

DUE PROCESS FOR CHILDREN: A RIGHT TO COUNSEL IN CUSTODY PROCEEDINGS

I. INTRODUCTION

When families are broken up through divorce, separation or death, or when parents' ability to care for their children is in question, the custody of minor children is determined by the courts. The due process clause of the fourteenth amendment would seem to require that children have the right to be heard through counsel in custody proceedings. Under modern practice in most jurisdictions, however, a child is unable effectively to place his preferences before the court, either by himself or with the assistance of counsel, even though the court's decision will have an enormous impact on the future course of his life.

The landmark case of *In re Gault*¹ made it clear that constitutional protections apply to children as well as adults.² In *Gault* the Supreme Court held, in part, that due process requires that children have a right to be heard through counsel in delinquency proceedings which could result in their confinement.³ In so holding, the Court recognized that experience has belied the notion that children are best served by being treated informally in a paternalistic system; delinquency proceedings, at least, are really adversary proceedings and therefore require certain procedural safeguards for the child. The Court found it irrelevant whether the proceedings were denominated civil or criminal, and based its holding on the potential loss of liberty due to confinement in a state institution.⁴ But a wide variety of other proceedings in which custody is at issue also pose the possibility of child placements involving serious loss of liberty and property. Although the terminology varies from jurisdiction to jurisdiction, the proceedings generally are of four types:⁵

Persons in need of supervision ("PINS"). Most states provide by statute for proceedings whereby children may be declared in need of supervision and, as a result, either institutionalized or placed on some sort of probation.⁶ PINS may be sent to the

1. 387 U.S. 1 (1967).

2. *Id.* at 13; see, e.g., *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948).

3. 387 U.S. at 41.

4. *Id.* at 27-30, 35-37, 49-50.

5. Disputes over custody also occur in cases where the larger issue is adoption, as when a child's natural parent seeks to revoke consent to adoption, or when foster parents seek to adopt a child without the approval of the social service agency with which the child had been placed. Those cases are outside the scope of this Note since adoption involves the issue of the creation of a legal parent-child relationship rather than simply a custodial relationship. Not all adoption proceedings involve custody issues. A stepparent, for example, may seek to adopt a stepchild of whom he already has custody. A child's interests and needs in adoption proceedings are analogous to his interests and needs in custody proceedings, however, so that an argument for his right to counsel in those cases could be made along lines similar to those suggested here.

6. N.Y. Family Ct. Act § 712(b) (McKinney Supp. 1974) defines a "person in need of supervision" as

a male less than sixteen years of age and a female less than eighteen years of age who does not attend school . . . or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority.

For possible dispositions of PINS in New York, including placements and probation, see N.Y.

same institutions as delinquents.⁷

Neglect and dependency. These proceedings are brought when children are abused, abandoned or improperly cared for, and do not necessarily rest on a finding of parental fault. Upon a determination that court intervention is required, the child may be returned to his parents subject to terms of probation, may be institutionalized in the custody of a social services agency, or may be placed in a foster home.⁸ Where necessary, the court may terminate permanently the parents' rights to the child, thus freeing him for adoption without the consent of his parents.⁹

Guardianship. In an appropriate case (such as orphanhood) the court must designate a guardian. This may be someone named by the child's parents in their wills or a relative or other adult who has an interest in him. If there is no such person available, however, the child may be placed in an orphanage or foster home. Guardianship is sometimes distinct from custody; thus a guardian may be appointed to make certain decisions for a child when the parents or others who have custody are incompetent to do so. As used above, however, "guardian" includes the "custodian."

Divorce or legal separation. When parents separate or divorce, the court decides which parent will have custody of the children, although it is possible that they may be placed in the custody of someone else.¹⁰ Even when the parents agree between themselves which of them should have custody, the court's approval of their agreement must be obtained.¹¹ The court also must determine or approve the parents' agreements as to visitation rights and support arrangements.

Family Ct. Act §§ 756-57 (McKinney 1963).

Cal. Welf. & Inst'n's Code § 601 (West 1972) provides:

Any person under the age of 18 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parents, guardian, custodian or school authorities, or who is beyond the control of such person, or any person who is a habitual truant from school within the meaning of any law of this state, or who from any cause is in danger of leading an idle, dissolute, lewd, or immoral life, is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court.

For the various dispositional alternatives, see Cal. Welf. & Inst'n's Code § 730 (West 1972).

Throughout this Note reference is made primarily to the statutes of New York and California, not only because New York and California are the largest jurisdictions, but because their statutory schemes with respect to custody proceedings are typical.

