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As the Supreme Court put it a half century ago, the right to counsel for juveniles reflects "society's special concern for children" and "is of the essence of justice." In a variety of legal proceedings, from delinquency matters to child welfare proceedings to judicial bypass hearings, the law requires the appointment of counsel to child litigants. While coherent in the whole, the law regarding counsel for child litigants is a patchwork of state and federal constitutional rulings by courts and statutory grants. Legal scholarship about a child litigant's right to counsel is similarly fragmented. Predominantly, legal scholars have examined arguments for a child litigant's right to counsel at government expense by focusing on a particular kind of proceeding.

This Article offers a unified theory for a child litigant's right to counsel at government expense that spans judicial proceedings. In legal proceedings where significant legal rights or interests are at stake, fairness demands that child litigants have a right to counsel at government expense in those proceedings. In the main, the law coheres with the theory proposed here. However, one type of proceeding involving tens of thousands of juveniles annually with tremendous consequences stands as an unjustifiable outlier – immigration removal (deportation) proceedings.

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INTRODUCTION

In immigration removal (deportation) proceedings, respondents do not have a right to counsel at government expense.[1] Each year, as many as a hundred thousand or more people represent themselves in these proceedings.[2] The number includes tens of thousands of respondents under the age of eighteen.[3] Jack Weil, a federal immigration judge who was responsible for training other immigration judges, was recently asked during a deposition if there were some respondents in immigration court so young that they would not be able to understand the court proceedings.[4] He insisted it was a case-by-case determination.[5] In explaining why a judge could allow a removal hearing against an unrepresented child to go forward, he averred that "I've taught immigration law literally to three year olds and four year olds. It takes a lot of time. It takes a lot of patience. They get it. It's not the most efficient, but it can be done."[6] Judge Weil doubled down later in the deposition. When asked if there were any cases involving children where the only way to ensure that the child received a fair hearing was either to stop the proceeding or provide counsel, he reiterated, "I have trained three year olds and four year olds in immigration law. You can do a fair hearing [without providing the child with a lawyer]."[7]

The judge's claim is hard to take seriously. As legal and child psychology experts remarked after learning of Judge Weil's testimony, key developmental milestones for three- and four-year-olds include saying simple sentences and building towers of blocks.[8] At the same time, immigration law is notoriously inscrutable.[9] According to

1. 8 U.S.C. § 1229a(b)(4)(A) (2012).

2. *Details on Deportation Proceedings in Immigration Court*, TRAC IMMIGRATION (Nov. 2018), https://trac.syr.edu/phptools/immigration/nta/.

3. *Juveniles — Immigration Court Deportation Proceedings*, TRAC IMMIGRATION (June 8, 2014), https://trac.syr.edu/phptools/immigration/juvenile/.

4. Transcript of Deposition of Honorable Jack H. Weil, J.E.F.M. v. Lynch, 837 F.3d 1026 (9th Cir. 2016) (No. 2:14-cv-01026-TSZ), at 69:18–22.

5. *Id.*

6. *Id.* at 69:24–70:3.

7. *Id.* at 160:13–161:12.

8. Jerry Markon, *Can a 3-Year Old Represent Herself in Immigration Court? This Judge Thinks So*, WASH. POST (Mar. 5, 2016), https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html?utm_term=.b69ad5822554.

9. Baltazar-Alcazar v. Immigration & Naturalization Serv., 386 F.3d 940, 948 (9th Cir. 2004) (stating that courts have repeatedly recognized that the immigration laws are "second only to the Internal Revenue Code in complexity").

the Ninth Circuit Court of Appeals, "[a] lawyer is often the only person who [can] thread the [immigration-law] labyrinth."[10] Yet, Judge Weil's insistence on the fairness of adversarial removal proceedings against unrepresented children reflects prevailing due process law.[11]

This conflicts with a broad national consensus that child litigants should be appointed counsel in legal proceedings. As the Supreme Court put it a half century ago, the right to counsel for juveniles reflects "society's special concern for children" and "is of the essence of justice."[12] In a variety of civil proceedings, from delinquency matters to child welfare proceedings to judicial bypass hearings, the law requires the appointment of counsel to child litigants.[13]

While coherent in the whole, the law regarding counsel for child litigants is a patchwork of state and federal constitutional rulings by courts and statutory grants. This mishmash is partly the result of the right developing haphazardly. Sometimes, legislation created the right. Other times, litigation resulted in court rulings that child litigants are entitled to counsel at government expense. Always, the right has expanded one kind of legal proceeding at a time. And though there have been occasional delays and a rare dead end here and there, the right has steadily expanded since a juvenile litigant's due process right to appointed counsel was first recognized over half a century ago.[14]

