone endorsed the FCP method. According to the authors, social workers were not pleased with the increase in legal motions and termination of parental rights petitions. *Id.* They described them as disruptive and a waste of resources. *Id.*

by FCP attorneys had a significantly higher rate of exit permanency than unrepresented children.[205] The study also found that children had higher rates of adoption and long-term custody without significantly lower rates of reunification.[206]

By reducing the length of time children spend in foster care, attorneys protect the three liberty interests discussed earlier. First, speeding up the reunification process protects the child's interest in family integrity.[207] Second, legal counsel reduces the time spent in foster care and thereby reduces the likelihood of physical and emotional abuse within the system.[208] Lastly, exiting the foster care system into a permanent home would remove the child from any restrictive congregate placement that may curtail their physical liberty.[209]

Overall, attorneys are best suited to protect children's liberty interests. GALs lack the training and ethical obligations of attorneys.[210] However, the appointment of a GAL in addition to an attorney could be beneficial to the dependency process.[211] The final step in the *Mathews* analysis is to assess the government interest.

c. The Government's Interest, Including the Function Involved and the Fiscal and Administrative Burdens of Providing the Additional or Substitute Procedural Requirements

1. Parens Patriae *Interest*

The State also has a legitimate interest in the outcome of dependency proceedings under the *parens patriae* doctrine.[212] States have a strong interest in the child's safety and well-being, and in reaching an "accurate

---

at 9. However, the fact that the FCP model increased the rate of exit permanency proves the opposite. *Id.* at 1.

205. *Id.*

206. *Id.* The fact that the FCP leads to higher rates of permanency without significantly impacting reunification is important because lowering the rate of reunification could be seen as detrimental to both the parent and child's liberty interest in family integrity. *See supra* Section V.B.1.a.

207. *See supra* Section V.B.1.a.

208. *See supra* Section V.B.1.b.

209. *See supra* Section V.B.1.c.

210. *See* Malempati, *supra* note 13, at 113–14.

211. *See supra* note 40.

212. *See Lassiter*, 452 U.S. at 27 ("Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision."); *Kenny A.*, 356 F. Supp. 2d at 1361 ("As *parens patriae*, the government's overriding interest is to ensure that a child's safety and well-being are protected."); *In re Dependency of M.S.R.*, 271 P.3d at 243 ("[T]he State has a compelling interest in both the welfare of the child and in an 'accurate and just decision' . . . ." (quoting *Lassiter*, 452 U.S. at 27)).

and just decision."[213] These interests are intertwined and requiring courts to appoint legal counsel for children would further both of them.

Erroneous determinations in dependency proceedings do not further the States' interests in protecting the child. If courts erroneously determine not to remove the child, the abuse and neglect will continue.[214] However, erroneous removal could potentially destroy family unity and subject the child to further suffering.[215] The Supreme Court acknowledged in *Lassiter* that ensuring both parties in a dispute have legal representation is largely beneficial to reaching an accurate and just decision.[216] Therefore, providing children with legal representation in dependency proceedings would further the states' *parens patriae* interest.

2. Monetary Interest

Under the *Mathews* analysis, courts can consider the cost of providing a particular method of due process.[217] The State will always have an interest in settling matters in the most economically efficient way possible.[218] This includes the cost involved with appointing legal counsel and the cost of the lengthy court proceedings that may follow.[219] In dependency proceedings, the cost of providing legal counsel does not skew the analysis against children for two reasons: (1) the cost does not overcome the children's liberty interests and (2) providing legal counsel would save states money.[220]

First, courts have consistently held that pecuniary interests do not overcome important private interests, such as those listed above.[221] Additionally, the

