

Where Are All the Children? Increasing Youth Participation in Dependency Proceedings

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Introduction

Should the proverbial alien from Mars visit the typical juvenile court hearing a dependency¹ case in 2007, he would find the scene confusing, to say the least. The sheer number of people gathered to determine where a child should live, decide who should take care of her, and investigate whether or not her needs are being met would no doubt impress the alien. There will be a caseworker from the public child welfare agency and, in certain states, a representative from a private foster care agency. There will be a public agency lawyer and possibly one for the private agency too. The child's mother and father will be there, each with their own attorney.² There may be relatives and a foster parent. There could very well be a Court Appointed Special Advocate, a non-lawyer volunteer who is responsible for offering some independent advice to the court. In most jurisdictions, the child will have her own

¹ "Dependency" refers to the combined judicial and social welfare system that seeks to ensure the safety, permanency, and well-being of children. Children typically enter the dependency system when a state agency responsible for child protection learns of an allegation that a child is being abused or neglected by his parent or other person legally responsible for his care. See *infra* Part II. Common synonyms used in some jurisdictions are "child protective proceedings" (New York) and "deprivation proceedings" (Georgia). The largest dependency system in the country is California's. For an excellent overview of the California dependency system, with a particular focus on the judicial function in that system, see CAL. ADMIN. OFFICE OF THE COURTS, CALIFORNIA JUVENILE DEPENDENCY COURT IMPROVEMENT PROGRAM REASSESSMENT (2005), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdf/CIPReassessmentReport.pdf> (last visited Nov. 20, 2007).

² The Supreme Court has held that parents do not have the constitutional right to a lawyer when they are faced with a state-filed petition to terminate their parental rights. *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981). Though there is no federal constitutional requirement that they do so, most states provide indigent parents with court-appointed counsel in termination of parental rights cases as well as in earlier stages of the dependency process. See Bruce Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 15 TEMPLE POL. & CIV. RTS. L. REV. 635, 638-39 (2006) (citing various state statutes and caselaw).

lawyer or guardian ad litem.³ And of course, there is the judge.

If our alien friend were to transmit a report back to the mother ship about the way in which American courts supervise the child welfare process and make critical decisions about children's lives, surely he would have many positive things to say about the exhaustive nature of our process in dependency court. Look at the many adults concerned about the child gathered together! But the alien, being all-knowing and wise as proverbial aliens are, would notice one glaring problem with this scene. There is someone critical to the court process who is noticeably absent. Someone with information no one else has. Someone who has to live with the decisions

³ The Federal Child Abuse Prevention and Treatment Act of 1975, requires states, as a condition for funding for child protection programs, to assure that they have "provisions and procedures requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings." 42 U.S.C. 5106a(b)(2)(A)(xiii) (2007). States have created various models of child representation in response to this requirement; indeed, no two states have exactly the same model. See REPRESENTING CHILDREN WORLDWIDE, *available at* http://www.law.yale.edu/rcw/rcw/jurisdictions/am_n/usa/united_states/fronpage.htm#_ednref12 (last visited Feb. 28, 2007). In New York, the child's attorney is called the law guardian. The state created the system of "law guardians for minors who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court." N.Y. FAM. CT. ACT § 241 (Consol. 2007). Nothing more is said in the statute about the role the law guardian is to play in dependency proceedings. On October 17, 2007, Chief Judge Judith Kaye signed an administrative order relating to the functions of the attorney for the child in Family Court proceedings. The order created a new rule that requires law guardians in dependency matters to "zealously advocate the child's position." The rule permits the attorney to advocate a position contrary to the child's wishes only if "following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child," and in any event the lawyer must still inform the court of the child's wishes. R. CHIEF JUDGE (N.Y.) § 7.2, *available at* <http://www.nycourts.gov/rules/chiefjudge/07.shtml> (last visited Dec. 3, 2007).

that are made in court far more than anyone else with an interest in the outcome.

Where is the child?

This Article analyzes the strange universe that is the dependency court, the only American judicial forum in which the one person at the center of the case is rarely present and, in most states, has no established right to be present. Part II provides a basic overview of the dependency system and the legal framework around foster care. Part III introduces one foster child who, against all odds, made her way to court to speak to the judge in her own words, providing a critical perspective on the case that was previously missing. Part IV argues that courts and lawyers should allow and encourage foster youth to attend and participate in court proceedings relating to their custody. The Article concludes in Part V with information about jurisdictions that have begun to incorporate the voice of young people in judicial proceedings and an outline for how others might approach this issue.

Part II

In the American legal tradition, children are raised by their parents, who have wide discretion to decide how best to meet the challenge.⁴ State intervention to protect children is limited to circumstances in which the parenting falls below a statutorily-defined minimum standard of care.⁵ That intervention can take a range of forms, such as the intrusion of

⁴ The standard, catechism-like recitation of Supreme Court cases endorsing a strong parental role invariably includes the following cases: *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Parham v. J.R.*, 442 U.S. 584 (1979); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁵ *See, e.g.*, N.Y. FAM. CT. ACT § 1012(f) (Consol. 2007). Throughout the Article, and this section in particular, I cite New York statutes as examples of how the dependency process works. Most states' schemes are similar, due partly to federal requirements.

an investigation by child protective services (CPS) and referral to voluntary services⁶; an administrative finding of child maltreatment⁷; temporary removal of the child from her home and placement in foster care⁸; and even permanent termination of parental rights.⁹ When parents do not comply with CPS requirements, or when the state believes the child is at too great a risk to remain at home even if parents were to comply with services, public officials are obligated to initiate a lawsuit in an appropriate court; in most urban jurisdictions, it is a specialized family or juvenile court.¹⁰ While CPS may take temporary physical custody of a child on an *ex parte* basis if there is a grave risk of harm¹¹, only a court can transfer legal custody of a child from his parents to the state.¹²

Juvenile court proceedings concerning children whose parents are charged with abuse or neglect are commonly known as dependency cases.¹³ The manner in which dependency proceedings are structured is remarkably uniform across the country—partly due to the minimum requirements of constitutional law, and partly because federal programs that provide funding for child abuse prevention and treatment and foster care services require states to meet certain procedural requirements.¹⁴ The local public agency initiates the proceeding by filing a petition.¹⁵ Parents appear and may be assigned counsel.¹⁶ The child may be assigned an attorney, a guardian ad litem, both, or neither, depending on the

⁶ See, e.g., N.Y. SOC. SERV. L. § 424.6 (Consol. 2007) (investigation) and § 424.11 (referral for services).

⁷ See, e.g., N.Y. SOC. SERV. L. §§ 424.7 (Consol. 2007) and 412.12.

⁸ See, e.g., N.Y. FAM. CT. ACT. § 1024 (Consol 2007).

