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A CHILD'S DUE PROCESS RIGHT TO LEGAL COUNSEL IN ABUSE AND NEGLECT DEPENDENCY PROCEEDINGS

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TEXT:

[*485] I. Introduction

The decisions of the United States Supreme Court establish that children are persons under the Constitution. n1 "The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law." n2 It follows that the Due Process Clause of the Fourteenth Amendment guarantees children procedural protection before the state can deprive them of their interests in life, liberty, or property. n3

n1 "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13 (1967). "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1974). See *infra* notes 14-20 and accompanying text.

n2 *Goss v. Lopez*, 419 U.S. 565, 572 (1975). No State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

n3 Though children are protected by the Constitution and are entitled to Due Process when their liberty or property interests are at stake, the rights of children are significantly different from the rights of adults. See *infra* note 22.

Although the Due Process Clause clearly entitles children to some degree of procedural protection, the Court has left unclear the particular interests protected and the particular protections that apply to children. n4 The Supreme Court has established, for example, that in juvenile delinquency [*486] cases when the authority of the court includes confining the child, adequate due process includes the right to legal counsel. n5 The Court has not established, however, whether similar due process protections attach in juvenile dependency proceedings when a state brings an action to protect a child from abuse or neglect, even though dependency courts often decide where and with whom a child will reside. n6 Dependency proceedings implicate a child's liberty interests; n7 therefore, the child must be provided with constitutionally adequate procedures to protect those interests. n8

n4 "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

n5 *In re Gault*, 387 U.S. 1 (1967). See *infra* notes 16-17 and accompanying text.

n6 Dependency proceedings are initiated based on an allegation of maltreatment of the child, either in the form of abuse or neglect. They are designed to reach an outcome that serves the best interests of the child. Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, 49-4 JUV. & FAM. CT. J. 1, 31 (1998).

The fundamental mission of the juvenile court-child welfare agency system is defined in therapeutic terms as to protect children from harm, to identify causes of family dysfunction, and to work with parents to solve the problems that lead to dysfunction... Traditionally, juvenile court judges have had broad discretion to make a disposition 'in the best interests of the child....' Statutes typically authorize the judge to dismiss the case outright; leave the child at home on certain conditions, including agency supervision (protective supervision); or remove the child and grant custody to a friend or relative, or to the state child welfare agency, which places the child in foster care.

LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS 799 (2002).

n7 See *infra* notes 50-56 and accompanying text.

n8 See *infra* notes 20 and 51, and accompanying text.

Although both federal and state statutes provide some form of representation for children in dependency proceedings, n9 it is time to examine whether children in dependency cases are constitutionally entitled to legal representation n10 under the Due Process Clause. To determine whether existing procedures are constitutionally adequate, the Supreme Court created a three-part balancing test in *Mathews v. Eldridge*. n11 Under the *Eldridge* [*487] test, courts must balance: (1) the private interest at stake; (2) the risk of error involved under the current procedures, and the probable benefits of additional procedural protections; and (3) the government's interest in the proceeding, including fiscal and administrative burdens. n12 When applied to children in dependency proceedings, this test indicates that the failure to provide children with legal counsel violates the Due Process Clause of the Fourteenth Amendment. n13

n9 See generally Adoption and Safe Families Act of 1997, 42 U.S.C. §§ 678-79 (1997), and Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5116 (1996). Pursuant to the federal Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5107 (1994), states are to provide a guardian *ad litem* to "represent" the child's best interests. The Child Abuse Prevention and Treatment Act established a statutory right to some form of representation for children in child protection proceedings. 42 U.S.C. §§ 5101-5107 (1994). More recently, Congress passed the Adoption and Safe Families Act of 1997, which included "provisions for legal representation, state funding of child welfare and adoption, and state performance requirements." Ventrell, *supra*

note 6, at 29.

n10 When I refer to legal representation, I am not referring to a guardian *ad litem* or an attorney acting as a guardian *ad litem* representing the best interests of the child. Instead, when I refer to legal representation, I am referring to an attorney acting in the role of a traditional attorney, representing the wishes of the client. *See infra* notes 85-88 and accompanying text regarding the differences between a traditional attorney and a guardian *ad litem*.

n11 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Although *Mathews* dealt with the issue of whether due process required a hearing before an individual's Social Security disability benefits could be terminated, the Supreme Court has subsequently applied the test to address other due process issues, including the right to counsel.

n12 *Id.*

n13 *See infra* notes 58-84 and accompanying text applying the *Eldridge* balancing test. The arguments set forth in this essay are focused entirely on the procedure guaranteed by the Due Process Clause of the Constitution, and not on statutory rights or substantive due process claims. These arguments do not rely on humanitarian grounds, morality, or emotional stories about the horrors children are subjected to in our court system. This essay is intended to present an argument, based solely on the language and reasoning of the Supreme Court, that children in dependency proceedings are constitutionally entitled, as a matter of procedural due process, to legal counsel to protect their interests.

II. History

A. Supreme Court Precedent Establishes That Children are Entitled to Protection Under the Due Process Clause of the Constitution

Though children are not entitled to the same constitutional rights offered to adults, n14 the Supreme Court has established that children are persons within the meaning of the Constitution, which entitles them to the protection of both the Bill of Rights and the Due Process Clause. n15 The Court extended Constitutional protection under the Due Process Clause to minors in the context of juvenile delinquency proceedings, n16 when the [*488] court stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." n17 Later, the Court reaffirmed the extension of constitutional due process to children in a number of cases involving the rights of students. n18 In one such case, the Court stated, "students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect." n19 The delinquency and student's rights decisions of the Supreme Court establish that children are entitled to constitutionally adequate due process under the Fourteenth Amendment when their liberty or property interests are implicated. n20

n14 *See infra* note 22 and accompanying text.

n15 *See* notes 14-20 and accompanying text.

n16 In 1967, the Supreme Court issued its landmark decision, *In re Gault*, 387 U.S. 1 (1967), stating that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* at 13. *Gault* involved a 15-year-old boy who was committed to an industrial school by the Arizona juvenile court without adequate due process. *Id.* at 4-11. *Gault* was given no notice of the charges against him, no counsel to represent him, no constitutional protection from self-incrimination, and no opportunity to confront and cross-examine his accuser. *Id.* at 10. The Supreme Court held that despite *Gault's* status as a minor, he was entitled to constitutional protection and the procedures used in Arizona violated *Gault's* constitutional rights. *Id.* at 36, 41, 50-51.

"Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." *Id. at 20*. While due process has always been a cornerstone of our freedom, *Gault* is significant because it explicitly states that procedural protections are not only for adults. Constitutional procedural protections apply to children as well, including the right to counsel in delinquency proceedings.

In the year prior to *Gault*, the Supreme Court held that minors are entitled to a hearing before a juvenile court may waive jurisdiction of the case. *Kent v. United States*, 383 U.S. 541 (1966). In the years following *Gault*, more constitutional protections were extended to children in juvenile delinquency proceedings. See *In re Winship*, 397 U.S. 358, 368 (1970); *Breed v. Jones*, 421 U.S. 519, 541 (1975).

n17 *In re Gault*, 387 U.S. at 13.

n18 In 1969, a group of students was suspended from school for wearing black armbands to protest the Vietnam War. *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The students objected to the suspensions on the grounds that the school violated their First Amendment right to freedom of speech. *Id.* In *Tinker*, the Court held that the students were protected by the First Amendment and that the school's attempt to prohibit the armbands violated the student's right to exercise their free speech. *Id. at 511-514*.

Similarly, in *Goss v. Lopez*, 419 U.S. 565 (1975) the Court stated that "young people do not shed their constitutional rights at the schoolhouse door." *Id. at 574* (citing *Tinker*, 393 U.S. at 506.) The case involved a number of students who were suspended from school for an extended period of time without the benefit of a hearing. *Goss*, at 567-72. The Supreme Court held that the procedures, or lack thereof, used by the school in suspending the students were unconstitutional because they denied the students their due process rights. *Id. at 582-84*. More recently, the High Court again held that the rights of students are protected by the Constitution. In 1985, the Supreme Court held that students are protected by the Fourth Amendment's prohibition against unreasonable search and seizure, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), though the Court in *T.L.O.* did hold that the search used by the school was a reasonable search and did not violate the student's due process rights.

Though these decisions would not be important if they dealt only with adults, the decisions are extremely important because they further establish the Supreme Court's recognition that children, like adults, are protected by the Constitution. The statement that "young people do not shed their constitutional rights at the schoolhouse door," *Goss*, 419 U.S. at 574, necessarily implies that children have constitutional rights to shed, further emphasizing the fact that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. at 13.

n19 *Tinker*, 393 U.S. at 511.

n20 The Due Process Clause is only applicable if the "nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (citing *Fuentes v. Shevin*, 407 U.S. 67, 92 (1972)). If the interest is not one that falls under the protection of the Fourteenth Amendment, then the Due Process Clause does not apply because the State has no affirmative duty to protect individuals from harm caused by private citizens. *Deshaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). The Court in *Deshaney* held that the State has no constitutional duty to protect a child from the abuse of his father. *Id. at 203*.

B. *The Mathews v. Eldridge Three-Part Balancing Test*

Once it is determined that an individual is entitled to protection under the Due Process Clause of the Fourteenth Amendment, "the question remains what process is due." n21 The Court has stated that children are not [*489] entitled to the same procedural protections as adults, n22 but the Court has not always clearly explained to what extent the Due Process Clause protects children. In order to determine "what process is due," n23 the Supreme Court uses a three-part

balancing test to ascertain whether an individual's due process rights have been violated. n24 In *Mathews v. Eldridge*, the Court stated "due process is flexible and calls for such procedural protections as the particular situation demands." n25 To determine what the "situation demands," courts must weigh three factors:

First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. n26

n21 *Morrissey*, 408 U.S. at 481.

n22 *Bellotti v. Baird*, 443 U.S. 622, 634 (1979). "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.* See also *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

In *McKeiver*, the Court refused to extend to minors the same procedural protections that were extended to adults. *McKeiver* held that a jury trial was not required in juvenile delinquency proceedings. The Court did not hold that children are not entitled to due process protection; the Court merely held that due process does not require a jury trial in delinquency proceedings. *Id.* at 545. The Court stated, "neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of the due process of law." *Id.* at 531 (quoting *Haley v. Ohio*, 332 U.S. 596, 601 (1948)).

n23 *Morrissey*, 408 U.S. at 481. Though due process is not easily defined, there are a few requirements that are essential to due process, such as "the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), and that "deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). These fundamental requirements of due process have been echoed repeatedly by the Supreme Court and are entrenched as essential elements of due process. *Id.*

n24 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

n25 *Id.* at 334 (citing *Morrissey*, 408 U.S. at 481.)

n26 *Mathews*, 424 U.S. 335. In *Mathews*, the Court applied the three-part balancing test and held that the Due Process Clause of the Fifth Amendment does not require an evidentiary hearing before Social Security disability benefits are terminated. *Id.* at 349.