---

213. *See Lassiter*, 452 U.S. at 27.
214. *See supra* Section V.B.1.b.
215. *See supra* Section V.B.1.b.
216. *See Lassiter*, 452 U.S. at 27–28. According to the Court, failing to provide counsel for the parent makes the "contest of interests . . . unwholesomely unequal." *Id.* at 28. Note that the Court had no reason to address whether the child should also be afforded legal representation because North Carolina already required legal representation for children in such matters. *Id.*
217. *Mathews*, 424 U.S. at 335 (holding that courts may consider the government's interest "including the function involved and the fiscal and administrative burdens" that the additional procedural requirement would entail as part of the *Mathews* test).
218. *See Lassiter*, 452 U.S. at 28.
219. *Id.*
220. *See id.*; *infra* notes 225–41 and accompanying text.
221. *See, e.g.*, *Lassiter*, 452 U.S. at 28 (finding that the states pecuniary interest was legitimate but "hardly significant enough" to overcome the parent's interest in family integrity); *Kenny A.*, 356 F. Supp. 2d at 1361 (finding that the child's interest in family integrity and

Court noted in *Lassiter* that the potential cost of providing representation in termination of parental rights proceedings would be "*de minimis*" compared to the cost of all criminal actions.[222]

Second, the appointment of counsel for children in dependency proceedings would save states money. In an Indiana class action case, Plaintiff's expert, Donald Duquette, prepared a return of investment analysis on the benefits of legal representation in Indiana based on the QIC study.[223] In 2016, Indiana spent $505,443,804 in both state and federal funds on out of home foster care placement.[224] With 20,419 children in Indiana's foster care system, the average cost per child per month was $2,063.[225] Based on the national average stay in foster care of twenty-one months, Indiana spent an average of at least $43,323 per child entering foster care.[226] Based on the QIC study, legal representation for children "reduces the average length of time in foster care by 16% or 3.36 months."[227] Therefore, providing legal representation would save Indiana $6,931 per child, calculated at $2,063/month x 3.36 months.[228] A single attorney representing one hundred children[229] could save Indiana $693,000. These savings would more than cover the cost of paying for legal representation.[230]

---

health and safety "far outweighs any fiscal or administrative burden" imposed by requiring legal counsel).

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

223. Expert Report of Prof. Donald N. Duquette at 21, Nicole K. v. Stigdon, No. 19-CV-01521-JPH-MJD (S.D. Ind. 2020), *appeal docketed*, No. 20-01525 (7th Cir. Apr. 1, 2020). Donald Duquette is a Clinical Professor Emeritus of Law and the founding director of Child Advocacy Law Clinic at the University of Michigan Law School. *Id.* at 1.

224. *Id.* at 21.

225. *Id.* This number is comparable to the national average of $2,148, not including court costs. *Id.*

226. *Id.* at 22. These costs do not include court costs or special costs such as special education and mental health services. *Id.*

227. *Id.*

228. *Id.*

229. The National Association of Counsel for Children recommends that an attorney represent no more than one hundred children in order to perform essential tasks adequately. *See Kenny A.*, 356 F. Supp. 2d at 1362. In its most recent report on child representation, CAI found that only 10% of statutes set specific caseload standards and another 12% acknowledged that attorneys need to comply with "reasonable caseload limits." FIRST STAR INST. & CHILD.'S ADVOC. INST., *supra* note 1, at 23. Additionally, CAI sued Tani Cantil-Sakauye, the Chair of the Judicial Council of California, over high caseloads for attorneys representing foster children in Sacramento County. *See* E.T v. Cantil-Sakauye, 682 F.3d 1121, 1122 (2012). According to CAI, some attorneys were representing as many as 388 children. FELLMETH & HELDMAN, *supra* note 4, at 376. However, the district court abstained from considering the claims, and the Ninth Circuit affirmed. *E.T.*, 682 F.3d at 1125.

230. The average salary for a GAL attorney in the United States is $68,889. *Guardian Ad Litem Attorney Salary*, ZIPRECRUITER, https://www.ziprecruiter.com/Salaries/Guardian-Ad-Litem-Attorney-Salary [https://perma.cc/A4Q8-QRGD].

Furthermore, the federal government will now reimburse states for up to 50% of the costs of providing legal representation for children in dependency proceedings.[231] Therefore, states like Indiana and Florida are spending substantially more money to deny children legal representation.