⁹ See, e.g., N.Y. SOC. SERV. L. § 384-b (Consol 2007).

¹⁰ See, e.g., N.Y. SOC. SERV. L. § 424.11 (Consol. 2007) and N.Y. FAM. CT. ACT. § 1011 (Consol. 2007).

¹¹ See, e.g., N.Y. FAM. CT. ACT § 1024 (Consol. 2007).

¹² See, e.g., N.Y. FAM. CT. ACT. § 1026(c) (Consol. 2007) (requiring agency to file a petition in Family Court by the next court day after an *ex parte* removal of a child from his home).

¹³ See *supra* note 1.

¹⁴ See Child Abuse Prevention and Treatment Act *supra* note 3.

¹⁵ See, e.g., N.Y. FAM. CT. ACT § 1031(a) (Consol. 2007).

¹⁶ See *supra* note 2.

jurisdiction.¹⁷ The court issues temporary orders regarding custody, parental and sibling visits, and services intended to rehabilitate the parents and address the children's medical, educational, and emotional needs. Eventually, a hearing is conducted regarding the factual allegations in the government's petition (the fact-finding or jurisdictional hearing).¹⁸ If the court finds that the parent has abused or neglected the child, or is otherwise unfit, a dispositional hearing is scheduled for a later date.¹⁹ At the dispositional hearing, the court will make longer-term orders, generally lasting six months to a year. Depending on the parent's compliance with the service plan written by the agency and ordered by the court, the agency may decide to return the child home or – on the other extreme – initiate proceedings to permanently terminate the parent's parental rights (the "TPR" case) and enable the child to be adopted by a new family. In some jurisdictions, the agency may not send the child home without notifying the court and other parties first, and sometimes a court order is required.²⁰

The range of parental unfitness allegations in dependency cases is vast.²¹ At the most extreme, a parent who has killed one of her children may be charged in dependency court and, as a result, lose her other children to foster care.²²

¹⁷ See *supra* note 3.

¹⁸ See, e.g., N.Y. FAM. CT. ACT § 1044 (Consol. 2007).

¹⁹ See, e.g., N.Y. FAM. CT. ACT §§ 1045, 1047 (Consol. 2007).

²⁰ New York law permits the agency to return a child home without a court order in its discretion, provided that the agency notifies the court and the parties 10 days in advance. N.Y. FAM. CT. ACT § 1089(d)(2)(viii)(C) (Consol. 2007).

²¹ See generally, VIRGINIA G. WEISZ, CHILDREN AND ADOLESCENTS IN NEED 35-110 (Sage Publications 1995).

²² Because the standard of proof in dependency court is either preponderance of the evidence or clear and convincing evidence, depending on the jurisdiction, and because some types of hearsay evidence is admissible in dependency proceedings, it is quite possible that a parent may face a dependency petition even though she may not be charged criminally for the death of a child. Prosecutors are ethically prohibited from filing charges if they do not think there is sufficient admissible evidence to prove a crime beyond a reasonable doubt. So, for example, I once represented three brothers whose parents were accused of having

Occasionally, cases involve difficult topics of sexual and severe physical abuse. Typically, cases involve parental substance abuse, mental illness and/or cognitive impairment; parental failure to protect the child from a known abuser (such as a mother's boyfriend); failure to meet the child's medical needs; or failure to ensure that a child goes to school. There are also cases in which the child is being raised in an environment said to be physically or emotionally unhealthy.²³ Most cases can proceed to a fact-finding hearing without the child's in-court testimony, either because her testimony is simply not needed or it can be admitted as a hearsay statement.²⁴

After the dispositional hearing, the court will review a dependency case on a regular basis for as long as the child remains in foster care and/or the parents remain under supervision of the state agency.²⁵ Federal law requires a minimum of one judicial review per year, though many states provide two or more per year.²⁶ At these "permanency" hearings, the court reviews the extent to which the parent is making progress in her required services, the child's needs,

starved a fourth son to death. The parents were charged in Family Court, the surviving children were placed in foster care, and ultimately the parents surrendered their rights so the children could be adopted by their foster family. Despite a lengthy criminal investigation, no criminal charges were ever filed. The parents claimed that the child, who was 10 at the time of his death, had a stomach virus that was more serious than they had realized. In order to prove that the parents had systematically starved a 10-year-old child, the prosecutor needed eyewitness testimony from my clients that would stand up to cross-examination by an experienced criminal defense attorney. That testimony was not forthcoming. In contrast, in the dependency proceeding ACS merely needed to show, by a preponderance of the evidence, that the parents' actions or inactions had led to their child's death, and their own story of failure to recognize the severity of the child's illness was sufficient to prove medical neglect.

²³ A physically unhealthy environment might be one in which the family resides in an illegal apartment with inadequate heat, light, and ventilation, or the home is excessively unsanitary. An emotionally unhealthy environment might be one in which the parents are engaged in behaviors or activities that are unsuitable for children to be exposed to.

²⁴ See, e.g., N.Y. FAM. CT. ACT § 1046(a)(vi) (Consol. 2007).

²⁵ See, e.g., N.Y. FAM. CT. ACT § 1088 (Consol. 2007).

²⁶ 42 U.S.C. § 675(5)(C) (2007).

and services the agency is providing to meet those needs.²⁷ For example, in New York, the foster care agency is required to submit a written report to the court and the parties providing “up-to-date and accurate information regarding . . . the health, well-being, and status of the child.”²⁸ This must include information about the child’s medical care, current placement, and educational progress.²⁹ The agency must also report on the visiting between the child and her parent(s) and siblings, including the frequency, duration, and quality of those visits.³⁰ At the conclusion of the permanency hearing, assuming the child remains in foster care; the court will make an order directing the agency to provide the family continued services.³¹ Among other things, the order will include a description of the visiting plan³²; for a child over the age of 14, a description of the services required to assist in the development of independent living skills³³; and other orders that the court deems appropriate.³⁴

In addition to the focus on service provision, dependency courts conduct permanency hearings with an eye towards avoiding a lengthy stay for the child in foster care. This is done by review of the agency’s long-term permanency plan for the child.³⁵ If the plan remains family reunification, the court will issue a new order directing both the agency and the parent to do various things to achieve that goal.³⁶ If the plan is changed to adoption, the court will direct the agency to

²⁷ See, e.g., N.Y. FAM. CT. ACT § 1089 (Consol. 2007).

²⁸ N.Y. FAM. CT. ACT § 1089(c)(2) (Consol. 2007).

²⁹ *Id.* The template report that the agency is required to use is available at the New York State Unified Court System website, available at <http://www.courts.state.ny.us/forms/familycourt/pdfs/PH-2.pdf> (last visited Sept. 19, 2007).