C. Prior Applications of the *Mathews v. Eldridge* Balancing Test by the Supreme Court

Before applying the *Mathews v. Eldridge* balancing test to determine the due process rights of children in dependency proceedings, it is useful first to examine how the Supreme Court has utilized the test in similar contexts. In *Lassiter v. Department of Social Services*, n27 the Supreme [*490] Court used the *Eldridge* balancing test to evaluate whether procedures that failed to provide indigent parents with legal counsel in parental-termination proceedings were constitutionally adequate. n28 Before the Court even commenced its *Eldridge* balancing, it began with a presumption against a parent's right to counsel in parental-termination proceedings because such proceedings could not result in a loss of "physical liberty" for the parent. n29 In balancing the interests, the Court stated that the parent's interest was a "a unique kind of deprivation" n30 and a "commanding one." n31 The State's interests included "the welfare of the child" n32 and reaching "an accurate and just decision," n33 which would be promoted by appointment of counsel. However,

the state also had a "weak pecuniary interest" n34 in minimizing the economic costs of the proceedings, which would be increased if counsel must be provided. n35 Finally, "the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high." n36 The Court held that in some cases the *Eldridge* balancing test would require that legal representation be appointed, and in others, such as the situation before the Court in *Lassiter*, legal representation would not be a constitutional requirement. n37

n27 *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981).

n28 *Id.* at 27.

n29 *Id.* at 25-27. In reaching its decision to begin with a presumption against the right to counsel, the Court stated, "the pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation... It is the defendant's interest in personal freedom ... which triggers the right to appointed counsel... Significantly, as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel... In sum, the Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured." *Id.* at 25-27.

n30 *Id.* at 27.

n31 *Id.*

n32 *Id.*

n33 *Id.*

n34 *Id.* at 31. However, the Court stated that "though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here." *Id.* at 28.

n35 *Id.*

n36 *Id.* at 31. The court stated that parents involved in parental-termination proceedings "are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation." *Id.*

Since due process is flexible and the *Eldridge* factors may vary from case to case, the court held that the decision of whether a parent is entitled to representation should be determined by trial courts on a case-by-case basis. *Id.* at 31-32. The Court, however, did state that appointment of counsel may be good policy. *Id.* at 33-34.

n37 *Id.* at 31. In *Lassiter*, the Court held that an indigent parent does not always have a due process right to counsel in parental-termination proceedings. *Id.* at 33-34. One might argue that the reasoning used in *Lassiter* establishes that children do not have a due process right to counsel in dependency proceedings. However, *Lassiter* can be distinguished because essential to the holding in *Lassiter* was the Court's decision to begin with a presumption against providing counsel before it even began its *Eldridge* analysis because the physical liberty of the parents was not at stake. *Id.* at 26-27. Though a parent's physical liberty is not at stake in a termination proceeding, the physical liberty of the child is precisely what is at stake in a dependency proceeding. At the conclusion of a dependency proceeding, the court will decide where, and with whom, it is best for the child to

physically live. Sometimes a child will even be ordered by the court to live somewhere against the child's wishes. While the Court began with a presumption against counsel in *Lassiter* because the physical liberty of the parent was not at stake, it would be incorrect to begin with such a presumption in a dependency proceeding.

Lassiter can also be distinguished because the *Eldridge* factor balancing is likely to yield a different result. The child's interest in a dependency proceeding is even greater than the interest of a parent in a termination proceeding. See *infra* notes 58-63 and accompanying text and *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Ct. App. 1996), *superseded by statute as stated in In re Santos Y.*, 112 Cal. Rptr. 2d 692, 717 (Ct. App. 2001). A California court noted this, stating "as a matter of simple common sense, the rights of children in their family relationships are at least as fundamental and compelling as those of their parents... If anything, children's familial rights are more compelling than adults'." *Id.* at 524 (citing *In re Jasmon O.*, 878 P.2d 1297, 1307 (Cal. 1994)). Though the parent's interest is great, the child's interest is even greater because at stake in a dependency proceeding for a child is essentially, the child's future, family, safety, health, and home. See *infra* notes 58-63 and accompanying text. Though the parent's interest was not enough to warrant a right to counsel in *Lassiter*, the weight of the child's interest is sufficient to tip the *Eldridge* balancing scales in favor of a right to counsel, especially considering there is no reason to begin with a presumption against the right to counsel

[*491] In the term after *Lassiter*, the Supreme Court applied the *Eldridge* test in *Santosky v. Kramer* n38 to determine the burden of proof necessary to terminate parental rights. Under the New York State law at issue, the state could terminate parental rights over the objection of the parents with only a preponderance of the evidence. n39 First, the Court established that process is due to parents in termination proceedings because "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." n40 Next, to determine what process is due, the Court applied the *Eldridge* balancing test stating, "in parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight." n41 The Court then held that the Fourteenth Amendment requires that the burden of proof necessary to sever parental rights be "at least clear and convincing." n42

n38 *Santosky v. Kramer*, 455 U.S. 745 (1982).

n39 *Id.* at 747.

n40 *Id.* at 753.

n41 *Id.* at 758.

n42 *Id.* at 747-8.

In a 1979 case, *Parham v. J.R.*, n43 the Supreme Court was faced with the issue of "what process is constitutionally due a minor child whose parents [*492] or guardian seek state administered institutional mental health care for the child." n44 In applying the *Eldridge* balancing test, to determine what process was constitutionally required, the Court noted that the private interests included both the "child's and parent's concerns." n45 The State has an interest in "not imposing unnecessary procedural obstacles that may discourage the mentally ill or their families from seeking needed psychiatric assistance," n46 as well as an interest in limiting procedures to keep the proceedings from becoming adversarial. n47 In conducting its analysis, the Court considered what procedures would satisfy due process by reducing the risk of erroneous commitment, without infringing upon the rights of parents or detracting from the goal of committing individuals in need of care. n48 The Court concluded that although a parent's desire alone is not enough to commit a child, the procedures used in Georgia were constitutionally adequate because they required a parental decision to commit the child, as well as an inquiry made by a physician. n49

n43 *Parham v. J.R.*, 442 U.S. 584 (1979).

n44 *Id.* at 588. The Court conceded that the child possesses a protected and "substantial liberty interest in not being confined unnecessarily for medical treatment," *Id.* at 600, and because a liberty interest is at stake, the child is protected by the Due Process Clause of the Fourteenth Amendment. *Id.*

n45 *Id.* The Court analyzed the private interests of both the child, who is opposed to commitment, and the parents, who are seeking the commitment of their child. *Id.*

n46 *Id.* at 605.

