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COMMENT: WITHOUT EFFECTIVE LAWYERS, DO MORE DETERMINATE LEGAL STANDARDS REALLY MATTER?

Vivek Sankaran*

In *Confronting Indeterminacy and Bias in Child Protection Law*, Professor Josh Gupta-Kagan wisely proposes that the child protection system needs more precise legal standards, not just to limit unnecessary state intrusion in the lives of families, but to also define the scope of that intrusion if it must occur. But as I read his piece, a question repeatedly ran through my mind - will the changes he proposes have any impact if parents in the child protection system continue to have ineffective lawyers representing them?

No system—even one with the most benevolent of intentions—can police itself and force itself to abide by legal standards, regardless of how stringent those standards are. Justice Louis Brandeis famously warned us that:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.¹

Justice Brandeis' warning plays itself out in the child protection system every day. Good-hearted professionals within the system justify their actions as simply furthering “the best interests of children,” and thus seek to shield themselves from rigorous oversight or accountability. And yet this rationale has resulted in the unnecessary destruction of black, brown, native and poor families for over a century. From Charles Loring Brace's attempts to find “better” homes for poor children,² to the federal government's attempts to eradicate Indian children of their culture,³ to the undisputed evidence that even today's child

1. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

2. See, for example, Erin Blakemore, ‘Orphan Trains’ Brought Homeless NYC Children to Work on Farms Out West, HISTORY (updated Apr. 9, 2019), <https://perma.cc/422N-MCDD> for more information about the work of New York minister Charles Loring Brace, who orchestrated a process in the mid-19th century to take poor children from their families and place them with wealthier families hundreds of miles away. There, the children would be forced into manual labor in exchange for living in their new home.

3. See, for example, Becky Little, *How Boarding Schools Tried to ‘Kill the Indian’ Through Assimilation*, HISTORY (updated Nov. 1, 2018), <https://perma.cc/NB8Y-HTBS> for more information about federal government policies based upon the belief that the only way to save a native child was to “kill the Indian in him.”

protection system disproportionately impacts black children,⁴ examples of this destruction abound. Left with unfettered discretion, even the most well-intentioned child protection system will overreach. No system, however benevolent its motives, has ever succeeded in policing itself.

Thus, without well-trained advocates available to enforce the very standards Professor Gupta Kagan suggests, the well-intentioned child protection system will likely find a way to continue encroaching on the rights of children and their parents.

Encouragingly, effective lawyers can serve as an antidote to this potential for overreach and can heighten the impact of Professor Gupta-Kagan's proposed reforms. In any given case, they can investigate and discover facts.⁵ They can present the counterfactual to the government's narrative. They can hold agencies accountable for ignoring rules. They can bring relevant statutes to the court's attention that limit the government's power. They can appeal decisions where judges have gone astray. Lawyers thus play a critical role in ensuring that decisionmakers strictly adhere to legislative mandates.

We all implicitly understand this. In our own lives, when faced with a situation where a governmental agency has wronged us, our first instinct would be to call a lawyer, both to safeguard our rights and to demonstrate that the government has erred. Think of a tax dispute with the Internal Revenue Service where the agency misapplied the tax code, claims you didn't pay enough money and is accusing you of fraud. You'd immediately hire a lawyer to hold the IRS accountable to what the law actually requires.

Studies of the effectiveness of lawyers in the child protection system confirm our instincts. When parents have well-trained lawyers, children spend fewer days in the foster care system and are returned to their birth families more quickly.⁶ And when they are in care, they are much more likely to live with their extended family, instead of with strangers.⁷ In other words, lawyers limit the government's ability to use its coercive authority to place children with strangers.

Yet, despite this understanding, the child protection system deprives most

4. See, e.g., *Disproportionality and Race Equity in Child Welfare*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 26, 2021), <https://perma.cc/934G-QNYD> (documenting that “[f]amilies of color are disproportionately represented in the child welfare system and are more likely to experience negative outcomes compared to white families.” These children “are more likely to experience multiple placements, less likely to be reunited with their birth families, more likely to experience group care, less likely to establish a permanent placement and more likely to experience poor social, behavioral and educational outcomes.”).

5. See *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*, A.B.A. (2006), <https://perma.cc/N6LQ-YFKB> (highlighting the responsibilities of parents' counsel).