Such statutes have been strongly criticized for vagueness. See, Note, *Parens Patriae* and Statutory Vagueness in the Juvenile Court, 82 Yale L.J. 745 (1973); *Gonzalez v. Mailliard*, No. 50424 (N.D. Cal., Feb. 9, 1971), vacated on other grounds, 416 U.S. 918 (1974). Typically, confinement or any other disposition may be for the duration of the child's minority. E.g., Cal. Welf. & Inst'n's Code § 607 (West 1972); Ill. Ann. Stat. ch. 37, §§ 705-2(3), 705-11 (Smith-Hurd 1972); N.Y. Family Ct. Act § 756(c) (McKinney 1963).

7. E.g., Cal. Welf. & Inst'n's Code §§ 730-31 (West 1972) permit PINS to be placed with delinquents. In New York, however, the Court of Appeals has required separate institutions. In *re Ellery C.*, 32 N.Y.2d 588, 592, 300 N.E.2d 424, 425, 347 N.Y.S.2d 51, 54 (1973).

8. E.g., Cal. Welf. & Inst'n's Code § 727 (West Supp. 1974); Ill. Ann. Stat. ch. 37, §§ 705-2(1)(c), 705-2(1)(d), 705-7 (Smith-Hurd 1972); N.Y. Family Ct. Act §§ 1051-58 (McKinney Supp. 1974).

9. E.g., Cal. Civ. Code §§ 224, 232 (West Supp. 1974); Ill. Ann. Stat. ch. 37, § 705-9 (Smith-Hurd 1972); N.Y. Family Ct. Act § 611 et seq. (McKinney Supp. 1974).

10. E.g., Cal. Civ. Code § 4600 (West Supp. 1974) provides in part that in any proceeding in which custody is at issue the court may award custody to a nonparent if parental custody would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child; accord, *Spade v. Spade*, 6 Misc. 2d 170, 163 N.Y.S.2d 146 (Sup. Ct. 1957) (placing children in the custody of a social service organization in a separation proceeding).

11. E.g., N.Y. Dom. Rel. Law § 240 (McKinney 1964); *Agur v. Agur*, 32 App. Div. 2d 16, 19, 298 N.Y.S.2d 772, 776 (2d Dep't 1969), appeal dismissed, 27 N.Y.2d 643, 261 N.E.2d 903, 313 N.Y.S.2d 866 (1970). In practice, however, such agreements are usually honored. See Weinman, *The Trial Judge Awards Custody*, 10 Law & Contemp. Prob. 721, 730 (1944), where it is suggested

These statutory categories are not exhaustive. Habeas corpus may often be available as a vehicle for the determination of custody. In the widely noted case of *Painter v. Bannister*,¹² the child's father temporarily entrusted him to his maternal grandparents; a year and a half later when the father asked for the return of his son, the grandparents refused to give him up. Custody was determined in a habeas corpus proceeding brought by the father. And in addition to statutory and common law proceedings, courts always have the power to determine custody as a matter of their equity jurisdiction.¹³

Despite the potential loss of liberty or property due to custody determinations, the Supreme Court has not yet, as it did in *Gault*, required the due process protections of a hearing and representation by counsel in any of the above situations in which custody is at issue. Some states, however, have required these protections, most frequently in cases which are viewed as having more serious consequences, such as PINS and neglect proceedings.¹⁴ Nevertheless, all custody cases have serious consequences, and children involved in them have interests at stake which require the due process protection of the right to be heard by counsel. This Note will develop the proposition that the right of children to be heard and to be represented by counsel should be extended to all proceedings in which custody is to be determined. It will then examine some problems raised by the role of counsel as spokesman for the child's viewpoint.

II. DUE PROCESS

The fourteenth amendment provides in part that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."¹⁵ Whether or not a particular safeguard is an ingredient of due process is determined, under current doctrine, by a two-tiered analysis.¹⁶ As a threshold matter, it must be determined whether the affected interest is "life, liberty, or property" within the scope of the amendment's protection. If that is decided affirmatively, it is constitutionally required that there be some form of hearing prior to deprivation of the protected interest.¹⁷ The precise form of the hearing and its particular procedural requisites are then determined separately in a balancing process in which the court weighs the importance of the procedural safeguard, the importance to the state of summary action, and the nature of the proceeding.¹⁸

that following a custody agreement between the spouses is often thought to provide for the welfare of the child because the agreement sheds light on which parent has the greater affection for the child.

12. 258 Iowa 1390, 140 N.W.2d 152 (1966).

13. The statutes are considered merely supplementary to the courts' inherent equity jurisdiction and do not displace it. 4 J. Pomeroy, *Equity Jurisprudence* §§ 1303-07 (5th ed. S. Symons 1941); see notes 61-62 *infra* and accompanying text.

14. E.g., Cal. Welf. & Inst'ns Code § 634 (West 1972) (counsel appointed for children in delinquency and PINS cases); N.Y. Family Ct. Act § 249 (McKinney Supp. 1974) (counsel appointed for children in delinquency, PINS and neglect cases). Some courts appoint counsel in other cases on their own initiative. See, e.g., Hansen, *Role and Rights of Children in Divorce Actions*, 6 J. Family L. 1 (1966).