³⁰ N.Y. FAM. CT. ACT § 1089(c)(2)(iv) (Consol. 2007).

³¹ N.Y. FAM. CT. ACT § 1089(d)(2)(vii) (Consol. 2007).

³² N.Y. FAM. CT. ACT § 1089(d)(2)(vii)(A) (Consol. 2007).

³³ N.Y. FAM. CT. ACT § 1089(d)(2)(vii)(G) (Consol. 2007).

³⁴ N.Y. FAM. CT. ACT § 1089(d)(2)(viii) (Consol. 2007).

³⁵ See e.g., N.Y. FAM. CT. ACT §§ 1089(c)(1) (Consol. 2007) and (3)-(5).

³⁶ N.Y. FAM. CT. ACT §§ 1089(d)(2)(vii) (Consol. 2007) and (viii)(F).

take certain steps, including recruitment of an adoptive family and filing of a TPR motion or petition.³⁷

Federal law requires states to initiate TPR cases if a child has been in foster care for 15 of the most recent 22 months, unless there is some compelling individualized reason not to.³⁸ As with the original dependency case, a TPR proceeding is bifurcated. One hearing determines if there are legal grounds to terminate parental rights and a second determines what disposition would be in the child's best interests.³⁹ State statutes lay out the legal grounds (or causes of action) for a TPR proceeding; these generally concern whether the parent has fulfilled the rehabilitative mandates imposed on her at the dispositional phase of the dependency proceeding.⁴⁰ In general, there is little need for a child's testimony at the first stage of a TPR proceeding, as the focus is typically on the parent's noncompliance with the agency's service plan or other alleged parental unfitness. Notwithstanding that grounds for termination may be proven in the first stage, the court is obligated to weigh whether TPR is in fact in the child's best interests at the dispositional hearing.⁴¹

Once a TPR is granted, the court will continue to conduct permanency hearings until the child is ultimately adopted or, the child "ages out" of foster care without having ever been adopted.⁴² During these hearings the court will review the child's needs, the services being provided to meet those needs, and what steps are being taken to find an adoptive family.⁴³ As the child gets older, adoption often becomes less

³⁷ N.Y. FAM. CT. ACT § 1089(d)(2)(viii)(E) (Consol. 2007).

³⁸ 42 U.S.C. § 675(5)(E) (2007).

³⁹ *See, e.g.*, N.Y. FAM. CT. ACT § 625 (Consol. 2007).

⁴⁰ *See, e.g.*, N.Y. SOC. SERV. L. § 384-b (Consol. 2007). In some states, the juvenile court has the authority to terminate a parent's rights in the initial dependency proceeding. *See, e.g.*, MASS. GEN. LAWS. ch. 119, § 26(4) (Consol. 2007).

⁴¹ *See, e.g.*, N.Y. FAM. CT. ACT § 631 (Consol. 2007).

⁴² *See, e.g.*, N.Y. FAM. CT. ACT § 1089(a)(1) (Consol. 2007).

⁴³ *See, e.g.*, N.Y. FAM. CT. ACT § 1089(c)(4)(iv) (Consol. 2007).

likely, and some young people long to reinitiate contact with their biological parents.⁴⁴

Aside from the narrow fact finding hearings in the initial dependency and TPR stages, dependency proceedings tend to focus less on past facts and more on the current social, emotional, and medical well-being of children. While there is a body of law that governs these proceedings, the obligations of the agency, and the power of the dependency court to make certain types of orders, advocacy in dispositional and permanency hearings is, for the most part, less about the law and more about the people involved. It is less about standards and more about needs; less about burdens of proof and more about emotional suasion. Typical questions the court poses include:

- Where is the child living, what is it like there, and how well matched is the placement to her needs?
- What is the nature and scope of visits with his biological parents, siblings, and extended family?
- What is the permanency plan for this child and what is the agency doing to make it happen?
- Is the child able to participate in age-appropriate activities that any child not in foster care would participate in?
- What are the child's career goals, hobbies, and interests, and are they being adequately nurtured?

⁴⁴ See Christine Gottlieb & Erik Pitchal, *Family Values: How Children's Lawyers Can Help Their Clients by Advocating for Parents*, 58 JUV. & FAM. CT. J. 17 (2007) (noting, in permanency planning for older youth, the importance of an option to vacate a prior TPR order). California law allows for the vacatur of a TPR order in appropriate cases. Only the child's attorney may file the motion, and three years must have elapsed since termination of parental rights, the child must not have been adopted, and the court must determine that adoption is no longer the permanency plan. The three year requirement may be waived if the agency and the child both stipulate that the child is not likely to be adopted. CAL. WELF. & INST. CODE § 366.26(i) (Deering 2007).

- What is the status of the child's educational progress and medical, mental, and dental health?
- Does she have needs in these areas that are unaddressed? How can they best be met?

By considering these and other similar questions, permanency hearings are as wide-ranging in scope as they are critical in function.⁴⁵ Complete answers cannot be provided if the child is not there to contribute.

Recently, increased national attention has been paid to the issue of youth participation in dependency proceedings. This is partly due to the fact that the median age of foster children has been on the rise and is currently 10.9.⁴⁶ There are now approximately 227,000 people in the United States aged 12 to 20 who are in state custody for their own protection.⁴⁷ These adolescents, like teenagers and young adults everywhere, have opinions about the world and their own lives. Yet their views are silenced.⁴⁸

Additionally, the Pew Commission on Children in Foster Care sparked a national conversation on the importance of youth participation in dependency court proceedings with the issuance of a major report in 2004.⁴⁹ The

⁴⁵ See also NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RES. GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 70-72 (1995) (outlining the questions the dependency court should be asking at permanency hearings).

⁴⁶ CHILD WELFARE INFO.

GATEWAY, FOSTER CARE: NOS. AND TRENDS (2005), available at <http://www.childwelfare.gov/pubs/factsheets/foster.cfm#backnotefive> (last visited Feb. 28, 2007). The data is current as of September 30, 2003.

⁴⁷ ADMIN. FOR CHILDREN AND FAMILIES, THE AFCARS REPORT (Sept. 2006), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.htm (last visited (Feb. 28, 2007). The data are preliminary estimates for September 30, 2005.

⁴⁸ Jill Chaifetz, *Listening to Foster Children in Accordance With the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 10 (1999).