6. See Lucas A. Gerber, Yuk C. Pang, Timothy Ross, Martin Guggenheim, Peter J. Pecora & Joel Miller, *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD & YOUTH SERVS. REV. 42 (2019).

7. *Id.* A list of studies documenting the impact that strong family defense can have on child welfare outcomes is available at *Research*, FAM. JUST. INITIATIVE, <https://perma.cc/X3RY-DE2Q> (archived Oct. 8, 2022).

parents, the vast majority of whom lack the money to pay for a lawyer, effective counsel to assist them.⁸ While nearly every jurisdiction in the country provides parents with a statutory right to counsel in child protection proceedings, the scope of that right varies. Some guarantee counsel from the very first removal hearing through the final termination of parental rights hearing, while others only provide counsel at later stages of a case.⁹ But no state provides parents with the right to counsel when they are being investigated by Child Protective Services, a critical stage at which agency decision-making goes unchecked because no judicial oversight occurs.¹⁰

While the scope of this right to counsel varies, one reality appears to be consistent across the country. Very few jurisdictions have invested in a parent's right to counsel in a way that demonstrates that they actually want the lawyer to be effective.¹¹ Parents' lawyers are underpaid and often carry caseloads so large that they can do little but attend court hearings on behalf of clients they hardly know.¹² They might not be compensated for doing the important work that they do outside of court—meeting with clients, investigating facts, attending administrative hearings—which directly affects their ability to challenge state action in the courtroom.¹³ And they might not be required to receive any specialized training in the law of child protection to represent clients in the child protection system.¹⁴ The tragic reality is that in most parts of the country, courts allow individuals who have just graduated from law school and passed the bar exam to represent parents in cases involving the permanent destruction of a family.¹⁵ Lawyers are allowed to do so without any training on child protection law, any knowledge of trauma, or any experience working with clients in any capacity.¹⁶

8. See Vivek S. Sankaran, *Moving Beyond Lassiter: The Need for A Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1 (2017) (highlighting ways in which state statutes vary in the scope of a parent's right to counsel).

9. *Id.*

10. In 2019, the New York City Council considered providing parents with the right to counsel in the investigatory stage, but ultimately did not adopt the proposal. See Michael Fitzgerald, *New York City Debates Lawyering Up Parents Early in Child Safety Investigations*, THE IMPRINT (Oct. 31, 2019), <https://perma.cc/V7AZ-ZB6L>; see also Michele Cortese & Tehra Coles, *Poor and at Risk of Losing Their Kids: Moms and Dads Under ACS Investigation Deserve More Legal Help*, N.Y. DAILY NEWS (Dec. 14, 2019 5:00 AM), <https://perma.cc/9JUR-JG8M>.

11. See Sankaran, *supra* note 8, at 8-10, for evidence on the persistent underfunding and lack of support for parents' counsel across the country.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. The National Association of Counsel for Children has developed a process to certify specialists in child welfare law after a rigorous training and an exam. But no jurisdiction mandates the process. More information about the program can be found at *Promoting Excellence: CWLS Certification*, NAT'L ASS'N OF COUNSEL FOR CHILD., <https://perma.cc/88FP-EW4H> (archived Oct. 9, 2022).

We have not only failed to create structures that guarantee the effective assistance of counsel, but have created processes that directly impede the ability of parents' lawyers to do their jobs. Parents' lawyers aren't always given complete access to information in the agency's possession about their client's case.¹⁷ They might not know of important administrative meetings at which key case-related decisions might be made.¹⁸ They might not even be permitted to speak directly with the agency caseworker, who retains significant power over whether a parent will reunify with their child.¹⁹ Yet when parents' lawyers raise concerns about these structural inequities that impede their ability to do their jobs, they are often chastised by those in the system, who stubbornly cling to the belief that observing basic due process protections is antithetical to promoting the best outcomes for children.

Recent developments have given the child protection community a glimmer of hope. In December of 2019, the federal government finally allowed federal foster care funds to be used to partially reimburse states for expenses related to paying lawyers for parents and children.²⁰ States have used this federal match to improve legal representation in a variety of ways, including increasing lawyer compensation, funding social workers to support attorneys, paying lawyers for out-of-court activities, and paying lawyers to handle legal matters ancillary to the child protection case, such as housing, child custody or public benefits cases.²¹ Over half of all states have tapped into these federal funds to provide additional support to parents' lawyers.²²

Additionally, across the country, advocates are pushing to expand pre-petition legal representation programs that would support parents during the CPS investigatory process, well before a petition is filed in juvenile court.²³ The first such program—the Detroit Center for Family Advocacy—has served parents in pre-petition cases for seven years, counseling parents on their rights in the investigatory process and handling legal matters that, if unresolved, would

17. See KAREN K. PETERS, COMMISSION ON PARENTAL LEGAL REPRESENTATION: INTERIM REPORT TO CHIEF JUDGE DiFIORE (2019), <https://perma.cc/Y5L5-A5MH> (highlighting the ways in which the structures that systems have created impede high quality legal representation for parents).