15. U.S. Const. amend. XIV, § 1.

16. *Board of Regents v. Roth*, 408 U.S. 564 (1972). The district court had engaged in a one-step analysis in which it balanced the competing interests. The Supreme Court rejected that approach, noting that "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." *Id.* at 570-71.

17. *Id.* Only in the most extraordinary circumstances may the hearing be postponed until after the event. E.g., *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

18. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970). It should be pointed out that the frequently quoted language of Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319 (1937), that the fourteenth amendment's due process clause requires only those procedures which are the "very essence of a scheme of ordered liberty," *id.* at 325, and that of Jus-

A. The Child's Interests

1. Liberty

At the very least, the "liberty" protected by the due process clause includes freedom from bodily restraint.¹⁹ Thus whenever a child may be institutionalized as a result of a custody proceeding, his liberty is sufficiently at stake for due process protections to attach. The Supreme Court has previously recognized this in the context of delinquency proceedings.²⁰ Arguably such proceedings are more analogous to criminal trials than are other proceedings which involve custody. However, because the basic restraint upon a child's liberty is identical when for any reason he is placed in the custody of an institution, the protections of due process should attach whenever institutionalization is possible, regardless of the nature of the proceeding.²¹ Such an application of due process is supported by the Court's analysis in *Gault*, which focused not on the nature of the proceedings but on the seriousness of the possible consequences.²²

Even when institutionalization is not contemplated, the child's liberty may still be at stake. The most obvious effect of a custody determination on a child is that he will spend his life with one set of adults rather than another. He will be subject to their control and influence, go to the schools they choose, and live where they live. With the possible exception of short visits, he may be deprived of enjoying the companionship and influence of other adults with whom he may have spent most of his life. It can be rejoined, of course, that a child does not normally have the liberty to choose his custodian. Nevertheless, once the situation in which a choice must be made arises, the failure to consider a child's viewpoint may well be a denial of his liberty within the meaning of the fourteenth amendment.

The Supreme Court has held that, at least from a parent's perspective, family relationships are interests entitled to due process protection. In *Armstrong v. Manzo*,²³ the Court held that a parent could not be deprived of the custody of his child without notice and a hearing. *Stanley v. Illinois*²⁴ held similarly with respect to the custody of an illegitimate child. Justice White, writing for the Court in *Stanley*, made it plain that a parent's interests in the "companionship, care, custody, and management of his or her children"²⁵ are cognizable under the due process clause. Even broader family interests have been recognized as protected by the due process clause. In *Meyer v. Nebraska*,²⁶ the Court declared that liberty denotes "not merely freedom from bodily restraint, but also the right of the individual to . . . establish a home and bring up children . . . and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."²⁷

tice Frankfurter in *Rochin v. California*, 342 U.S. 165 (1952), finding a procedure in violation of the clause because it "shocks the conscience," *id.* at 172, and is offensive to the "community's sense of fair play and decency," *id.* at 173, both suggest a test for the application of due process which is inapposite here. Those cases involved the question of which provisions of the first eight amendments are to be incorporated into the due process clause of the fourteenth amendment. There was no doubt in those cases that the interests involved were protected. The question was, rather, whether they were required to be protected in the same way against the states as against the federal government.

19. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (due process required for parole revocation); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); see text accompanying notes 25-26 *infra*.

20. *In re Gault*, 387 U.S. 1, 13, 41 (1967).

21. That there is any loss of liberty at all is the only issue at the first stage of the due process analysis. Certainly children suffer various degrees of deprivation according to the type of institution in which they are placed, but such distinctions may be relevant only at the balancing stage.

22. *Id.* at 27-30, 35-37, 49-50.

23. 380 U.S. 545 (1965).

24. 405 U.S. 645 (1972).

25. *Id.* at 651.

26. 262 U.S. 390 (1923).

27. *Id.* at 399.

To the extent that such interests are protected as liberties, rather than simply as the property interests of parents in their children,²⁸ the reciprocal interests of children in their parents' companionship, care, custody and guidance should be protected as well. It is arguable that the child's interests in his parents are of a different character than the parents' interests in their child; whereas a parent has a right to custody of his or her child, the reciprocal right of a child to his parents' guidance may be only a privilege. Nevertheless, by analogy to cases holding that interests are protected by due process when they are privileges as well as when they are rights,²⁹ that distinction should not be consequential.