In addition to the direct costs of providing out of home placement, states incur other costs when children remain in foster care. Children in foster care and those who age out of the system are worse off than children that stay out of the system.[232] In 2018, Indiana put together a report on foster children's school performance.[233] According to the report, only 64% of children in foster care graduate from high school, compared to the statewide average of 88%.[234] Additionally, students in foster care were twice as likely to be suspended from school.[235]

Furthermore, the struggles of foster children carry over into adulthood. Generally, children that age out of foster care have lower rates of employment and education, and higher rates of mental illness.[236] Only 8% of children that age out of foster care earn a four-year degree, and foster children typically earn less than half of what their non-foster care peers earn.[237] According to a national survey, 23% were neither enrolled in education nor employed, and 43% had experienced homelessness.[238] Therefore, extended foster

231. *See* CHILD.'S BUREAU, *supra* note 47, at 296–97 ("A title IV-E agency that has an agreement with a tribe or any other public agency under section 472(a)(2)(B)(ii) of the Act may claim title IV-E administrative costs for legal representation provided by tribal or public agency attorneys under the agreement in all stages of foster care related legal proceedings. The title IV-E agency may also claim administrative costs for independent legal representation provided by an attorney for a candidate for title IV-E foster care or a title IV-E eligible child in foster care who is served under the agreement, and the child's parents, to prepare for and participate in all stages of foster care related legal proceedings.").

232. FELLMETH & HELDMAN, *supra* note 4, at 349.

233. Shaina Cavazos, *Indiana Foster Children are Less Likely to Graduate*, *More Likely to be Suspended, a New Report Shows*, CHALKBEAT (Apr. 4, 2019, 7:43 PM EDT), https://www.chalkbeat.org/posts/in/2019/04/04/indiana-foster-children-are-less-likely-to-graduate-more-likely-to-be-suspended-a-new-report-shows/ [https://perma.cc/9C7B-MGX8].

234. *Id.* Furthermore, one in five students in foster care only graduated because they received waivers allowing them to receive diplomas without having passed state tests, compared to only 8% of non-foster care students receiving waivers. *Id.*

235. *Id.*

236. FELLMETH & HELDMAN, *supra* note 4, at 349.

237. *Id.*

238. *Id.* To assist struggling foster children, Congress passed the Fostering Connections to Success and Increasing Adoptions Act of 2008 to allow foster children to remain in care up until age twenty-one. *Fostering Connections to Success and Increasing Adoptions Act*, N. AM. COUNCIL ON ADOPTABLE CHILD. (May 3, 2017), https://www.nacac.org/resource/fostering-connections-to-success-and-increasing-adoptions-act/ [https://perma.cc/BMB7-

care stays will also cost states money in the form of welfare and potential criminal activity.[239]

Now that the *Lassiter* presumption and all three *Mathews* prongs have been analyzed, they must be weighed against each other to determine if due process entitles children to legal counsel in dependency proceedings. First, children in dependency proceedings are uniquely situated to survive the *Lassiter* presumption because they face the potential loss of physical liberty.[240] Therefore, only the three *Mathews* prongs need to be weighed against each other. Children have strong liberty interests in family integrity, health and safety, and freedom from bodily restraint.[241] These interests cannot be adequately protected by a lay GAL who lacks the training necessary to provide proper legal representation in court.[242] Lastly, appointing legal counsel furthers a State's *parens patriae* and monetary interests. Hence, the three prongs weigh strongly in favor of requiring legal representation.

C. The Argument Against a Case-by-Case Basis

In addition to establishing the *Lassiter* presumption, the *Lassiter* case also allows courts to determine the right to counsel on a case-by-case basis. However, foster children should have a per se right to counsel because, as shown above, the *Mathews* factors always weigh in their favor and Supreme Court case law supports a categorical right to counsel.[243]

The *Lassiter* holding—that parents have no categorical right to legal counsel in termination of parental rights hearings—can be deceptive.[244] If the permanent severance of the parent-child relationship is not enough to skew the *Mathews* factors in favor of legal counsel, then what will? Recall that all three *Mathews* factors appeared to favor the appointment of counsel for parents in dependency proceedings, yet Ms. Lassiter still lost.[245] She lost because the facts of *Lassiter* were extreme. Not only was Ms. Lassiter

---

VR29]; Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No 110–351, § 201, 122 Stat. 3949, 3957–58. States that extend their foster care programs will continue to receive title IV-E funding. FELLMETH & HELDMAN, *supra* note 4, at 334. As of 2017, twenty-four states that have extended foster care until age twenty-one. *Id.*

239. *See* FELLMETH & HELDMAN, *supra* note 4, at 334.