Legal scholarship about a child litigant's right to counsel is similarly fragmented. Predominantly, legal scholars have examined arguments for a child litigant's right to counsel at government expense by focusing on a particular kind of proceeding.[15] This scholarship invariably makes its case for appointed counsel within the prevailing framework of the *Mathews v. Eldridge* (1976)[16] due process balancing

10. *Id.*

11. *See, e.g.*, Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 554 (9th Cir. 1990) (holding that non-citizens have a due process right to secure counsel of their choice, but at their own expense).

12. Kent v. United States, 383 U.S. 541, 554, 561 (1966).

13. *See infra*, Part II.

14. *Kent*, 383 U.S. at 554 (holding that juveniles have a due process right to counsel at transfer hearings to determine whether a juvenile's case would go forward in criminal rather than juvenile court); *In re* Gault, 387 U.S. 1, 30–31 (1967) (holding that juveniles have a due process right to counsel at the adjudication stage of juvenile delinquency proceedings).

15. *See, e.g.*, Benjamin Good, *A Child's Right to Counsel in Removal Proceedings,* 10 STAN. J. C.R. & C.L. 109 (2014); Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & C.R. L. REV. 663 (2006); Julie K. Waterstone, *Counsel in School Exclusion Cases: Leveling the Playing Field*, 46 SETON HALL L. REV. 471 (2016).

16. 424 U.S. 319 (1976).

test, which narrows the focus to the stakes, interests, and procedures of a particular type of proceeding.[17] What is lacking in the literature is a unified theory for a child litigant's right to counsel at government expense that spans judicial proceedings.

This Article attempts to offer such a theory. Because the theory addresses the fairness of proceedings involving juvenile litigants writ large, it eschews a three-part *Mathews* inquiry. Nor is the theory tethered to particular empirical findings from neuroscience, adolescent brain development, or developmental psychology.[18] That research undoubtedly supports the theory of appointed counsel for child litigants advanced here.[19] But as the Supreme Court recently observed, the differences between children and adults are generally known "commonsense propositions," which "the literature confirms" but for which "citation to social science and cognitive science authorities is unnecessary."[20] Moreover, differences beyond cognitive capacities—such as a child's presumptive lack of financial resources to hire counsel, and the government's *parens patriae* obligation toward children—inform the theory as well.

The theory is quite simple. In legal proceedings where significant legal rights or interests are at stake, fairness demands that a child litigant have a right to counsel at government expense in those proceedings.[21] The theory is grounded in the core value of fairness and the longstanding accommodation in the law of stable and enduring truths about the differences between children and adults.[22]

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17. *See, e.g.*, Pitchal, *supra* note 15, at 695 (2006) ("Though criticized, *Mathews* has been widely accepted by courts and repeatedly applied by the Supreme Court, so advocates have no choice but to filter arguments through its rubric."). *Mathews v. Eldridge* identified a three-part balancing test for determining whether a proceeding comported with due process, including (1) the private interest at stake in the proceedings; (2) the risk of erroneous deprivation of such interest under current procedures and the likelihood that additional or substitute procedural safeguards would reduce that risk; and (3) the government's interest, including the fiscal and administrative burdens that a proposed procedural safeguard would impose. *Mathews*, 424 U.S. at 321.

18. *See* Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447 (2009) (examining empirical studies in the area of procedural justice theory and urging courts to allow social science research related to adolescents and conceptions of procedural justice to inform the decision of whether juveniles should get certain procedural rights).

19. *See infra*, Part I.

20. J.D.B. v. North Carolina, 564 U.S. 261, 273 n.5 (2011); *see also* Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL'Y 109, 154 (2012) (noting that "Justice Sotomayor shifted the focus from the realm of social science to what she termed "commonsense propositions" about the nature of adolescence").

21. The theory does not encompass civil matters between private parties.

22. Terry A. Maroney, *The Once and Future Juvenile Brain*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 189, 201 (Franklin E. Zimring & David S. Tanenhaus eds., 2014).

The theory is outlined in Part I. Answering whether child litigants should be entitled to counsel at government expense involves two simple questions: (1) are significant interests at stake in the proceedings?; and (2) is the litigant before the court a minor? If the answer to both is yes, then fairness demands that the government provide the child litigant with counsel.