⁴⁹ PEW COMM'N ON CHILDREN IN FOSTER CARE,

commissioners—judges, politicians, and experts in child welfare—were appalled at the state of the national foster care system, and the report contains several pointed recommendations for how the system needs to be righted.⁵⁰ In its section on strengthening courts, the Pew Commission recommends that courts “be organized to enable children and parents to participate in a meaningful way in their own court proceedings.”⁵¹

Data on youth participation in dependency court is not easily available. In the wake of its report, the Pew Commission sponsored a national survey of current and former foster youth conducted by Home At Last, a public education initiative based at the Children’s Law Center of Los Angeles.⁵² Less than 15% of respondents reported that they attended court most of the time.⁵³ According to the survey, the reasons that young people do not attend court include that they do not want to miss school (or were not allowed to) (21%) and that they believe that no one will listen to them in court anyway (24%).⁵⁴ Of those youth who have attended court, 17% percent reported that they were not permitted to speak to the judge.⁵⁵ Assuming these data are representative, professionals in the system have a lot of work to do to make youth feel welcome in court and to take their views into account in a meaningful and authentic way.

FOSTERING THE FUTURE: SAFETY, PERMANENCE, AND WELL-BEING FOR CHILDREN IN FOSTER CARE (2004), *available at* <http://pewfostercare.org/research/docs/FinalReport.pdf> (last visited Nov. 25, 2007).

⁵⁰ *Id.* at 17-18.

⁵¹ *Id.* at 18.

⁵² HOME AT LAST, FOSTER YOUTH PARTICIPATION IN COURT: A NATIONAL SURVEY (2006).

⁵³ *Id.* at 9.

⁵⁴ *Id.* at 12.

⁵⁵ *Id.*

Part III

I once had a client whom I will call Jenny. Jenny was 14 with a sharp mind and very firm opinions about her situation and her case. She wanted to go home and live with her mother. Jenny's mother was an alcoholic who had failed, after many years, to complete an alcohol treatment program. Jenny had severe muscular dystrophy confining her to a wheelchair and forcing her to rely on a respirator to breathe. She lived in the adult ward of a rehabilitation hospital, because her medical condition was so fragile and the agency had been unable to locate a suitable foster home for her needs. Still, she went to regular public school, was popular with her classmates, and earned excellent grades.

To convince the judge to let her go home, I came up with what I thought was a pretty clever argument. Given her significant medical needs, it was clear that no matter where she lived, she would need 24 hour nursing care. I argued that by having a nurse in the home, there would be no child protection concerns to have Jenny living with her alcoholic mother. The judge thought about this, but was not persuaded.

When I reported the news to Jenny, she was disappointed, though not surprised. However, she had important things to say about her situation and she was not entirely convinced that I had argued her case effectively. She had had several law guardians, as well as a parade of caseworkers, over the years. Each of these people claimed to be working on her behalf, but she had never seen any results. So, she told me she wanted to see the judge.

In and of itself, this was a remarkable request. So few young people I represented ever asked about this, and I hardly ever offered or encouraged it—after all, I had too many cases and the Family Court was just not set up to have kids come in and participate. Jenny's request was even more daunting due to her medical condition. After all, she lived her life in a bed and a wheelchair and could not breathe on her own. Family Court *certainly* was not set up for someone in her state to come in.

I thought about it for about two seconds, noticed the expression of resolve and determination on Jenny's face, and said "Yes, of course, I will make this happen for you." I talked to the judge, who agreed to meet with Jenny privately in her chambers. Given the many people involved, it took significant effort to find the right day and time and to arrange for Jenny and all of her clunky medical equipment to be transported to court and then up to chambers. With help from the court staff and cooperation from the other lawyers on the case, I put the pieces into place.

Jenny was wheeled into the judge's chambers, and at first, it seemed to me that the meeting was not going so well. Jenny would not say a word! Suddenly this brilliant, sharp-tongued, fast-witted teenager had clammed up. I considered how angry the judge was going to be with me for wasting her time—after all, I had told her all about how talkative and opinionated Jenny was. But slowly, Jenny started to open up. While she never got as chatty with the judge as she had been with me, she did express her views.

The judge stuck to her prior decision. In retrospect, there was probably nothing Jenny could have done or said that would have made the judge reconsider the earlier order. But one thing is certain: everyone felt a whole lot better that Jenny had come to court. Jenny felt like she had finally been heard, and her mother was glad to know that her daughter was being taken seriously. The court staff—the court officers, the clerks, the lawyers running around—stopped in their tracks when Jenny's wheelchair came through. It was clear that they understood something very important was happening. Even the judge, despite not changing her order, was visibly moved. She remembered Jenny from that day forward, having a face to go with the name, and a person to go with the story. The experience affected the judge more subtly, as well. It may have not made a difference in this particular case, but going forward, the judge was more apt to slow down, to ask more questions and inquire about the child's perspective on the case.

Part IV

Jenny's story illustrates three primary reasons why, normatively speaking, young people in foster care should be participants in their own court proceedings. Barring exceptional circumstances, youth participation in family court is good for individual youth, their cases, and society.

A. *Youth participation is good for youths.*

Nothing short of a child's freedom is at stake in foster care proceedings.⁵⁶ If children are removed from their parents, the state agency usually controls where they live. Many children are subject to multiple placements during their time in state custody.⁵⁷ Throughout the dependency process, a child is subject to the possibility of being placed in a group home or other institutional setting (i.e., a locked mental health facility) in which her physical liberty may be compromised.⁵⁸ Youth may be moved from one placement to another with little or no warning and without explanation. In a system that can be very disempowering to youth, being present in court returns to them a bit of dignity; being part of the process in which their fate is decided can heighten their self-esteem.⁵⁹

⁵⁶ See generally Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Proceedings*, 15 TEMPLE POL. & CIV. RTS. L. REV. 663 (2006).

⁵⁷ See *Kenny A. ex. rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005).

⁵⁸ *Id.*

⁵⁹ Quantitative study of the levels of youth civic participation is very challenging. Molly W. Andolina, Krista Jenkins, Scott Keeter, and Cliff Zukin, *Searching for the Meaning of Youth Civic Engagement: Notes From the Field*, 6 APPLIED DEVELOPMENTAL SCIENCE 189 (2002). “[F]ew studies have examined whether civic engagement programs continue to foster adolescents’ civic engagement after the programs have ended, and most studies have not evaluated program impacts on other outcomes, such as educational attainment, over a long period of time.” Jonathan F. Zaff and Erik Michelsen, *Encouraging Civic Engagement: How Teens Are (or Are Not) Becoming Responsible Citizens*, Child Trends Research Brief (October 2002), available at www.childtrends.org/files/k6brief.pdf (last visited Nov. 3, 2007).