n47 *Id.*

n48 *Id.* at 606. In his dissent, however, Justice Brennan disagreed with the majority's analysis because they did not place enough emphasis on the interests of the minor. Brennan stated, "notions of parental authority and family autonomy cannot stand as absolute and invariable barriers to the assertion of constitutional rights by children." *Id.* at 631 (Brennen, J., dissenting). Brennan also stated that "a child who has been ousted from his family has even greater need for an independent advocate." *Id.* at 631 (Brennen, J., dissenting).

n49 *Id.* at 606. Some might argue that the Court's holding in *Parham* establishes constitutional precedent that children should not be entitled to counsel. After all, in *Parham*, the child was not entitled to representation in his own civil commitment proceeding, yet the Court held that the procedures were adequate. *Parham*, however, can be distinguished because two factors that were essential to the *Parham* decision are not applicable in the context of a dependency proceeding.

First, in *Parham*, the Court relied on the presumption that the "natural bonds of affection lead parents to act in the best interests of their child," *Id.* at 602 (citing 1 W. BLACKSTONE, COMMENTARIES at 447; 2 J. KENT, COMMENTARIES ON AMERICAN LAW at 190), because there was no finding of neglect or abuse. However, a dependency proceeding is initiated because a parent was unable to protect the interests of a child, either due to abuse or neglect. When a parent has failed to adequately provide for a child, or has gone as far as to actively harm the child, that parent is no longer able to speak on behalf of the best interests of the child. *Parham* acknowledged this, stating "absent a finding of neglect or abuse... the traditional presumption that the parents act in the best interests of their child should apply." *Parham*, 442 U.S. at 604. In fact, the Court has recognized that parents "may at times be acting against the interest of their children." *Id.* at 602 (quoting *Bartley v. Kremens*, 402 F. Supp. 1039, 1047-48 (E.D. Pa. 1975)). Case law establishes that parents do not have complete control over their children. See also *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Danforth*, 428 U.S. at 52. The presumption that a parent speaks for the best interests of their child is naive, illogical, and inapplicable in the context of a dependency proceeding.

Second, the need to limit procedural obstacles is not as applicable in a dependency proceeding, as it is in a commitment proceeding. In a civil commitment proceeding, there is a greater need for a quick decision because the child may be in need of immediate psychiatric care. *Parham*, 442 U.S. at 605-06. In a dependency proceeding, however, the need to reach the proper result is far more important than the desire for a quick resolution of the case. The procedure of removing a child from his home and finding a permanent placement often takes years. See *supra* note 6 and HARRIS & TEITELBAUM, *supra* note 6, at 816. Unlike in *Parham*, speed is not a vital concern because reaching the proper result is a far more important objective.

Another important factor in the Court's decision in *Parham* was the Court's desire not to make the proceedings adversarial. The Court wanted to avoid "intrusion in the parent-child relationship" because "pitting parents and child as adversaries often will be at odds with the presumption that parents act in the best interests of their child." *Parham*, 442 U.S. at 610. While that reasoning made sense in a commitment proceeding, it is misplaced in a dependency proceeding. In a dependency proceeding, the State has already intruded into the

parent-child relationship and the focus is on parental ability, the corresponding relationship, and the safety of the child. Unlike commitment proceedings, dependency proceedings begin with an adversarial quality and providing a child with counsel will do little to increase the adversarial feel of the trial.

[*493] III. Analysis

A. Dependency Proceedings Impact the Liberty Interests of Children

The Supreme Court has stated, "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf through . . . restraint of personal liberty, which is the 'deprivation of liberty' triggering the protections of the Due Process Clause." n50 Although the State is under no affirmative obligation to act to protect a child in danger, n51 once the State chooses to act and initiates a dependency proceeding, the liberty interests of the child are implicated by State action. n52 Dependency proceedings [*494] implicate a child's liberty interest because at stake for the child is his safety, his familial relationships, his "emotional and social interests," n53 and his interest in a "stable and permanent home." n54 Since the liberty interests of the child are implicated by a State initiated dependency proceeding, n55 the [*495] State has an affirmative duty to provide the child with constitutionally adequate due process. n56

n50 *Deshaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989). It is important to remember that the fact that the parent's liberty interest may also be at stake in a dependency proceeding is no excuse for denying a child his due process. In determining whether the liberty interests of natural parents were at stake in parental termination proceedings in *Santosky*, the Court stated that "the fact that important liberty interests of the child and its foster parents may also be affected by a permanent neglect proceeding does not justify denying the *natural parents* constitutionally adequate procedures." *Santosky v. Kramer*, 455 U.S. 745, 754 (1982). Similarly, the fact that a parent's liberty interest is at stake in a dependency proceeding "does not justify denying" the child "constitutionally adequate procedures." Although the interests of parents may effect the process that is ultimately due, they cannot be used as an excuse to deny children due process.

n51 The Due Process Clause is only applicable if the "nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (citing *Fuentes v. Shevin*, 407 U.S. 67, 92 (1972)). If the interest is not one that falls under the protection of the Fourteenth Amendment, then the Due Process Clause does not apply because the State has no affirmative duty to protect individuals from harm caused by private citizens. *Deshaney*, 489 U.S. at 195.

n52 *Id.* at 200. It should be noted that the Supreme Court has never directly decided whether a child's liberty interest is at stake in a dependency proceeding. However, prior case law and rational thought indicate that a child's liberty interest is at stake in a dependency proceeding. *See supra* notes 50-56.

n53 *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 524 (Ct. App. 1996).