Part II lays out the current legal landscape of a child litigant's right to appointed counsel. In the main, the law coheres with the theory.[23] Part III identifies one type of proceeding involving tens of thousands of juveniles annually with tremendous consequences that stands as an outlier—immigration removal (deportation) proceedings. This Part explains why child respondents in removal proceedings should be provided with counsel as a matter of due process.

PART I: A COMMON SENSE THEORY OF A RIGHT TO APPOINTED COUNSEL FOR CHILD LITIGANTS

Few would assert with a straight face that a legal proceeding that could result in the detention of a juvenile, the separation of the juvenile from her family, or the denial of a juvenile's right to make reproductive choices—whatever the young person's age—could be fair if the juvenile did not have the benefit of legal counsel. That commonsense proposition undergirds the theory of a right to appointed counsel for child litigants asserted here. Children are different from adults in well-known ways relevant to their need for counsel in judicial proceedings, and those differences are shared by juveniles generally. As a result, proceedings impacting a child's significant interest are fair only when the child is provided with counsel. This holds whatever the administrative or financial burdens the requirement of appointed counsel for child litigants might impose.

This Part first explains why a rule demanding appointed counsel for child litigants is a matter of common sense, buttressed by developmental research about the cognitive capacities of children and adolescents. It then explains why the theory calls for a categorical right

23. That does not mean that all jurisdictions fully ensure that child litigants do not proceed unrepresented. As the Office of Juvenile Justice and Delinquency Prevention recently observed, provisions for waiver of counsel, "paired with limited internal oversight of juvenile indigent defense practices, can leave youth legally unrepresented." OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, LITERATURE REVIEW: INDIGENT DEFENSE FOR JUVENILES 3 (2018), https://www.ojjdp.gov/mpg/litreviews/Indigent-Defense-for-Juveniles.pdf.

to counsel, and not a case-by-case inquiry into individual circumstances. Finally, it defines "significant interests" to include long- and oft-recognized liberty and property interests, as well as a child's right to family integrity.

A. Common Sense

The idea that juveniles are different from adults and demand different legal standards is neither new nor controversial. The law has long accounted for the reality that juveniles "characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them."[24] From age-related driving and alcohol rules to restrictions on the enforceability of contracts entered into with minors[25] and innumerable other provisions, laws safeguard juveniles from their own vulnerabilities.[26] Indeed, "it is the odd legal rule that does *not* have some form of exception for children."[27]

Due process jurisprudence is no different. A quartet of cases decided by the Supreme Court between the 1930s and the 1960s recognized that fairness demanded special rules for children. The first two cases involved interrogation by police. In *Haley v. Ohio* (1948),[28] a plurality concluded that a statement obtained from a fifteen-year-old interrogated by relays of police from midnight until he confessed around 5:00 a.m. without a lawyer or an adult with him was involuntary and coerced in violation of the Due Process Clause of the Fourteenth Amendment.[29] According to the Court, "a mere child—an easy victim of the law— . . . cannot be judged by the more exacting

24. *J.D.B.*, 564 U.S. at 273.

25. Children at common law, and in many cases still to this day, could void a legal contract at their option. E. ALLAN FARNSWORTH, CONTRACTS 230 (2d ed. 1990) ("Common law courts early announced the prevailing view that a minor's contract is 'voidable' at the instance of the minor."); Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47, 50–51 (2012).

26. *See* Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195, 202 (2015) ("Two particular vulnerabilities of youth—their susceptibility to poor decisionmaking and their physical and emotional immaturity—shape the legal regulation of juveniles.").

27. Miller v. Alabama, 567 U.S. 460, 481 (2012).

28. 332 U.S. 596 (1948).

29. *Id.* at 601. Until the mid-twentieth century, the Fourteenth Amendment's Due Process Clause regulated police interrogation. *See generally* U.S. CONST. amend. XIV, § 1 (declaring that no person may be deprived of "life, liberty, or property without due process of law"). It required that confessions be voluntary, prohibiting law enforcement from overbearing the will of a suspect to get her to confess. *See* Spano v. New York, 360 U.S. 315, 320–24 (1959).

standards of maturity."[30] That law enforcement advised the youth of his rights was not sufficient for him to go it alone against government agents.[31] In *Gallegos v. Colorado* (1962),[32] the Supreme Court reiterated that a juvenile subject of police interrogation "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions."[33] Juvenile interrogation, the court explained, involves "a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights."[34] In the Court's view, a juvenile suspect could not, by himself, "know, let alone assert, such constitutional rights as he had."[35]

A pair of cases from the 1960s brought due process protections from the station house to the courthouse. In *Kent v. United States* (1966),[36] the Supreme Court recognized a due process right to appointed counsel for juveniles at transfer hearings, where juvenile court judges determine whether to transfer a delinquency case to adult criminal court.[37] The Court held that only the appointment of counsel for the juvenile would ensure that the transfer hearing would be fundamentally fair.[38] In *In re Gault* (1967),[39] the Supreme Court expanded the due process right to appointed counsel to juvenile respondents at the adjudication stage of civil delinquency proceedings because "[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon

30. *Haley*, 332 U.S. at 599.