The child's interests at stake in custody proceedings have also been viewed as liberties entitled to due process protection in their own right. In discussing those interests, the dissenting opinion in *Brown v. Chastain*³⁰ said:

We are dealing here with rights just as fundamental as a man's personal liberty (which is at stake in a criminal proceeding which could result in incarceration). . . . Indeed, there could hardly be a better case for Fourteenth Amendment protection than this one. The formation of a young girl's life habits are at stake. The make-up of her personality will be determined for all time during the next few years. A well-founded parental relationship for this girl is a necessity. . . .³¹

In short, whenever a child may be institutionalized *or* shifted from one custodian to another, he has interests at stake which are entitled to due process protection.³²

2. Property Interests

Almost without exception, when a child is involved in any custody proceeding he has property interests which will be affected by its outcome. When parents divorce or separate, their assets and earning power will be spread over two households instead of one, so that unless they are either very wealthy or very poor, their standard of living will decline significantly. Strictly speaking, a child's standard of living due to his parents' divorce or separation cannot be a property interest which is at stake in the custody proceeding because, given the breakup of the family, it is unavoidable.³³ But there are some economic effects of a custody determination incident to divorce or separation which are not unavoidable and may thus involve protected interests; for example, the provisions of any support order immediately make more or less money available for the child's care. Moreover, whenever custody must be determined between individuals, regardless of their relationship to the child, they will in most cases have different financial resources,

28. Some state courts have recognized a kind of property interest of children in the "services" of their parents, awarding damages to children against deserting parents and their new companions for loss of society, love, companionship and guidance. E.g., *Miller v. Monsen*, 228 Minn. 400, 37 N.W.2d 543 (1949). Contra, *Kane v. Quigley*, 1 Ohio St. 2d 1, 203 N.E.2d 338 (1964). See generally W. Prosser, *Law of Torts* § 124 (4th ed. 1971).

29. E.g., *Bell v. Burson*, 402 U.S. 535 (1971) (finding procedural defects in a hearing to suspend a motorist's driver's license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that welfare recipients are entitled to an evidentiary hearing before benefits are terminated). Writing for the Court in *Bell*, Justice Brennan explained its holding as "but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.'" 402 U.S. at 539.

30. 416 F.2d 1012 (5th Cir. 1969).

31. *Id.* at 1027 (Rives, J., dissenting) (majority reversed on other grounds).

32. Any change in custodians affects the same interests, so that there is no difference for *due process purposes* between removal of the child from the custody of both parents, removal of the child from the custody of one parent with custody awarded to the other parent, removal of the child from the custody of foster parents, and so on. Cf. note 21 *supra*.

33. It has been suggested, however, that children should be able to contest the granting of their parents' divorce or approval of their separation. Kleinfeld, *The Balance of Power Among Infants, their Parents and the State*, 4 Family L.Q. 320, 332-35 (1970).

so that the court's decision will have a direct effect on the child's standard of living. If institutional care is a possible consequence of the proceeding, not only may the child's standard and style of living be immediately affected, but a history of institutionalization may well have an adverse affect on his financial situation in the future.³⁴

The economic benefits which may possibly be lost as the result of a custody determination, like any property interests, will be protected by the due process clause as long as the child has "a legitimate claim of entitlement" to them, rather than simply an "abstract need or desire."³⁵ A legitimate entitlement has been found to depend on neither the value of the property interest³⁶ nor whether it is styled a "right" rather than a "privilege."³⁷ In some cases a property interest has been found to fall within the protection of the due process clause where it was merely an expectancy.³⁸ The only qualification is that the expectancy must have some foundation in rules, regulations, customs or explicit mutual understandings between the parties, which could be asserted at the hearing.³⁹ Under these standards, a child's interests in the economic benefits which may be lost as the result of a custody determination deserve constitutional protection. A child clearly has a "legitimate claim of entitlement" to a basic level of support, since that is provided by statute in all states. Because the level of support required by statute is frequently contingent upon such factors as the relationship between the child and his custodian and the ability of the custodian to provide support, the child has a protected economic interest in the custody decision.⁴⁰ In the divorce context, a child has an additional entitlement to the benefits of the court's support order. The child also has an interest in the support which his custodian is able and willing to provide beyond the required level. Even if such interest is characterized as a mere expectancy, it may well be of the type protected by due process. Similarly, when institutionalization is a possible result, the adverse immediate and collateral economic effects are surely infringements of protected interests.

It is arguable that any consideration by a court of the economic consequences of a custody decision is a violation of the equal protection clause, at least where custody is given to the wealthier party. But the equal protection problem is not insuperable under current doctrine. Since the Supreme Court has refused to find that wealth is a "suspect classification,"⁴¹ the constitutionality of a state's actions based on wealth does not

34. Whether there are such adverse financial effects, such as limitations on the ability to obtain jobs and credit, of course depends on the type of institution and the reason for the child's placement there. It is doubtful that a child would be hampered later in life by having been in an orphanage, but the effects of having been in a "training school" or other reformatory to which PINS may be sent are potentially quite pervasive.

35. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

36. *Fuentes v. Shevin*, 407 U.S. 67, 88-90 (1972).