n54 *Id.* The California Supreme Court, relying on Supreme Court case law, has held that "children, too, have fundamental rights--including the fundamental right to be protected from neglect and to 'have a placement that is stable [and] permanent.'" *In re Marilyn H.*, 851 P.2d 826 (Cal. 1993). Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent." *In re Jasmon O.*, 878 P.2d at 1307. Furthermore, "an individual's many related interests in matters of family life are compelling and are ranked among the most basic civil rights. (*Quillion v. Walcott* 434 U.S. 246, 255 (1978); *In re Marilyn H.*, 851 P.2d 826 (Ca. 1993)). The United States Supreme Court has stated that 'the intangible fibers that connect parent and child have an infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.' (*Quoting Lehr v. Robertson*, 463 U.S. 248, 256 (1983))... Courts have described the constitutional principles which govern familial rights in language which strongly suggests the Constitution protects the familial interests of children just as it protects those of parents." *In re*

Bridget R., 49 Cal. Rptr. 2d at 523-24.

n55 See *supra* notes 50-56 and accompanying text. There are some who might argue that a child's liberty interest is not at stake in a dependency proceeding. Support for such a claim might be found in decisions such as *Reno v. Flores*, 507 U.S. 292 (1993) or *Santosky v. Kramer*, 455 U.S. 745 (1982). When both of these decisions are examined critically, however, they do not lead to the conclusion that a child has no liberty interest in the child's own dependency proceeding.

At issue in *Reno* was a class of alien juveniles who were arrested by the INS and held in custody pending deportation hearings. *Reno*, 507 U.S. at 295. The detained juveniles argued that they had a right to be released "into the custody of responsible adults." *Id.* The Court disagreed and held that the substantive due process rights of the juveniles were not violated and that the procedures used by INS were adequate. The Court stated, 'juveniles, unlike adults, are always in some form of custody,' and where the custody of the parent or legal guardian fails, the government may...either exercise custody itself or appoint someone else to do so (*quoting Schall v. Martin*, 467 U.S. 253, 265 (1984))... So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves... Minimum standards must be met, and the child's fundamental rights must not be impaired; but the decision to go beyond those requirements--to give one or another of the child's additional interests priority over other concerns that compete for public funds and administrative attention--is a policy judgment rather than a constitutional imperative." *Reno*, 507 U.S. at 302-05. When this language is carefully examined, it does not indicate that the juvenile has no interest at stake and therefore no entitlement to due process. *Reno* did not hold that the juvenile was not entitled to due process; on the contrary, *Reno* merely held that the juvenile's substantive due process rights were not violated. *Id.* at 292. In fact, *Reno* held that the procedures provided to the juveniles were constitutionally adequate. Though juveniles are "always in some form of custody" and the government does possess the power to "either exercise custody itself or appoint someone else to do so," juveniles are still entitled to their constitutionally protected procedural rights. The juvenile's interest in *Reno* may not have been fundamental under a substantive due process analysis; however, the fact that the Court recognized that "minimum standards" must be met, demonstrates that some measure of procedural due process was applicable. *Id.* at 302-05.

In *Santosky*, the Court evaluated the procedures necessary to terminate parental rights. The Court stated "at the factfinding, the State cannot presume that child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge... But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Santosky*, 455 U.S. at 760-61. One might use this language to argue that children are not entitled to due process until parental unfitness is demonstrated. However, such reasoning would be faulty in a dependency proceeding. First of all, dependency proceedings are not initiated to terminate parental rights; rather, they are intended to achieve the best interests of the child and ensure the child's safety. In a dependency proceeding, which is often initiated following allegations of abuse or neglect, it is illogical to assume that the interests of the child and the parents coincide, since directly at issue in the proceeding may be whether the parent can adequately provide for the care and safety of the child. Parental termination proceedings may focus on parents, but dependency proceedings primarily concentrate on the child's interests, future, and safety. *Santosky* stated that before parental unfitness is established, a child and parent share a common interest in the parent-child relationship; however, the same common interest does not exist in a dependency proceeding. In addition, as previously discussed, see *supra* note 50, while both the parent and the child may have an interest in maintaining the relationship, both the parent and the child are entitled to due process.

n56 It should be noted that even if a court found that the child's liberty interests were not great, due process would still be necessary. "To determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake... We must look to see if the interest is within the

Fourteenth Amendment's protection of liberty and property." *Smith v. Org. of Foster Fams. for Equal. and Reform*, 431 U.S. 816, 841 (1977) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972)). Therefore, even minor impositions on an individual's liberty require adequate procedure. The weight of the interest will dictate what procedures are due, but not whether due process is necessary. *Id.*

B. Application of the Mathews v. Eldridge Balancing Test

1. THE PRIVATE INTEREST THAT WILL BE AFFECTED n57

n57 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

In evaluating the first *Eldridge* factor, it is evident that the child's interest in his dependency proceeding is immense. Just as a "parent's interest in the accuracy and injustice of the decision to terminate his or her parental status is . . . a commanding one," n58 the child's interest in the outcome of a dependency proceeding is also "commanding." n59 But the interest of the child is even greater than that of a parent. n60 Children, as a result of their youth, may not be able to deal as well as their parents with the stress of the proceedings. n61

[*496] Children's familial rights are more compelling than adults', because children's interests in family relationships comprise more than the emotional and social interests which adults have in family life; children's interests also include the elementary and wholly practical needs of the small and helpless to be protected from harm and to have stable and permanent homes in which each child's mind and character can grow, unhampered by uncertainty and fear of what the next day or week or court appearance may bring. n62

n58 *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981).

n59 Similarly, just as a parent has a "desire for and right to the companionship, care, custody and management of his or her children," *Santosky*, 455 U.S. at 758-59 (citing *Lassiter*, 452 U.S. at 27), a child has the same interest in the companionship and care of his parents.

n60 "As a matter of simple common sense, the rights of children in their family relationships are at least as fundamental and compelling as those of their parents." *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 524 (Ct. App. 1996).

n61 A child also has more at stake than a parent because when a parent loses parental rights over a child, that is all that the parent loses. *Id.* The child, on the other hand, loses his parents, his home, and possibly contact with the only people the child has ever really known, including siblings and friends. *Id.*

n62 *Id.*

While removal from the home is one option for the child, the child may also have a strong interest in being removed from his home because, unlike parents, the child's safety may be at risk. n63 The child has a great interest in his own safety, in protection from physical and sexual abuse, and receiving adequate care and food. Aside from the criminal context, few other interests in court rival the interest of a child in the outcome of his own dependency proceeding.

n63 *Id.*

2. THE RISK OF ERRONEOUS DEPRIVATION OF SUCH INTEREST THROUGH THE PROCEDURES USED

n64

n64 *Mathews v. Eldridge*, 424 U.S. 335.