Put another way, it is good for young people to participate in cases where such critically important decisions are made about them.⁶⁰

Many states require the appointment of a lawyer for children in dependency proceedings. The mere fact that a youth has an attorney does not mean that the youth cannot or should not attend court proceedings. First, there is a fundamental unfairness to a regime in which the other key players—the agency caseworker and the parents—have a right to be present in addition to their lawyers, but the child does

Studies do exist that document a correlation between youth participation in extracurricular activities and positive outcomes for youth. See Nancy Darling, *Participation in Extracurricular Activities and Adolescent Adjustment: Cross-Sectional and Longitudinal Findings*, 34 J. YOUTH & ADOLESCENCE 493 (2005); Jennifer A. Fredericks & Jacquelynne S. Eccles, *Extracurricular Involvement and Adolescent Adjustment: Impact of Duration, Number of Activities, and Breadth of Participation*, 10 APPLIED DEVELOPMENTAL SCI. 132 (2006); Nancy Darling, Linda L. Caldwell & Robert Smith, *Participation in School-Based Extracurricular Activities and Adolescent Adjustment*, 37 J. LEISURE RES. 51 (2005); Bonnie L. Barber, Margaret R. Stone & Jacquelynne S. Eccles, *Adolescent Participation in Organized Activities*, in WHAT DO CHILDREN NEED TO FLOURISH: CONCEPTUALIZING AND MEASURING INDICATORS OF POSITIVE DEVELOPMENT 133 (Kristen Anderson Moore & Laura H. Lippmann eds. 2005).

⁶⁰ See F. ANG ET AL., PARTICIPATION RIGHTS OF CHILDREN 232-36 (Intersentia Uitgevers N V 2006).

Researchers in developmental psychology have documented 40 discernible “developmental assets” for adolescents, experiences and qualities that are essential to healthy growth and transformation from child to adult. Among these are specific assets relating to empowerment. See Search Institute, *40 Developmental Assets* (1997), available at www.search-institute.org/assets (last visited Nov. 3, 2007). The Search Institute conducted a survey of the attitudes and behaviors of 150,000 youth in grades six to 12 in 202 communities. The study measured the percentage of respondents who, based on their answers to the survey’s questions, had experienced the 40 assets. As a group, the four assets in the empowerment category had the lowest overall experience rates compared to the other seven groups. Search Institute, *Percentages of 6th- to 12th-Grade Youth Experiencing Each Asset* (2003), available at www.search-institute.org/research/assets/assetfreqs.html (last visited Nov. 3, 2007).

not. There is a significant risk that the child's voice will be unwittingly distorted, even by her own lawyer.⁶¹

Second, without a conception of what "court" is, early adolescents and younger children are unable to understand fully what the lawyer's role in the process is. Emily Buss makes this observation powerfully, pointing out that children understand what doctors, teachers, and possibly even therapists do, but the ordinary youth lacks comprehension regarding attorneys and judges.⁶² An attorney who meets with a client to solicit the youth's views on the case is forced to explain that she will be going to court to see the judge and ask the judge to do what the client wishes. This makes little or no sense to a child who does not know what a court is or what a judge does.

When they are not present for court, youth must rely on adults to tell them what happened. Many young people report receiving conflicting information about what transpired in court without them. Often their law guardian tells them one thing, and their caseworker tells them something completely different—if they are told anything at all. Often, major case decisions are made—such as a change in placement—and the young person has no idea that anything has happened until suddenly her world turns upside down. The harmful impact caused by a substantial change in a child's living situation is only increased when the change comes as a surprise, or when the child's confusion puts her in constant fear and uncertainty about the permanence of her present living situation. By being present in court, children's misconceptions, confusion, or

⁶¹ Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L. J. 692, 711 (2006).

⁶² Emily Buss, *You're My What?: The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699 (1996). Buss explains that even if a child has a sense of lawyers and courts from television, the child may still be confused. After all, on television, lawyers go to court with their clients by their side. *Id.* at 1707.

misunderstandings can be mitigated or avoided altogether and surprises can be avoided.⁶³

⁶³ It is important to note that merely having the young person present in court will not guarantee that her experience will be a positive or meaningful one. The adults involved in the judicial system must make serious efforts to create a space for youth in which they are truly heard. Frequently, when youth are invited to participate, they are not truly engaging with adults because adults select which of them gets to be involved and the young people serve as mere tokens. Caitlin Cahill and Roger A. Hart, *Re-Thinking the Boundaries of Civic Participation by Children and Youth in North America*, 17 CHILDREN, YOUTH AND ENVIRONMENTS 213, 218 (2007). Youth participation is “often exploitative or frivolous.” Roger A. Hart, *Children’s Participation: From Tokenism to Citizenship*, UNICEF Innocenti Essays No. 4 (1992) at 4, available at http://www.unicef-irc.org/publications/pdf/childrens_participation.pdf (last visited Dec. 3, 2007). Authentic participation can be undermined when adults in power are domineering and control the decision-making process. Mike Kesby, *Rethorizing Empowerment-through-Participation as a Performance in Space: Beyond Tyranny to Transformation*, 30 SIGNS 2037 (2005). True youth participation is “a process of engaging young people in developing knowledge and transferring it to others.” Della M. Hughes and Susan P. Curran, *Youth Engagement Makes a Difference in Addressing Community Violence*, 5 COMMUNITY AND YOUTH DEVELOPMENT J. 7, 8 (2005), available at http://www.cydjournal.org/2005Fall/pdf/Publisher_Notes.pdf (last visited Dec. 3, 2007). It requires viewing youth as “resources and agents of change, rather than as a collection of problems in need of prevention.” *Id.* at 7.

Lawyers for children must work very hard to make sure that for clients who do come to court, the court process unfolds in a developmentally healthy manner. This will often require a significant time investment *out* of court. “They must carefully explain to clients their rights, the proceedings, and the potential consequences of the case; effectively counsel the clients on their options; build trust; and elicit the clients’ wishes that will guide each stage of the proceedings.” Patricia Puritz and Katayood Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466, 472 (2007). The court process itself needs to be reformed—cases should be scheduled so as not to conflict with school, and the physical courthouse space needs to be more welcoming to young people. If these things are not done, youth are likely to be more frustrated than empowered. See Daniel G. Cooper and Scott P. Hays, *Engaging Youth for Positive Change: A Critical Analysis of Case Studies on Local Action*, 17 CHILDREN, YOUTH AND ENVIRONMENTS 433, 439

B. Youth participation is good for individual cases.

When young people have a voice in Family Court, judges have more information and are able to make better decisions, leading to better results for youth and their families. Youth have information, opinions, and perspectives that nobody else in the courtroom has.

Few decisions are as enormous in our society as the decision to involuntarily remove a child from her parents' custody and place her in foster care. Children face the possibility of great psychological harm when separated from their families, even in cases where abuse is a factor.⁶⁴ Removal of a child is therefore a decision that should not be made without closely weighing every potentially relevant fact, and a child's account of events is clearly a valuable and

(2007) (describing frustration of youth involved in civic engagement program when city alderman inexplicably canceled appointment).