37. See note 29 *supra*.

38. Thus a hearing has been required prior to the nonrenewal of a teacher's employment contract or of a tenant's lease, although the terms of their previous agreements had expired. *Perry v. Sindermann*, 408 U.S. 593 (1972) (teacher whose term of employment had expired is entitled to a hearing on the policies and practices of the school to determine whether his interest in employment is an entitlement); *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970) (due process hearing required prior to termination of month-to-month automatically renewable lease even though it was terminable by either party at the end of any month upon the giving of one month's notice); cf. *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 937 (2d Cir. 1974); *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973).

39. *Perry v. Sindermann*, 408 U.S. 593, 601-03 (1972).

40. Statutory duties of support are typically defined in terms of family relationships. Only a few states impose a duty of support on guardians. See, e.g., the Uniform Civil Liability for Support Act § 6, which includes among the factors to be considered in determining the amount due for support (1) the standard of living and situation of the parties, (2) the relative wealth and income of the parties, and (3) the earning ability of the obligor.

41. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); cf. *Salyer Land*

depend on their being shown to be necessary to promote a compelling governmental interest,⁴² but will be upheld simply if they are rationally related to a legitimate state interest.⁴³ Undeniably, the desire to provide for a child's welfare is a legitimate state interest, and the wealth of potential custodians is rationally related to its achievement.

Even if wealth were suspect, a child's economic interests could properly be raised in a custody proceeding. While it would then be unconstitutional for adults seeking custody to have a determination made on the basis of their wealth, it does not follow that it would be unconstitutional or even inappropriate for the courts to consider wealth when the issue is raised by the child. When the child makes a choice on the basis of his own interest, the court's sanction of that choice does not involve the state in the final determination nearly so much as when the child is not involved in the process. Thus the economic effects of a custody determination may be taken into account for purposes of deciding whether the child has interests protected by the due process clause, since they properly could be raised by the child in custody proceedings.

3. *Children's Rights Under the Substantive Law of Custody*

In the majority of custody cases the court is mandated to make its determination in the "best interests of the child."⁴⁴ When that is the case it may be argued that the child cannot be denied due process, although his views are not presented to the court, because the best is made of a bad situation. On the other hand, the fact that children have a right under the substantive law of custody to a determination made in their best interests is all the more a reason for them to be heard in custody proceedings—not because due process protections will assure an outcome which is in fact in the child's best interests, but

Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973). In *Rodriguez* the Court said that "... at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." 411 U.S. at 24. But cf. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), where Justice Douglas, writing for the Court, said, "Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored." *Id.* at 668. The *Harper* language, however, may be considered dictum since the statutory classification there in question failed even to meet the threshold test of being rationally related to a legitimate state goal. See note 43 *infra*.

42. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

43. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Morey v. Doud*, 354 U.S. 457 (1957); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

44. See text accompanying notes 62-63 *infra*. Cal. Civ. Code § 4600 (West Supp. 1974) provides in part that custody should be awarded in the following order of preference:

- (a) To either parent according to the best interests of the child.
- (b) To the person or persons in whose home the child has been living in a wholesome and stable environment.
- (c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

It further provides that:

Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interest of the child.

It has been recommended that the "best interests" standard be applied without any reference to parental fitness when the custody contest is between a parent and a nonparent who has been in a protracted *in loco parentis* relationship with the child. Ellison & Occhialino, *Family Law*, 1972 Survey of N.Y. Law, 24 Syracuse L. Rev. 513, 548 (1972). See also Foster & Freed, *Child Custody*, 39 N.Y.U.L. Rev. 423, 438 (1964).

because important interests are entitled to be adjudicated by processes which assure fairness.

The substantive right to a determination in one's own best interest is a right neither of property nor of liberty exclusively. But a clear designation is not a necessary prerequisite to the invocation of procedural due process.⁴⁵ Moreover, as the dissent said in *Brown v. Chastain*,⁴⁶ "[T]he child's right to a just determination of her best interests is fully as important as a person's right to be free from incarceration by the State."⁴⁷

In sum, whether a child's interests at stake in custody proceedings are characterized as liberty, property or a matter of substantive law, or a combination of these, such interests are closely analogous to other interests which have previously been accorded protection under the due process clause. Viewed in conjunction with the serious impact which custody proceedings may have on the life of the child, these interests are clearly deserving of constitutional protection.

B. Procedural Safeguards Versus the State's Interest in Summary Proceedings

Assuming that children involved in custody proceedings have interests at stake which are within the scope of the due process clause, it is constitutionally required that the child be heard in those proceedings.⁴⁸ Procedural due process "at a minimum [requires] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."⁴⁹ Whether further procedural safeguards are constitutionally required depends on the balance between the importance of those safeguards on the one hand and the importance to the state of summary action on the other, taking into account the nature of the proceeding.⁵⁰

In other contexts, the Supreme Court has recognized that the right to be heard would be "of little avail if it did not comprehend the right to be heard by counsel."⁵¹ In *Powell v. Alabama*⁵² the Court explained the fundamental nature of the right to counsel in terms of the incompetence of the ordinary layman to vindicate his rights in court without a lawyer.⁵³ *Powell* and the cases which have followed and extended it⁵⁴ were criminal cases, but their logic is not confined to that area alone.⁵⁵ If counsel is necessary for adult laymen because of their incompetence, it is certainly necessary for children.