31. *Id.* at 601 (The Court could not "indulge [the] assumptions" that a fifteen-year-old, without the aid of counsel, "would have a full appreciation of that advice and that . . . he had a freedom of choice.").

32. 370 U.S. 49 (1962).

33. *Id.* at 54 (Gallegos was a fourteen-year-old held for five days without seeing a lawyer, parent, or other friendly adult who, after being advised of his right to silence by police, confessed to an assault.).

34. *Id.* (This conclusion applied "no matter how sophisticated" the juvenile.).

35. *Id.*

36. 383 U.S. 541 (1966).

37. *Id* at 564.

38. *Id.* at 561; *see generally id.* at 554 (The provision of counsel, the Court observed, was part of "society's special concern for children.").

39. 387 U.S. 1 (1967).

regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."[40]

Notably, none of these cases involved amicus briefs from psychologists, and none involved citations to scientific findings regarding the distinguishing cognitive or psychosocial characteristics of juveniles. Indeed, long before the brain development revolution of the last couple of decades, judges and policymakers plainly understood that the differences between children and adults demanded special accommodations to ensure fairness. As the President's Commission on Law Enforcement and the Administration of Justice observed fifty years ago, "[t]he most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot."[41]

The last three decades have brought empirical backing to these common sense conclusions and spurred a renewed effort to ensure that the law provides children with special protections. The first major ruling, *Roper v. Simmons* (2005),[42] outlawed the death penalty for juvenile offenders.[43] The decision was grounded in "general differences between juveniles under 18 and adults" that are "too marked and well understood" to ignore.[44] Yet, as Professor Terry Maroney has observed, despite the emphasis on brain science in argument and in filings, the Supreme Court dedicated "a grand total of one phrase" to that science.[45] According to the Court, its conclusions about the distinguishing characteristics of juveniles reflect what "any parent knows."[46] In *Graham v. Florida* (2010),[47] which outlawed life without parole sentences for non-homicide offenses committed by juveniles, the citation to science grew to two sentences.[48] The

40. *Id.* at 36.

41. U.S. PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86 (1967).

42. 543 U.S. 551 (2005).

43. *Id.* at 551.

44. *Id.* at 569, 572.

45. Maroney, *supra* note 22, at 197.

46. *Roper*, 543 U.S. at 569.

47. 560 U.S. 48 (2010).

48. *Id.* at 68 (noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); *see* Maroney, *supra* note 22, at 201.

discussion expanded to a paragraph in *Miller v. Alabama* (2012),[49] the Court's third juvenile sentencing case.[50]

That accommodations for youth within the law are grounded as much in common sense and long-known, stable truths as new scientific findings was brought home by the Supreme Court in its recent case crafting special considerations for youth interrogated by police. In *J.D.B. v. North Carolina* (2011),[51] the Court put it plainly: a person's age "generates commonsense conclusions about behavior and perception" that "apply broadly to children as a class" and "are self-evident to anyone who was a child once himself."[52] Individuals "need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age.[53] They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult."[54] According to the Court, "to ignore the very real differences between children and adults . . . would be to deny children the full scope of the procedural safeguards" offered by the law.[55] The Court, in short, could discern no reason to blind itself to the "commonsense reality" that juveniles are different from adults in ways that matter to the law.[56]

The upshot of these cases is that developmental science is but "one source of data tending to confirm a general proposition about gross differences between adolescents and adults" relevant throughout the law.[57] Rather than a brain science revolution in the twenty-first century regarding juveniles and the law, therefore, there is instead, after a wayward period,[58] a revived commitment to providing children

49. 567 U.S. 460 (2012).

50. *Id.* at 471, 472 n.5 (observing that *Roper* and *Graham* "rested not only on common sense—on what 'any parent knows'—but on science and social science as well" and acknowledging that "[t]he evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger").