⁶⁴ See, e.g., *In re Nicholson*, 181 F. Supp. 2d 182, 185 (E.D.N.Y. 2001) (“[E]ven relatively short separations may hinder parent-child bonding, interfere with a child’s ability to relate well to others, and deprive the child of the essential loving affection critical to emotional maturity.”); Michael Wald, *State Intervention on Behalf of ‘Neglected’ Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 993-94 (1975) (“Removing a child from his family may cause serious psychological damage—damage more serious than the harm intervention is supposed to prevent.”); JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN, & ANNA FREUD, *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 8-9 (Free Press 1996) (“Children, then, are not adults in miniature. They differ from their elders in their mental nature, their functioning, their understanding of events, and their reactions to them.”); The “Failure to Protect” Working Group, *Charging Battered Mothers With “Failure to Protect”: Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 857 (2000) (noting that removing children who have witnessed domestic violence from their non-abusive mother re-victimizes children and increases their fear of abandonment). See also Mark D. Simms, Howard Dubowitz, & Moira A. Szilagyi, *Health Care Needs of Children in the Foster Care System*, 106 PEDIATRICS 909, 912 (October 2000) (“Removal from one’s family, even an abusive one, is generally traumatic for children.”); Am. Acad. of Pediatrics Comm. on Early Childhood, Adoption & Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145, 1146 (November 2000) (comparing adults’ superior ability to cope with impermanence to children’s inability to cope with disruptions and uncertainty).

relevant source of evidence. The standard for most decisions in dependency proceedings is the child's best interests. A youth's opinion about his or her living situation, while not determinative, surely is relevant to determine what is in that child's best interests.⁶⁵

The risk of harm children face from removal is irreparable.⁶⁶ If placed in state custody the child is exposed to all the potential failings of the system.⁶⁷ She may bounce and drift from foster home to foster home, live in overcrowded and unsanitary conditions, and suffer neglect or even abuse by her substitute caretakers.⁶⁸ She may have a caseworker who is

⁶⁵ See Model Rules of Prof'l Conduct R. 1.14 cmt. 1 (2004) ("Children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.").

⁶⁶ See Jennifer Walter, *Averting Revictimization of Children*, 1 J. CENTER CHILDREN & CTS. 45 (1999).

⁶⁷ Many of the systemic failures of foster care programs have led to class action lawsuits seeking court-ordered reform. See, e.g., *Kenny A. ex. rel. Winn v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003); *Marisol A. ex. rel. Forbes v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996); *Lashawn A. v. Dixon*, 762 F. Supp. 959 (D.D.C. 1991). From 2001 to 2004, the Department of Health and Human Services conducted a series of audits of the states' foster care systems, the Child and Family Service Reviews. States were assessed on seven outcomes (two each for safety and permanency and three for child well-being). In order to pass the CFSR, the states were required to be in substantial conformity with all seven outcomes. Not one state passed. Six states were in substantial conformity with Safety Outcome 1; six were in substantial conformity with Safety Outcome 2; none was in substantial conformity with Permanency Outcome 1; seven were in substantial conformity with Permanency Outcome 2; none was in substantial conformity with Well-Being Outcome 1; 16 were in substantial conformity with Well-Being Outcome 2; and one was in substantial conformity with Well-Being Outcome 3. ADMIN. FOR CHILDREN AND FAMILIES, GENERAL FINDINGS FROM THE FEDERAL CHILD AND FAMILY SERVICE REVIEWS, available at <http://www.acf.hhs.gov/programs/cb/cwmonitoring/results/genfindings04/ch1.htm> (last visited March 1, 2007).

⁶⁸ Almost 5,000 foster children living in group homes or residential facilities are the victims of substantiated abuse or neglect by staff per year. ADMIN. FOR CHILDREN AND FAMILIES, CHILD MALTREATMENT 2004: LIVING ARRANGEMENT OF VICTIMS (2004), available at

inexperienced, undertrained, and unable to access necessary services for her. She may lose contact with friends and extended family members and be removed from her school, her church, and her community. Her health, mental health, and education needs may go unaddressed, causing her to deteriorate.⁶⁹ Compounding these potential problems, all of these experiences occur in the *child's* sense of time. It is well accepted that children experience time much more slowly than adults. Whereas a parent might be able to tolerate a six month separation from her child, from the child's perspective, half a year can be unbearably long.⁷⁰

Research demonstrates that children who spend substantial time in foster care face far worse outcomes as adults than their peers.⁷¹ Often, their emotional, behavioral, and educational development are all constrained. This results in higher rates of homelessness, unemployment, and acute and chronic health conditions. Most live below the poverty line, and women have higher rates of youth pregnancy.⁷² Their circumstances are, quite bluntly, bleak. If the very people whom we are supposed to be "saving" through the child protection system were more present, visible, and active during the decision making process, we would likely see better outcomes.⁷³

http://www.acf.hhs.gov/programs/cb/pubs/cm04/table3_14.htm (last visited March 1, 2007).

⁶⁹ See Simms et al., *Health Care Needs of Children in the Foster Care System*, *supra* note 64, at 911.

⁷⁰ See, e.g., Am. Acad. of Pediatrics Comm. on Early Childhood, Adoption & Dependent Care, *Developmental Issues for Young Children in Foster Care*, *supra* note 64, at 1146.

⁷¹ PEW COMM'N ON CHILDREN IN FOSTER CARE, *supra* note 49 at 9-11; ANNIE E. CASEY FOUND., KIDS COUNT DATA BOOK: MOVING YOUTH FROM RISK TO OPPORTUNITY 7-8 (2004) (collecting research), *available at* http://www.aecf.org/kidscount/databook/pdfs_e/essay_e.pdf.

⁷² *Id.*

⁷³ The benefits of youth participation extend even to cases involving younger children or those who are not able to speak. "Just by having children attend the hearing, judges can glean vital information that would otherwise be lacking. Bench officers can observe first-hand the child's

C. Youth participation is good for all of us.

Participation in court is a fundamental right. Our civil procedure doctrine is replete with cases affirming the critical importance of notice of proceedings and the opportunity to be heard.⁷⁴

The state and parents both have extremely strong interests at stake in dependency proceedings. These interests are typically in direct conflict, such as when the state seeks to remove a child from a parent's custody. However, the questions at issue in these proceedings are usually not as binary as they may initially appear. The child's perspective on the issues often differs from both the parents' and ACS's. The state is focused on child safety, and the parents are opposed to all interventions and court-imposed requirements; the child, though, may have more nuanced views. For example, the child may wish to remain at home with her mother, but is not opposed to a requirement that her mother obtain and enforce an order of protection against an abusive boyfriend.