240. *See* Malempati, *supra* note 2, at 212.

241. *See supra* Section V.B.1.

242. *See supra* Section V.B.2.b.

243. *See In re Gault*, 387 U.S. 1 at 13.

244. *See Lassiter*, 452 U.S. at 31–32.

245. *See id.* at 31, 33. The Court conceded that the parent's interest is a "commanding" one. *Id.* at 27. It also acknowledged that the State shares the parent's interests in an accurate and just decision, and any pecuniary interest the State has is outweighed by the parent's interest. *Id.* at 27–28. Additionally, dependency proceedings may overwhelm an uncounseled parent. *See id.* at 30. Taken together, the *Mathews* factors appear to weigh in favor of legal counsel.

serving a twenty-five to forty-year sentence for second-degree murder, but by the time the State filed for a termination of parental rights hearing, she had not seen her son or tried to contact social services regarding his safety or whereabouts in over two years.[246] Given these circumstances, the Supreme Court concluded that appointing counsel for Ms. Lassiter would not have made a "determinative difference."[247]

Lassiter is a perfect example of "hard cases make bad law." If Ms. Lassiter's circumstances had been different, perhaps the Court would have found a per se right to counsel for parents. However, based on her egregious behavior, the Court concluded that the *Mathews* factors will not always overcome the presumption against the right to counsel.[248] Nevertheless, even in an extreme case from the perspective of a child, the *Mathews* factors would skew in favor of legal representation. Take the three liberty interests stated above: family integrity, health and safety, and freedom from bodily restraint.[249] Even in cases where the child does not wish to reunite with their family, perhaps due to extreme mistreatment, when would a child not have a strong interest in their personal safety? Or in being free from bodily restraint? Never. Additionally, appointing legal counsel will further the States strong *parens patriae* and pecuniary interests.[250]

Furthermore, as Justice Blackmun argues in his *Lassiter* dissent, the majority departed from past authority when it held that the right to counsel should be determined on a case-by-case basis.[251] In *Mathews*, the Court reasoned that the due process analysis applies to the "generality of cases, not the rare exceptions."[252] Based on this line of reasoning, the Court before *Lassiter*, required a case-by-case consideration of due process issues in different "*contexts*, not of different *litigants* within a given context."[253] For example, in *Goldberg v. Kelly*, the Court held that welfare recipients as a class were distinguishable from other recipients of government benefits

246. *See id.* at 20–21.
247. *Id.* at 32–33.
248. *See id.* at 31.
249. *See supra* Section V.B.1.
250. *See supra* Section V.B.1.c.
251. *See Lassiter*, 452 U.S. at 49 (Blackmun, J., dissenting). Justice Blackman also argues in a footnote that the majority's decision will impose a greater burden on trial courts by requiring them to determine in advance whether legal representation would make a difference in each case. *Id.* at 51 n.19.
252. *Mathews*, 424 U.S. at 344.
253. *See id.* at 49.

and thus entitled to an evidentiary hearing.[254] In contrast, the Court held in *Mathews* that Social Security disability recipients as a class were not similarly situated to welfare recipients and therefore were not entitled to an evidentiary hearing.[255]

For these reasons, children should have a per se right to legal counsel under the Fourteenth Amendment Due Process Clause. This can be achieved by amending CAPTA to require legal counsel for children in dependency proceedings.[256]

VI. SOLUTION

Children's liberty interests in dependency proceedings need to be protected by legal counsel. This does not mean that a GAL does not add value to the dependency process. For example, Mississippi provides children with an attorney and a GAL.[257] On the other hand, states like Michigan require that the GAL be an attorney, while states like Kentucky have statutes that require legal counsel without mentioning a GAL.[258] Therefore, to ensure children in dependency proceedings have legal representation while also allowing the states some discretion, CAPTA should be amended as follows:

> In every case involving a victim of child abuse or neglect, which results in a judicial proceeding, an attorney who has received training appropriate to the role, including training in early childhood, child, and adolescent development, shall be appointed to represent the child in such proceedings. The court may also appoint a guardian ad litem to represent the child. The role of the guardian ad litem shall be to (1) to obtain first-hand, a clear understanding of the situation and needs of the child; and (2) to make recommendations to the court concerning the best interests

254. Goldberg v. Kelly, 397 U.S. 254, 264 (1970), *superseded by statute*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105, *as recognized in* State *ex rel.* K.M. v. W. Va. Dep't of Health & Hum. Res., 575 S.E.2d 393, 402 (W. Va. 2002), *and* Hudson v. Bowling, 752 S.E.2d 313, 321 (W. Va. 2013). The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 specifically prohibits individual entitlements to assistance from any state program receiving funds under the Act. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, § 401(b), 110 Stat. 2105 (codified as amended at 42 U.S.C § 601).

255. *Mathews*, 424 U.S. at 342.

256. *See infra* Part VI.

257. MISS. CODE ANN. § 43-21-121(4) (2021) ("The court, including a county court serving as a youth court, may appoint either a suitable attorney or a suitable layman as guardian ad litem. In cases where the court appoints a layman as guardian ad litem, the court shall also appoint an attorney to represent the child.").

258. Ky. Rev. Stat. Ann. § 620.100(1) (LexisNexis 2020) ("If the court determines, as a result of a temporary removal hearing, that further proceedings are required, the court shall advise the child and his parent or other person exercising custodial control or supervision of their right to appointment of separate counsel . . . ."); Mich. Comp. Laws § 722.630 (2020) ("In each case filed under this act in which judicial proceedings are necessary, the court shall appoint a lawyer-guardian ad litem to represent the child.").

> of the child. The child's attorney may serve as the guardian ad litem so long as such an appointment does not create a conflict of interest between the child and the attorney. Otherwise, the court must appoint a separate, qualified individual to serve as the guardian ad litem, such as a court-appointed special advocate.[259]

This revision would ensure that children in dependency proceedings get the high-quality legal representation they deserve. For now, a federal case is currently on appeal in the Seventh Circuit. The Children's Advocacy Institute, Morrison & Foerster LLP, and DeLaney & DeLaney LLC filed a class action against three Indiana counties on behalf of foster children.[260] The case has the potential to create a new binding precedent.[261]

VII. CONCLUSION

In conclusion, children are entitled to legal counsel in dependency proceedings under the Fourteen Amendment Due Process Clause. Congress can incentivize states to provide legal counsel by amending CAPTA as stated above.[262] Providing legal counsel will protect children's individual liberty interests and save states money.[263] While states may continue to utilize GALs, a GAL is not an adequate substitute for legal representation.[264] Children have their own independent liberty interests and deserve the same zealous legal advocacy afforded to parents and the State.

---

259. Note that this revision does not address the issue of what type of client-attorney model should be adopted. The debate over which type of attorney children in dependency proceedings is a separate and lengthy analysis. For discussions about what type of representation children should receive, see generally Malempati, *supra* note 13, at 110 (analyzing the best-interest and traditional client-directed lawyer models of representation and arguing that the dichotomy between the two is false and hinders child representation); Kelly & LeVezu, *supra* note 117, at 385 (arguing for a legal-interest advocacy model rather than a best-interest model for preverbal children). However, regardless of what methodology a state plans to adopt, the state needs to lay out clear guidelines for attorneys to follow to avoid role confusion.

260. Nicole K. v. Stigdon, No. 19-CV-01521-JPH-MJD, 2020 WL 1042619, at *1 (S.D. Ind. Mar. 3, 2020), *appeal docketed*, No. 20-01525 (7th Cir. Apr. 1, 2020).

261. *See id.* at *4.

262. *See supra* Part VI.

263. *See supra* Section V.B.2.c.

264. *See supra* Section V.B.2.b.