The effects of an erroneous deprivation of the child's interest are tremendous. n65 An erroneous decision that forces a child to remain in an abusive or neglectful home may result in physical harm or even death for the child. n66 An erroneous decision that removes the child from his own home will have the result of removing the child from his family, which could have a traumatic effect on the child. n67

n65 *In re Bridget R.*, 49 Cal. Rptr. 2d at 524. See *supra* notes 58-63.

n66 In most states, however, when a court decides to keep a child in the home, services are provided by the state to protect the child and help the family. See HARRIS & TEITELBAUM, *supra* note, 6 at 816.

n67 *Id.*

The effects of an erroneous decision may be awful and traumatic for the child, but under the *Eldridge* test, the likelihood of an erroneous decision still must be examined. In *Santosky*, the Court questioned the standards used for making decisions in these types of proceedings by stating that, "permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge." n68 Like permanent neglect proceedings, dependency proceedings rely on imprecise value judgments. In *Santosky*, the Court looked not only at the risk of error, but also at the possible consequences of an error, stating, "given the weight of the private interests at stake, the social cost of even occasional error is sizable." n69 The child's interests in a dependency proceeding are tremendous [*497] and the consequences of an erroneous decision may be catastrophic for the child. n70 Therefore, given the imprecise standards used and the enormous weight of the interest at issue, the risk of erroneous deprivation is immense.

n68 *Santosky v. Kramer*, 455 U.S. 745, 762 (1982).

n69 *Id.* at 764. It is important to look at both the risk of error and the possible ramifications should such an error occur.

n70 *In re Bridget R.*, 49 Cal. Rptr. 2d at 524. See *supra* notes 60-62 and accompanying text.

Recognizing that the risk of erroneous deprivation is high, however, does not end the debate. Next "the probable value, if any, of additional procedural safeguards" n71 must be considered. Providing legal counsel for children n72 is a procedural safeguard that could substantially decrease the likelihood of error by enhancing the court's fact-finding ability. n73 Children, to an even greater extent than their parents, are likely to be extremely distressed and disoriented by the proceedings. n74 As Ann Haralambie states, "victims in abuse and custody proceedings need the assistance of counsel to cope with the complexities of the law, to make skilled inquiry into the facts, to insist on the regularity of the process, and, most importantly, to pursue [the child's] desired ends." n75 While a child may be intimidated and confused, an attorney will be able to present the views and wishes of the child before the court because an attorney has the legal skills and experience to guide a child through the process. n76 Through counseling with his child client, an attorney can assist the court in eliciting the wishes of the child, as well as the facts. n77 By providing children with legal counsel in dependency proceedings, courts will be presented with a different and unique perspective of the facts; the child's perspective. More importantly, courts will then be best able to understand the wishes and desires of the child. Receiving additional evidence, including the child's perspective, will allow the court to make a more informed and accurate decision, reducing the risk of error. n78

n71 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

n72 Though somewhat obvious, children do not have the economic resources nor the ability to hire legal counsel themselves. That is one reason it is so important that the court provide children with counsel.

n73 It should be noted that when I refer to improved fact-finding by the court, the goal is neither removal of the child from the home or keeping the child with his family. Rather, the goal is improving accuracy so that dependency courts are most effectively able to achieve a result that is in the best interests of the child.

n74 ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* 30 (1993).

n75 *Id.*

n76 *Id.* "Children benefit from being given an opportunity to be heard and taken seriously in courts." HARRIS & TEITELBAUM, *supra* note 6, at 880.

n77 A traditional attorney, unlike a guardian *ad litem*, is bound by the traditional rules of attorney client privilege. This may help the child to be more comfortable and open with his attorney. Marvin Ventrell, *Rights and Duties: An Overview of the Attorney-Child Client Relationship*, 26 *LOY. U. CHI. L.J.* 259 (1995). See *infra* notes 85-88 and accompanying text discussing the differences between the roles of an attorney and a guardian *ad litem*.

n78 "There is now consensus among dependency court professionals that quality legal representation for children is necessary to a high functioning court process." Ventrell, *supra* note 6, at 31 (citing American Bar Association Center on Children and the Law, *Court Improvement Progress Report* (1998)).

See *supra* notes 68-77 and accompanying text. It is important to remember, that arguing that children have a due process right to legal representation in dependency proceedings is not the same as arguing that children should have the final say in the outcome of the proceedings and in their placement. Although the child's wishes should not be the outcome determinative factor in the case, they must be considered so that the judge can make a decision that is in the best interests of the child.

[*498] 3. THE GOVERNMENT'S INTEREST n79

n79 *Mathews v. Eldridge*, 424 U.S. 335.

Like the termination proceeding in *Santosky*, the two primary interests of the State in a dependency proceeding are "a *parens patraie* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings." n80 The State's *parens patraie* interest in the welfare of the child is best promoted by procedures that enhance the court's fact-finding ability, enabling courts to reach a result most in line with the best interests of the child. Just as the "State may share the indigent parent's interest in the availability of appointed counsel," n81 the State also may share an interest in appointed counsel for a child. Providing children with legal counsel will decrease the risk of erroneous decisions by aiding courts in their fact-finding ability. n82 Therefore, by helping courts make more accurate and informed decisions, appointed legal counsel will promote the State's goal of achieving the best interests of the child.

n80 *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

n81 *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981). This is similar to the reasoning used in *Lassiter* when the Court recognized the State's interest in appointed counsel for parents. *Id.* at 27-28.

n82 See *supra* notes 71-78 and accompanying text.