Once in state custody, children have a bundle of substantive and procedural rights that most children do not have. Most of these are rights as against the government, arising in the context of the foster child's special relationship with the state. For children in intact families who have rights against the state, their parents are the best vindicators of those rights.⁷⁵ But the parents of foster children are focused on other matters. They have lost custody of their children and

appearance, demeanor, and personal interaction with others, including parents, social workers, attorneys and caregivers, who are present. Judges have an opportunity to evaluate for themselves critically important nonverbal information that may help share their ultimate decisions, and decision-making is informed by a one-on-one personal interaction that gives life to an otherwise sterile report and file." Miriam Aroni Krinsky and Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings*, 6 NEV. L. J. 1305 (2006).

⁷⁴ See, e.g., *Dusenbery v. United States*, 534 U.S. 161, 167-68 (2002); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

⁷⁵ *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007).

must make compliance with court orders and social workers' dictates their top priority. Among those well-established rights that youth in foster care have are: the right to caseworkers who are adequately trained and supervised and who have a manageable caseload; the right to live in foster homes and other placements that have been adequately screened so as to ensure that children will be safe there; the right to live in a placement where the caretaker has been provided relevant information about the child's medical history and who is well matched to the child's needs (as opposed to random placements); the right to live with adult relatives as opposed to strangers, the right to be placed with siblings; the right to services to support the foster placement and avoid disruptions and multiple moves among different placements; the right to timely and appropriate permanency planning; the right to appropriate and necessary mental health, medical, and education services; and, for teenage mothers in foster care, the right to be placed with her own children, absent a finding of unfitness against the minor parent.⁷⁶

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

New York City's child welfare agency, the Administration for Children's Services ("ACS"), relies on private foster care agencies to provide most of the day-to-day

⁷⁶ *Kenny A. ex. rel. Winn v. Perdue*, 218 F.R.D. 277, 286 (N.D. Ga. 2003).

services to youth and their families.⁷⁷ There are many positive aspects to this arrangement. For example, small non-profit agencies may have the expertise and flexibility to provide specialized services that ACS lacks. Unfortunately, once the state abandons a field to private actors, inertia can make it difficult for the state to return to the field later. As a result, the state is sometimes beholden to its private vendors, who have enormous leverage in daily negotiations over the provision of services. Should one agency go out of business it can have significant ripple effects throughout ACS and the other contractors, all of whom must scramble to find the replacement foster homes and services. Thus, it is generally in the state's interest to keep its contractors satisfied and in business. This conflicts with the needs of individual children on a regular basis.⁷⁸ The role of the judiciary is to pay attention to meeting the needs of the youth in each case, not the needs of the agency.

In dependency proceedings, society has an interest that goes beyond merely protecting children: having a dignified, orderly decision making process in which all interested parties are able to have their views expressed cogently and zealously to the court. Society is strengthened by having adjudicatory processes that are recognized to be fair, regardless of

⁷⁷ For a national perspective on private child welfare services, see MADELYN FREUNDLICH & SARAH GERSTENZANG, AN ASSESSMENT OF THE PRIVATIZATION OF CHILD WELFARE SERVICES (CWLA Press 2003). See also Leslie Kaufman, *Foster Children at Risk, and an Opportunity Lost*, N.Y. TIMES, Nov. 5, 2007, at A1 (reporting on fiscal improprieties in private agency under contract to ACS); Scott McCown, Op-Ed., *Privatize Protective Services? Let's Not*, FT. WORTH STAR-TELEGRAM, May 15, 2005, available at [http://www.cppp.org/files/4/CPS%20Op%20Ed%20\(3\).pdf](http://www.cppp.org/files/4/CPS%20Op%20Ed%20(3).pdf) (last visited Nov. 25, 2007).

⁷⁸ For example, if two siblings are placed in separate foster homes, they have a compelling interest in having a continued relationship. To maintain this relationship, they should be allowed to visit with each other on a regular basis. If their foster parents cannot transport them to visits, then the agency's staff will have to do this. Unfortunately, sometimes agencies do not have enough vans or staff to take children to visits. ACS should not tolerate this as an excuse, but it is constrained due to the nature of its relationship with its contractor.

substantive outcomes. Research in the area of procedural justice suggests that people are able to recognize the fairness of procedures even when they disagree with the actual outcome.⁷⁹ And since today's youth are tomorrow's adults, if we treat them unfairly now, we are placing in jeopardy the citizenry's overall faith in democratic institutions.⁸⁰

The issues in dependency cases—where should this child live, are his medical needs being met, and so forth—touch on the basic value of human dignity. The dependency petition itself is a moral claim. When the state files a case in dependency court, it makes the point on behalf of all society that it is worth it to violate the privacy and sanctity of the family. It does this on grounds that a child is being neglected or abused by her own parents. A moral claim must be adjudicated pursuant to a moral process. A process that does not allow all relevant parties to be heard and to participate meaningfully does not meet this moral standard. “The appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.”⁸¹ A child must feel that he is being fairly treated in order to benefit from the rehabilitative efforts of the court process.⁸²

Some might suggest that an adequate substitute for youth participation in court would be to assign them independent counsel. Certainly, zealous legal representation for children is a critical component to a healthy system but it is not an appropriate replacement for actual youth

⁷⁹ Tom R. Tyler, *What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 *Law & Soc'y. Rev.* 103, 127 (1988).

⁸⁰ Cahill and Hart, *supra* note 63, at 218-19. See also Zaff and Michelsen, *supra* note 59, at 2 (“Adolescents who are involved in civic affairs have been found to have better work ethics as adults, to be more likely to volunteer and vote, and to have more socially responsible attitudes”); Hart, *supra* note 63, at 34.

⁸¹ *In re Gault*, 387 U.S. 1, 26 (1967).

⁸² *Id.* (citing sociological studies).

participation. In most places, children's lawyers are overburdened by crushing caseloads.⁸³ Invariably, they miss important things about their clients as a result of juggling their caseload. They may understand all the issues at one court appearance, but then court gets adjourned to a later date and they are unable to check back in with their client in the meantime—who knows what they might miss during that period?

Even the most diligent and conscientious children's lawyer with unlimited resources and a reasonable caseload cannot provide the dignity and human respect that only comes through direct participation. Even if the young person has no additional facts to offer, and his opinion is conveyed by his lawyer accurately in both substance and tone, there is something missing when that young person is denied the opportunity to speak for himself.

Liberty includes peace of mind, and freedom means having some measure of stability in the world around you. A system that allows the government to decide where a person will live and, if incapable of caring for himself, who will care for him, without allowing that person reasonable access to the state actor decision maker is, by any definition, oppressive and tyrannical.

Part V

There is a national movement, and growing international recognition that youth should participate in decisions that address their lives. The United Nations' Convention on the Rights of the Child requires all signatory states to provide children "the opportunity to be heard in any judicial and administrative proceedings affecting the child."⁸⁴

⁸³ HOWARD DAVIDSON & ERIK PITCHAL, CASELOADS MUST BE CONTROLLED SO ALL CHILD CLIENTS CAN RECEIVE COMPETENT LAWYERING (2006), available at http://law.fordham.edu/documents/int-2casecristu_web.pdf (last visited Feb. 28, 2007).