18. *Id.* at 19.

19. Conversations with practitioners has revealed that in certain jurisdictions like Los Angeles and New York City, lawyers for child protection caseworkers do not permit family defense lawyers to talk directly to those caseworkers.

20. See *Federal Funding*, FAM. JUST. INITIATIVE, <https://perma.cc/R46X-NES5> (archived Oct. 9, 2022) (listing resources detailing federal support for legal representation under Title IV-E of the Social Security Act).

21. See, e.g., *Strategy Brief: Strong Families: How Does High-Quality Legal Representation for Parents Support Better Outcomes?*, CASEY FAM. PROGRAMS (2019), <https://perma.cc/BRS9-UFTQ> (providing examples of how states are investing in high quality legal representation).

22. *Id.*

23. See *How is Pre-Petition Legal Representation Critical to the Continuum of Legal Advocacy?*, CASEY FAM. PROGRAMS (2021), <https://perma.cc/TCE3-U8W9> (providing more information about pre-petition legal representation programs).

jeopardize the ability of the family to remain together.²⁴ Now, similar programs exist all over the country. These programs are funded by public and private dollars and provide an important check on agency overreaching at the critical pre-removal stage of the case. But pre-petition legal representation programs continue to be the exception, not the norm.

Despite these important developments, most parents across the country must still navigate the system without a lawyer in the investigation stage, and without the assistance of an effective attorney after a petition has been filed in court. Until these realities change, the impact of Professor Gupta-Kagan's proposed changes will not be realized.

So what else can be done to guarantee that every parent receives assistance from a qualified attorney? Here are several suggestions for stakeholders to consider:

- Congress should require every child protection agency to ensure the provision of counsel for parents from the first removal hearing to the final termination of parental rights hearing as part of agencies' legal obligations under Title IV-E of the Social Security Act. Congress should also amend the Child Abuse Prevention Treatment Act to require every state in the country to provide parents with counsel.²⁵
- The Administration for Children and Families should use discretionary funds to create a quality improvement center dedicated to expanding pre-petition legal representation, in which different models of pre-petition advocacy can be implemented, evaluated and promoted.²⁶
- State child welfare agency leaders should use state and local funds to create pre-petition legal representation programs to ensure that families at risk of losing their children receive the assistance of a lawyer as early as possible.
- Judges who witness ineffective lawyering every day should publicly speak out about the importance of addressing the crisis in legal representation. Judges should also work with state and national associations to highlight the importance of parents' counsel and work with state legislatures to ensure that adequate funding is appropriated to fund this right.
- Parents' lawyers should form local associations that can speak with a unified voice to state legislatures in order to ensure that other

24. See Jo Mathis, *Detroit Center for Family Advocacy is First of its Kind*, LEGAL NEWS (May 23, 2013), <https://perma.cc/E3AW-RYUF>.

25. Currently, the Child Abuse and Prevention Treatment Act only requires that states provide children with guardians ad litem in every case. 42 U.S.C. § 5106(a).

26. More information about the federal government's child welfare quality improvement centers can be found at *Quality Improvement Centers*, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS., CHILD.'S BUREAU (July 2, 2021), <https://perma.cc/SU6E-US4G>. The centers "generate and disseminate research and knowledge in specific focus areas with the goal of helping agencies, managers, workers, and other child welfare professionals with service delivery."

stakeholders understand the obstacles lawyers face in delivering adequate representation for parents in the system.

These recommendations are certainly incomplete. But they are a step towards creating a world where parents involved in child protection cases receive the type of legal advocacy that any of us would want for ourselves and our families in this situation.

Until we transform the system to guarantee that all parents receive effective counsel, the problems Professor Gupta-Kagan identifies in his paper—state overreach and biased decision-making—that result in the temporary separation and permanent destruction of families will continue to exist.

Making statutes more precise simply isn't enough.