A related but distinct purpose for which counsel is necessary is that of arguing matters of law as well as matters of fact. One reason for the lack of sophistication of the law of

45. See, e.g., *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (holding that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (Attorney-General's designation of a group as subversive requires due process hearing). But cf. *Hannah v. Larche*, 363 U.S. 420 (1960) (finding of United States Civil Rights Commission that persons had violated the civil rights of blacks; the Court found no procedural protection required because the Commission's function was purely investigative and not adjudicative).

46. 416 F.2d 1012 (5th Cir. 1969).

47. *Id.* at 1027 (Rives, J., dissenting) (majority reversed on other grounds).

48. See notes 16-17 *supra* and accompanying text.

49. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); accord, *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

50. See note 18 *supra* and accompanying text.

51. *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (hearing to determine welfare rights), citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

52. 287 U.S. 45 (1932).

53. Counsel was deemed so necessary to fairness that "[i]f in any case, civil or criminal, a . . . court were arbitrarily to refuse to hear a party by counsel, . . . such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense." *Id.* at 69.

54. E.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

55. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (right to be heard by counsel at hearing to determine welfare rights).

custody as compared, for example, with the law of children's rights in probate, is that children have traditionally been represented in probate proceedings. While providing counsel for children in custody proceedings may be one way of assuring that all relevant evidence will be before the court, that could be accomplished in other ways as well.⁵⁶ But representation by counsel is the only way to assure that all matters of law will be presented and argued fully.

Where children are not heard through counsel, some important issues of law will rarely, if ever, be raised. Issues such as the wealth or religion of potential custodians may be constitutionally inappropriate for the adult adversaries to raise, but counsel for the child could argue that they deserve to be taken into account. Other issues, such as whether or not the child's wishes with respect to his placement should be given deference by the court, are as a practical matter rarely raised by the adversaries under the present system, since they have no interest in gaining recognition for points of view which may differ drastically from their own.

On the other side of the balance are the state's interests in a summary proceeding. As a preliminary matter, it should be pointed out that many custody proceedings are hardly "summary" under current practice; except where the court approves a custody arrangement made by divorcing or separating parents, the various types of custody proceedings all require some sort of adversary hearing. Nevertheless, some increased burdens may be placed on the state if all children in custody cases were represented by counsel.

First, the judicial machinery may be encumbered by more time-consuming hearings and by increased costs. Whether or not hearings would, in fact, take longer if children were represented by counsel cannot be predicted with any accuracy. The presence of counsel for the child may quite possibly sharpen the presentation of the issues, thus avoiding spurious argument by the other parties and reducing the number of instances in which the issues are re-litigated.

Yet some additional costs to the state are inevitable, although they would not arise in all cases. So long as the adult parties together could afford the cost of counsel for the children, there is no reason for the state's costs to be increased. Attorneys' fees could be charged to the adult parties along with other litigation costs. Private counsel could be assigned at a standard fee which could be set to make optimal use of private legal ser-

56. Many states provide for factual investigations by social service agencies or probation departments either in all custody cases or at the discretion of the court, by statute or rules of court. E.g., Cal. Code of Civ. Pro. § 263 (West Supp. 1973); Cal. Welf. & Inst'n's Code § 582 (West 1972); Colo. Rev. Stat. Ann. § 46-1-27 (Supp. 1971); Ohio R. Civ. P. 75(D), (P). The use by the court of the reports of such investigations has been criticized because they are often not made part of the record or not available to the parties, and because they are hearsay. See generally, Comment, Use of Extra-Record Information in Custody Cases, 24 U. Chi. L. Rev. 349 (1957). Certainly, however, the statutes and rules can require the reports to be made part of the record and copies to be provided to the parties. E.g., Colo. Rev. Stat. Ann. § 46-1-27 (Supp. 1971); Ohio R. Civ. P. 75(D), (P). The same requirements have been imposed by case law. E.g., *Wheeler v. Wheeler*, 34 Cal. App. 3d 239, 109 Cal. Rptr. 782 (1973); *Long v. Long*, 251 Cal. App. 2d 732, 59 Cal. Rptr. 790 (1967).

Statutes can deal with the hearsay problem by requiring that the author of the report be present at trial and subject to cross-examination. E.g., Cal. Code of Civ. Pro. § 263 (West Supp. 1973); Ohio R. Civ. P. 75(D), (P). Though the report itself is still hearsay even if the author is present at trial, it is probably admissible either under the doctrine of past recollection recorded or under the business records exception to the hearsay rule. As to hearsay contained in the reports, the usual rules would apply, so that either the hearsay would be inadmissible or the declarant called to testify. See, e.g., Colo. Rev. Stat. Ann. § 46-1-27 (Supp. 1971).