51. 564 U.S. 261 (2011).

52. *Id.* at 272.

53. *Id.* at 279–80.

54. *Id.*

55. *Id.* at 281 (referring to, in this context, the *Miranda* procedural safeguards of individuals interrogated by police while in custody).

56. *Id.* at 265.

57. *Id.* at 273 (given a history "replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults"); Maroney, *supra* note 22, at 201.

58. *See* Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 851–82 (2010); Franklin E. Zimring, *The 1990s Assault on Juvenile Justice: Notes from an Ideological Battleground*, 11 FED. SENT'G REP. 260, 260 (1999).

with enhanced protections on account of "commonsense conclusions" that "anyone who was a child" knows.[59]

Perhaps no such protection is more important than the right to appointed legal counsel for juveniles involved in judicial proceedings. Litigants in general (be they juveniles or adults) need the assistance of counsel for many reasons. At the adjudication stage, counsel ensures the procedural fairness of legal proceedings, helps litigants negotiate pre-trial matters, safeguards litigants' substantive rights, asserts claims and defenses, presents and tests evidence, holds opposing counsel to its burden of proof, advocates for fair resolutions and discretionary relief, and preserves issues for appeal. The assistance of a lawyer is especially important in complex legal proceedings that involve intricate statutory schemes that demand familiarity and understanding of state and federal case law to interpret and apply. When those complex legal proceedings can result in detention, and separation from family and community, appointing counsel becomes imperative.

The characteristics of youth greatly heighten the need for counsel.[60] A substantial body of research has consistently demonstrated that adolescents lack a basic understanding of court proceedings and the cognitive capacities to represent themselves.[61] In brief, the research supports the following findings about adolescents:

- adolescents' brain structures for planning and similar tasks are still developing;
- adolescents' undeveloped capability of regulating impulses or emotions frustrates their ability to think strategically about important decisions;

59. *J.D.B.*, 564 U.S. at 272.

60. Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 323 (2006) (recognizing that while there are exceptions, the general rule is that people under the majority age are legally incompetent).

61. *See* Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents' Judgment and Culpability*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 325, 341–42 (Thomas Grisso & Robert G. Schwartz eds., 2000); Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1774–80 (1995); Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & HUM. BEHAV. 221, 222–23 (1995); Jay N. Giedd, *The Amazing Teen Brain*, SCI. AM., June 2015, https://www.scientificamerican.com/article/risky-teen-behavior-is-driven-by-an-imbalance-in-brain-development/ ("MRI studies show that the teenage brain is not an old child brain or a half-baked adult brain; it is a unique entity characterized by changeability . . . . [T]he prefrontal cortex, which controls impulses, does not mature until the 20s.").

- adolescents' undeveloped planning ability makes them less future-oriented, and less capable of properly understanding the consequences of their decisions;
- adolescents are more likely than adults to yield to authority figures rather than make their own decisions;
- adolescents' decision-making deficiencies are magnified in stressful situations; and
- parents do not make up for adolescents' lack of cognitive capacity.[62]

Some of these characteristics alone demonstrate that adolescents lack the capacity to represent themselves in judicial proceedings. Taken together, the list is irrefutable.

The state's *parens patriae* obligation further underscores the need to provide appointed counsel for child litigants. Originating in Anglo-American common law centuries ago, the doctrine encompasses the government's power and responsibility to protect and care for those who cannot take care of themselves, including children.[63] Latin for "parent of the country," the *parens patraie* doctrine obligates the state to serve as the ultimate protector of a child's interests.[64] This interest favors appointed counsel for child litigants.[65]

Finally, the dependence that marks childhood makes appointed counsel necessary. Simply put, most youth lack the financial resources to secure counsel for themselves. This is especially true of youths who come into contact with criminal justice and family court systems.[66]

62. *See* RICHARD J. BONNIE ET AL., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 89–116 (2013); ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 46–60 (2008).

63. Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 382 (2000); Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978).

64. *See* Clark, *supra* note 63, at 415 ("[T]he doctrine of parens patriae itself gives government the power to act parentally towards children, beyond its police power over adult citizens and beyond protecting them from its own or others' coercion.").

65. Good, *supra* note 15, at 141.

66. *See* Katherine Hunt Federle, *Child Welfare and the Juvenile Court*, 60 OHIO ST. L.J. 1225, 1237 (1999) ("[T]he risks associated with poverty make it more likely for poor children and their families to end up in the juvenile court system."); Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 WIS. L. REV. 331, 346–47 (2002) ("[T]he overwhelming majority of child protective proceedings involve the poor . . . .").