The State's fiscal interests, however, militate against providing counsel because of the cost of providing an attorney. When these two interests were compared in *Lassiter*, the Court stated, "though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as [the indigent parent's right to counsel]." n83 Similarly, though the cost of providing attorneys for children is significant and deserves consideration, that interest is significantly outweighed by the State's interest in achieving the proper outcome and providing for the child's best interests.

n83 *Lassiter*, 452 U.S. at 28.

4. BALANCING THE THREE ELDRIDGE FACTORS

Balancing the three factors demonstrates that dependency proceedings that do not provide children with legal counsel are constitutionally inadequate. n84 The child's interest in the proceeding is commanding and the outcome [*499] will have far-reaching effects throughout the life of the child. The risk of error associated with dependency proceedings is high because of the importance of the interests at stake, as well as the uncertainty and subjectivity inherent in such proceedings. Further, providing legal counsel for children will have the effect of reducing that risk by enhancing the court's fact-finding ability. Finally, the State possesses a strong interest in achieving the best interest's of the child and a less weighty interest in minimizing the costs of the proceedings. When weighing these factors, it is apparent that when dependency proceedings do not provide children with legal representation, such proceedings violate the due process rights of children. In contrast, the additional procedure of providing children with legal counsel in dependency proceedings, when viewed in light of the *Eldridge* balancing test, would satisfy the Due Process Clause.

n84 But see *supra* note 36 and *infra* note 92 regarding case by case application of the *Eldridge* analysis.

Despite the benefits providing children with counsel would offer, there are some who might argue that children are not entitled to legal representation in dependency proceedings. One rationale for such an argument may be that though it is true children are in need of some form of representation, a guardian *ad litem* is sufficient to meet the procedural requirements, so an attorney is not necessary. A guardian *ad litem* is an individual appointed by the court to speak on behalf of the best interests of the child. n85 A guardian *ad litem* is a valuable resource in a dependency proceeding, but the roles of attorneys and guardians *ad litem* are fundamentally different. The role of a guardian *ad litem* is to express his own view of the child's best interests, but a guardian *ad litem* is under no obligation to express the views and wishes of the child. n86 An attorney, on the other hand, usually n87 has an ethical responsibility to express and represent the wishes of his client before the court. The American Bar Association has adopted standards that recognize the importance of competent representation for a child in dependency proceedings. n88

n85 According to BLACK'S LAW DICTIONARY 635 (7th ed. 1999), a guardian *ad litem* is "considered an officer of the court to represent the interests of the infant." In addition, unlike a traditional attorney, a guardian *ad litem* is not bound by the attorney-client privilege.

n86 See ABA Standards for Lawyers Representing Children in Abuse and Neglect Cases, 29 *FAM. L.Q.* 375 (1995). "The ABA standards express a clear preference in favor of appointing an 'attorney' for the child, as opposed to a Guardian *ad litem*, and include a recommendation that the child's attorney 'should represent the child's expressed preferences and follow the child's direction throughout the course of the litigation,'" Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required*, 34 *FAM. L.Q.* 441, 443 (2000).

n87 See *infra* note 92. "Addressing 'one of the most difficult ethical issues of lawyers representing children,

the Standards provide that if the lawyer believes that the child's preference would be 'seriously injurious to the child,' the lawyer may request appointment of a separate guardian *ad litem* and continue to represent the child's expressed preference, unless the child's position is prohibited by law or without any factual foundation.' ABA Standards § B-4(3)." HARRIS & TEITELBAUM, *supra* note 6, at 878.

n88 The traditional role of an attorney is to "represent the interests of the client zealously within the bounds of the law." HARALAMBIE, *supra* note 74, at 12 (citing Model Code of Professional Responsibility, Canon 7). "While attorneys certainly advise and counsel their clients, the bottom line obligation is to carry out all proper, legal, and ethical directives of the client... The newer Model Rules of Professional Conduct at least address the issue of the child's attorney. ER 1.14(a) of the Model Rules adopts the general principle that attorneys for children must 'as far as reasonably possible' maintain this traditional role toward child clients. The reason for this stricter view is, in part, that if the child's attorney does not advocate the child's position *as the child sees it*, the child really has no independent voice. Ultimately, it is the court that is charged with determining the child's best interests, and attorneys *qua* attorneys have no greater expertise than anybody else to make an independent decision about what is best for the child. An attorney arguing in opposition to the position expressed by his or her client acts contrary to the traditional foundational duties defining the attorney-client relationship." HARALAMBIE, *supra* note 74, at 12. For a listing of "ten selected fundamental ethical advocacy rules for the child's attorney" adopted from the Model Rules of Professional Conduct, *see* Ventrell, *supra* note 77, at 270-72.

[*500] The goal of a dependency proceeding is to achieve the best interests of the child. n89 The court and the judge are seeking this objective, in some instances the parents may be seeking this objective, and the guardian *ad litem*, if appointed, is seeking this objective. But without an attorney, no one is presenting the wishes and feelings of the child, other than the child. "The fundamental requisite of due process is the opportunity to be heard." n90 Since a child will likely not be able to fully present his own opinions, feelings, concerns, and wishes to the court on his own, n91 the child needs an attorney to act as legal counsel so that the child is given a meaningful opportunity to be heard. n92 "The adversary system produces its best results when all positions are argued forcefully before the court. Lawyers are ill-trained to make best interests decisions and well-trained to serve as zealous advocates for their clients' positions." n93 As the ABA [*501] has recognized, n94 providing a child with legal representation will enable a court to most effectively meet the best interests of the child. Unlike a guardian *ad litem*, an attorney will represent the voice of the child, which will provide the court with more information and improve its fact-finding ability, allowing the court to make a more informed decision. n95

n89 *See supra* note 6.

n90 *Grannis v. Ordean*, 234 U.S. 385 (1914); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

n91 *See supra* note 74-77.

n92 There may be times, such as when the child is very young, when the balancing of the interests involved will not result in appointing legal counsel. For example, if a child is too young to speak, then the child cannot express her or his wishes to an attorney and a guardian *ad litem* may satisfy the child's due process. In *Lassiter*, the court determined that the right to counsel for an indigent parent should be determined by trial courts on a case by case basis. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32 (1981). *See supra* note 36. Similarly, courts may, under certain circumstances, decide that appointing legal counsel for a child will be of no value in the proceeding.