In addition to such reports, courts are free to appoint expert witnesses, such as psychiatrists, in custody as in other cases. E.g., Cal. Evid. Code § 730 et seq. (West 1966); Uniform Rule of Evidence 59; Model Code of Evidence rule 403(b) (1942); Fed. R. Evid. 706 (effective July 1, 1975).

vices, and thus minimize the burden of the state.⁵⁷ Furthermore, if the parties could not reasonably afford the entire cost and the state provided counsel from a public agency, there is no reason why the parties could not be assessed that part of the costs which they could reasonably afford in order to offset some of the burden on the state. Possibly law students in clinical programs could also be used as a source of free representation for children in those cases.⁵⁸

Notwithstanding these increased burdens, the state's concern for streamlined judicial administration may not carry much weight in the context of due process. As Justice White, writing for the Court in *Stanley v. Illinois*,⁵⁹ has said:

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.⁶⁰

Potentially more disturbing to the state's interests than increased burdens on judicial administration is the apprehension that counsel for children will impinge on the court's role in custody proceedings. In exercise of their equity jurisdiction, courts have traditionally had ultimate supervision of the welfare of children, deriving their authority originally from the prerogatives of the Crown as *parens patriae*.⁶¹ In *Finlay v. Finlay*,⁶² Judge Cardozo explained the court's role and authority as follows:

The chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate, and careful parent" . . . and make provision for the child accordingly. He may act at the intervention or on the motion of a kinsman, if so the petition comes before him, but equally he may act at the instance of any one else. He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights "as between a parent and a child," or as between one parent and another He "interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*."⁶³

The state's possible concerns are that the effect of providing counsel for children will be to usurp the court's role and deprive children of the benefits of an informal, paternalistic proceeding.

As to the effect on the court's role, the provision of counsel for children is purely a procedural innovation and will not diminish the court's substantive responsibility or authority. Under the *parens patriae* theory, children do not need counsel because the

57. To maximize the use of private legal services, the standard fee would be set to reflect the equilibrium point where the same number of lawyers are willing to work for the fee as pairs of litigants are reasonably able to pay it. If the fee were set higher, there would be a surplus of lawyers willing to work and a deficit of (pairs of) litigants who could pay their fee; if it were set lower, there would be a surplus of (pairs of) litigants able to pay and a deficit of lawyers willing to work.

58. See Justice Brennan's concurring opinion in *Argersinger v. Hamlin*, 407 U.S. 25, 40-41 (1972), suggesting the use of supervised law students as defense counsel for the indigent in misdemeanor cases.

59. 405 U.S. 645 (1972).

60. *Id.* at 656.

61. Literally, "father of his country."

62. 240 N.Y. 429, 148 N.E. 624 (1925).

63. *Id.* at 433-34, 148 N.E. at 626.

court, sua sponte, acts in their best interests. While the provision of counsel for children as a matter of due process recognizes that the court's role of *parens patriae* is insufficient to protect their constitutional rights, it does not affect the court's position as ultimate decision-maker. The independence of the court will be maintained not merely formally, but practically as well, since the function of counsel is to protect the child's interests by presenting the child's views to the court,⁶⁴ not by making an independent determination of what is in the child's best interest.

As to the benefits of an informal, paternalistic proceeding, it is doubtful that there is much to be lost. The system which implements the ideal of special treatment for children in accordance with the *parens patriae* concept has recently come under vigorous attack.⁶⁵ For a variety of reasons, including a substantial lack of resources, juvenile courts have been able to provide little, if any, protection for the children who come before them. "The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines."⁶⁶ The informal procedures which were intended to assure individualized treatment were said by Justice Fortas, writing for the Supreme Court in *In re Gault*,⁶⁷ to amount in that case to a "kangaroo court."⁶⁸ The *Gault* Court rejected the contention that the proceedings are not adversary, and in that context concluded that the judge cannot represent the child.⁶⁹ Representation of children by counsel in various custody proceedings will hardly deprive children of the benefits of an informal, paternalistic system, which in practice do not exist.

III. THE ROLE OF COUNSEL

In custody proceedings where counsel for children has been required by statute or decision, or where counsel is provided at the discretion of the court, the assumption of many attorneys who represent the children is that they are primarily an arm of the court whose role is to try to obtain what they determine to be in the child's interest, rather than what the child-client may desire. This dichotomy will not arise in situations where the attorney and the child have similar perceptions of the child's interests. This is often the case in some noncustody areas, such as probate, where the goal to be achieved is obvious—from most points of view more money is better than less. But in delinquency cases, for example, where the child will almost always want to seek an outright acquittal, many attorneys feel that it is in their clients' interest to admit guilt and accept professional rehabilitative help.⁷⁰

Regardless of whether the child or the attorney more correctly perceives what is in fact better for the child, the constitutional purpose of providing a person with representation is to enable him effectively to present *his* views to the court. The fourteenth amendment does not require the "best" result for the person whose interests are at stake; rather, it requires that a person be heard in proceedings which affect his interests.