⁸⁴ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 12(2).

This provision allows states to afford this opportunity indirectly, through a representative, but many nations have implemented legislation to permit direct youth participation. One excellent example is Australia, where the State of New South Wales has a statute that requires the child welfare system to give a child the “opportunity to express his or her views freely, according to his or her abilities, [and] any assistance that is necessary for the child or young person to express those views.”⁸⁵

While the United States has not ratified the Convention on the Rights of the Child,⁸⁶ several states and counties here have made a commitment to youth participation. The most notable example is Los Angeles County. L.A. County is 4,000 square miles in size and over 95 miles in width. It only has *one* courthouse that hears dependency cases, and public transit is notoriously lacking. Despite these factors, in Los Angeles over 25,000 foster youth a year come to court. The ingredients to L.A.’s success appear to be consensus among all stakeholders in the dependency court system that youth participation is a necessary component to proceedings there, supplemented by ongoing will of all parties. Some of the will in Los Angeles may have its genesis in the California bill of rights for children in foster care that, among other things, gives youth in dependency cases the right to come to court and speak to the judge.⁸⁷ A local court rule in Los Angeles County

⁸⁵ CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) ACT OF 1998, § 10(1) (N.S.W. ACTS 2007). Many nations, especially in Europe, are taking the C.R.C. seriously and finding ways to incorporate the participation of children into various judicial and administrative proceedings. *See generally* F. ANG ET AL., *supra* note 60.

⁸⁶ The only other nation in the world not to ratify the Convention is Somalia, which does not have a functioning government. Because the U.S. has not ratified the CRC or even really debated it, there is not a public discourse about its meaning or even widespread awareness of its existence. *See* Cahill and Hart, *supra* note 63, at 215. The CRC’s notion that youth are citizens with rights is radical, compared to the more traditional view in the U.S. that young people are potential citizens or “citizens-in-waiting.” *Id.* at 218.

⁸⁷ CAL. WELF. & INST. CODE § 16001.9(a)(17) (Deering 2007). Several other states have statutory provisions or court rules that require notice of court dates to youth of certain ages; some also provide them the right or at

goes further, *requiring* foster children to attend court unless their attorney waives the appearance:

Children are entitled to attend court hearings. Every child four years or older must be advised of his or her right to attend court hearings by the children's services worker and/or his or her attorney of record. A child must attend court hearings unless his or her appearance is waived by his or her attorney of record. The reasons for non-appearance shall be recorded in the minute order. The children's services worker is responsible for arranging transportation of the child to the court. In all cases, the attorney for the child shall consult with the child and explain the outcome of the proceedings.⁸⁸

At the federal level, Congress has enacted a new law which requires the states, in exchange for accepting federal money to support foster care, to assure that in all permanency hearings, the dependency court “consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child.”⁸⁹ A recent Administrative Order issued by the New York State Office of Court Administration implements this provision in New York. It provides that in all permanency hearings, “the child shall be represented by a law guardian and the Family Court shall consider the child’s position regarding the child’s permanency

least the opportunity to be heard. *See, e.g.*, FLA. R. JUV. P. 8.255(b) (“the child has a right to be present at the hearing unless the court finds that the child's mental or physical condition or age is such that a court appearance is not in the best interest of the child”); MICH. COMP. LAWS § 712A.19a(4)(h) (LexisNexis 2007) (requiring notice of permanency hearings to children over the age of 11); MINN. STAT. § 260C.163(2) (2007) (“[A] child who is the subject of a petition, and the parents, guardian, or legal custodian of the child have the right to participate in all proceedings on a petition.”).

⁸⁸ LOS ANGELES CO. SUPER. CT. R.17.10.

⁸⁹ Child and Family Services Improvement Act of 2006, Pub. L. No. 109-288, § 10, 120 Stat. 1233 (2006).

plan.”⁹⁰ On its face, this rule is an incomplete embodiment of the federal requirement, because it clearly allows the child’s lawyer to present the child’s position directly to the court and makes no provision whatsoever for the child’s actual attendance in court or in-person appearance before the court. For younger children it may very well be “age appropriate” for the law guardian to set forth the child’s position. For older youth and teenagers however, it is inexplicable how taking the child’s position by proxy could be considered age-appropriate consultation.

Despite this unsatisfactory court rule, New York City is making progress in including the voice of youth in dependency court. Over half of the foster care population in New York City is older than age 12.⁹² Recognizing this fact, New York City’s Family Court has begun an initiative, *Focus on Adolescents*, to raise awareness and understanding throughout the court system of this population’s special needs. One noteworthy pilot project within this initiative is Teen Day, a program in which one bench officer sets aside her entire calendar just to hear permanency hearings involving adolescents and goes to great lengths to get the young people to attend court on that day.⁹³ ACS offers information and service referrals to the teen clients in the courthouse on the designated Teen Days.⁹⁴ Making the logistical arrangements for Teen Day takes significant effort on the part of the bench

⁹⁰ 22 N.Y.C.R.R. § 205.17(e).

⁹² As of March 2006, over 10,000 of New York City’s foster children were age 12 and older.

NEW YORK CITY ADMIN. FOR CHILDREN’S SERVS., OUTCOME 6: INCREASE PERMANENCY FOR ADOLESCENTS 5, *available at* http://www.nyc.gov/html/acs/downloads/pdf/outcomes/out6_quickview.pdf (last visited Feb. 28, 2007). The overall foster population as of March 2006 was just shy of 17,000. NEW YORK CITY ADMIN. FOR CHILDREN’S SERVS., MONTHLY UPDATE 2 (NOV. 2006), *available at* http://www.nyc.gov/html/acs/downloads/pdf/stats_monthly_update.pdf (last visited Feb. 28, 2007).

⁹³ Kathleen Lucadamo, *Push Is On for Foster Kids to Talk to Judges*, N.Y. DAILY NEWS, Feb. 11, 2007.

⁹⁴ *Id.*

officer, her staff, and the various lawyers and other court personnel. As New York City has several dozen judges in five separate courthouses to handle dependency matters, these logistical challenges highlight the intractability of the problem of increasing youth involvement in a busy and chaotic urban foster care system.

Conclusion

The foster care system is predicated on the value of protecting children's safety and well-being. The process we have constructed to do this is disempowering and disrespectful of the people it is designed to serve. It does great damage to the dignity and self-worth of the parents and children who find themselves tangled up in it. It is the duty of agency and judicial leaders, as well as dedicated advocates, to do everything necessary to overcome this and to make the experience more humane and dignified for young people who have already suffered so much.