"The vast majority of legal scholars who have addressed this issue recommend that a lawyer should take direction from her or his child client (only) if the child is determined to have developed the cognitive capacity to engage in reasoned decision-making... Some propose a bright-line age rule and some propose a case-by-case assessment by the lawyer or by the appointing judge." HARRIS & TEITELBAUM, *supra* note 6, at 879. For

further discussion of when an attorney should, or should not, express the wishes of the child, *see id.*

n93 HARRIS & TEITELBAUM, *supra* note 6, at 879. "Children's judgments are not consistently worse than those of adults, particularly when all options presented are fraught with risks, and, children benefit from being given an opportunity to be heard and taken seriously in courts." *Id.* at 879-80.

n94 *The American Bar Association's Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases* "'express[es] a clear preference for the appointment' of a lawyer who takes the role of the 'child's attorney,' which is defined as 'a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as [are] due an adult client.' *Id.* §§ A-1, A-2. The National Association of Counsel for Children has also endorsed the approach of the ABA standards, as did the participants in the 1995 Fordham University School of Law Conference on Ethical Issues in the Legal Representation of Children, reported at 64 *FORDHAM L. REV.* 1281 (1996)." HARRIS & TEITELBAUM, *supra* note 6, at 878.

n95 *See supra* notes 74-78 and 86-94 and accompanying text.

Finally, some critics may argue that children are not entitled to representation because dependency proceedings are initiated to seek the best interests of the child; the court will protect the child's interests, making an attorney unnecessary. n96 However, in *Gault*, the Court stated that good intentions are a "poor substitute for principle and procedure." n97 Even when a state is acting in the best interests of a citizen, the citizen must be provided with adequate procedural protections. n98 As Arthur Vanderbilt of the New Jersey Supreme Court stated, "in their zeal to care for children neither juvenile judges nor welfare workers can be permitted to violate the Constitution, especially the constitutional provisions as to due process that are involved in removing a child from its home." n99 Although *Gault* dealt with delinquency, its reasoning applies in the dependency context as well. The altruistic custodial interests of the State cannot justify depriving a child of his Fourteenth Amendment procedural rights. n100 Just as a child cannot be forced to live in an industrial school without benefits of counsel, n101 proceedings should not be held to determine the placement of a child [*502] without the child's having the benefits of counsel. No matter how benevolent the interests of the court may be, a child is constitutionally entitled to adequate procedural protections. n102

n96 Rebuttal of other possible arguments against a child's right to counsel in dependency proceedings can be found in *supra* notes 37, 49, and 55.

n97 *In re Gault*, 387 U.S. 1, 27 (1976).

n98 *Id.*

n99 *Id.* at 19 (citing ARTHUR VANDERBILT, VIRTUE, BASIC STRUCTURE FOR CHILDREN'S SERVICES IN MICHIGAN, x (1953)).

n100 In addition, though a child in a dependency proceeding is not at risk for imprisonment, many parallels can be drawn between the delinquency context and a dependency proceeding. For example, in *Gault*, the child was being placed in an industrial school against his will because the state believed it was in the best interests of the child. *In re Gault*, 387 U.S. at 27. The industrial school was not a prison and was actually intended to benefit *Gault*, but the Court stated "it is of no consequence...that the institution to which he is committed is called an Industrial School." *Id.* Regardless of the name given, it was a form of confinement by the state. *Id.* Similarly, in a dependency proceeding, there is a possibility that the child will be forced to live in a home against his will because the state believes it is in the child's best interests.

n101 *Id.* *See supra* note 16.

n102 *Id.*

IV. Proposal and Conclusion

Case law establishes that children are protected by the Constitution. n103 The Fourteenth Amendment of the Constitution guarantees individuals due process of law before a court can issue a decision affecting one's liberty or property interest. n104 A child's liberty interest is at stake in a dependency proceeding and, therefore, the child is entitled to constitutionally adequate procedural protection. n105 To determine "what process is due," n106 the Supreme Court has created a three-part balancing test. n107 When the balancing test is applied to a child's right to counsel in a dependency proceeding, the weight of the interests involved demonstrates that when children are not provided with legal counsel, they are denied their constitutional due process rights, which are guaranteed in order to protect their liberty interests. n108 Providing children with legal counsel, however, would satisfy the *Eldridge* balancing test as a constitutionally sufficient procedural protection.

n103 *See supra* notes 14-20 and accompanying text.

n104 *See supra* notes 2 and 4.

n105 *See supra* notes 50-56 and accompanying text.

n106 *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

n107 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1974).

n108 *See supra* notes 58-84 and accompanying text.

Though at first glance, providing children with legal counsel may seem like a radical idea, it is far from it. In his *Lassiter* dissent, Justice Blackmun recognized this possibility when he stated, "the possibility of providing counsel for the *child* at the termination proceeding has not been raised by the parties. That prospect requires consideration of interests different from those presented here, and again might yield a different result with respect to the right to counsel." n109 A Supreme Court ruling that the Due Process Clause of the Fourteenth Amendment requires that children be provided with counsel would not be inconsistent with precedent. Rather, it would be a logical extension of reasoning used by the Court in prior decisions.

n109 *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 43 (1981) (Blackmun, J., dissenting).