64. See Section III *infra*.

65. S. Wheeler & L. Cottrell, Jr., *Juvenile Delinquency—Its Prevention and Control* (1966); see U.S. President's Comm'n on Law Enforcement and Administration of Justice, *Report: The Challenge of Crime in a Free Society*, at 80-81 (1967).

66. *In re Gault*, 387 U.S. 1, 30 (1967), citing Wheeler & Cottrell, *supra* note 65, at 35.

67. 387 U.S. 1 (1967).

68. *Id.* at 28.

69. *Id.* at 36. Justice Fortas, writing for the Court, also quoted Dean Pound's statement that "[t]he powers of the Star Chamber were a trifle in comparison with those of our juvenile courts." *Id.* at 18.

70. See Platt & Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. Pa. L. Rev. 1156 (1968); Ferster, Courtless & Snethen, *The Juvenile Justice System: In Search of the Role of Counsel*, 39 Fordham L. Rev. 375 (1971).

Since in custody proceedings the child's interests are at stake,⁷¹ due process requires that *his* preferences be expressed and considered.

The same result is mandated by the Code of Professional Responsibility:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer.⁷²

When the question of the role of counsel for children in delinquency cases arose, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association took the position that, despite the pressures on lawyers to view themselves as an arm of the court whose role is essentially to promote the rehabilitation of the juvenile offender, their primary duty is to provide their clients with a zealous defense "to obtain full exoneration."⁷³

For representation by counsel to be meaningful, the relevant criteria would appear to be that the child be able to understand the placement alternatives and articulate his preference,⁷⁴ though no arbitrary age limit, of course, can assure that these criteria will be satisfied. Serious problems will certainly arise when the children are very young. Generally, when a client is incapable of making a considered judgment on his own behalf and has no guardian, the lawyer makes decisions for him (except such decisions as are required by law to be made by the client himself, if competent, or by a guardian if not).⁷⁵ Some courts have perceived a conflict in such situations where an attorney must function as both attorney and client, and have required that a separate guardian *ad litem* be appointed to make decisions for a child who cannot make them for himself.⁷⁶

Representation of a child involved in a custody case, whatever the child's age, will be a heavy burden for most attorneys. Few will feel that they have the necessary skills or experience to deal comfortably or effectively with children in the emotional atmosphere of most custody cases, especially if they are bound to listen to the child rather than simply look at the evidence and make their own determinations. Nevertheless, we should not underestimate either the ability of most lawyers to deal with a young client, or the ability of children to make reasonable choices regarding their own custody.

IV. CONCLUSION

In the variety of proceedings in which custody is determined, children have interests at stake which are entitled to the protections provided by the due process clause of the fourteenth amendment. At a minimum, due process requires that children be heard in custody proceedings. For that hearing to be effective, it is necessary that children be represented by counsel. When the importance of representation by counsel is balanced against the state's interests in summary proceedings, it is plain that such representation

71. See text accompanying notes 19-47 *supra*.

72. ABA Code of Professional Responsibility EC 7-7.

73. ABA Standing Comm. on Ethics and Professional Responsibility, Informal Opinions, No. 1160 (1971).

74. See also Cal. Civ. Code § 4600 (West Supp. 1974), which provides that "[i]f a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof."

75. ABA Code of Professional Responsibility EC 7-12.

76. E.g., *In re Dobson*, 125 Vt. 165, 212 A.2d 620 (1965).

is not only necessary as a practical matter, but is an ingredient of due process in all custody cases.

To satisfy due process and the Code of Professional Responsibility, an attorney for a child in a custody proceeding must function as an advocate for the child's preferences.

Custody proceedings involve a multitude of children each year and have a profound effect on their lives. It is time to give the child's viewpoint its proper constitutional place in those proceedings.⁷⁷

PAUL K. MILMED

77. According to the United States Bureau of the Census, *Statistical Abstract of the United States—1974*, at 66 (95th ed. 1974), there were approximately 639,000 divorces granted in 1969 in the United States, with an average of 1.31 children per divorce. Thus there were approximately 837,090 children whose parents divorced in that one year. In 1973 there were 913,000 divorces. The number of children per divorce in 1973 is not known, but at the 1969 rate there would have been 1,196,030 children whose parents divorced in 1973.

The figures for other types of custody cases are equally staggering. In 1973, for example, there were 141,000 dependency and neglect cases in the United States (involving children under 18 years old), and 1,112,000 delinquency cases (involving children between 10 and 17 years old). *Id.* at 162.