B. Categorical

In due process cases, the law typically takes a categorical approach. The governing test for determining whether a proceeding comported with due process is the *Mathews v. Eldridge* test, which balances (1) the private interest at stake in the proceedings; (2) the risk of erroneous deprivation of such interest under current procedures and the likelihood that additional or substitute procedural safeguards would reduce that risk; and (3) the government's interest, including the fiscal and administrative burdens that a proposed procedural safeguard would impose.[67] Predominantly, the Supreme Court has applied the *Mathews* balancing test categorically. As the Court has put it repeatedly, "a process must be judged by the generality of cases to which it applies, not the rare exceptions."[68] This means that courts do not focus on any particular litigant or case, but analyze the interests at stake for claimants like the plaintiff, and consider the costs and the benefits of the additional procedure across the general category of proceedings.[69]

Due process claims by juveniles have been analyzed as categorical claims and resolved with categorical rules, even outside the *Mathews* framework. The foundational juvenile due process cases of *Kent* and *Gault*, for example, found that due process required counsel for juveniles, not because the individual characteristics of Morris Kent or Gerald Gault made counsel necessary in their particular cases, but because juveniles as a class need counsel for their proceedings to be fundamentally fair.[70] Similarly, the Supreme Court's recent sentencing cases have resulted in bright-line prohibitions on the death penalty and automatic life without parole

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

68. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 321, 330 (1985); *see Mathews*, 424 U.S. at 344 ("[Procedural] rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."); Santosky v. Kramer, 455 U.S. 745, 757 (1982) (same); Parham v. J.R., 442 U.S. 584, 612–13 (1979) (same); Ingraham v. Wright, 430 U.S. 651, 680 n.49 (1977) (same).

69. *See Mathews*, 424 U.S. at 341–44, 348 (considering what is "typically" or "generally" true of claimants and whether additional procedures would "often" or "in most cases" reduce the risk of error); John Pollock, *The Case Against Case-by-Case: Identifying Categorical Rights to Counsel in Basic Human Needs Cases*, 61 DRAKE L. REV. 763, 813 (2013). *But see* Turner v. Rogers, 564 U.S. 431 (2011) (rejecting a due process claim to appointed counsel in all civil contempt cases and holding that, on a case-by-case basis, individuals may require counsel to ensure that their proceeding was fundamentally fair). Notably, *Turner* did not address proceedings where the government "is likely to have counsel or some competent representative." *Id.* at 449.

70. *In re* Gault, 387 U.S. 1, 36 (1967); Kent v. United States, 383 U.S. 541, 561–62 (1966).

sentences for juvenile offenders.[71] Likewise, when insisting on special protections for youth subject to police interrogation, the Court observed that legal protections for juveniles "as a class" reflect "the settled understanding that the differentiating characteristics of youth are universal."[72]

There is no reason to depart from this categorical approach with regard to a right to counsel for child litigants. While the categorical method comes with occasional under- or over-inclusiveness,[73] the reason that fairness demands counsel for child litigants—the distinguishing characteristics of youth as a class—will always be present. Further, a categorical approach optimizes fairness, and it is much more efficient to treat members of a large similar group in a like manner.

A categorical approach for due process claims to counsel by child litigants is also preferred because of the shortcomings of the *Mathews* balancing approach.[74] Specifically with respect to child litigants, the *Mathews* balancing approach does not sufficiently allow for consideration of the distinguishing characteristics of child litigants and the long-held commitment within the law to special rules for youth. For example, *Mathews* factor one is the private interest at stake.[75] While children are autonomous individuals with liberty interests of their own, this factor is easily clouded by children's status as dependents of adults who possess strong rights to control them.[76] As

71. Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

72. J.D.B. v. North Carolina, 564 U.S. 261, 273 (2011). More often than not, this results in lines drawn at age 18, though that is not always the case. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 574 (2005) ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood."); Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1116 (2012) ("[B]enchmarks of maturity in the law frequently occur at different points in time.").

73. *Roper*, 543 U.S. at 574 ("Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules.").

74. *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 103–05 (1985) (arguing that *Mathews* transformed due process inquiries into utilitarian ones that subordinated the intrinsic value of the process as a fundamental, individual right); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 674 (2d ed. 1988) ("[The *Mathews* court's] approach overlooks the unquantifiable human interest in receiving decent treatment . . . [and] provides the Court a facile means to justify the most cursory procedures by altering the relative weights to be accorded each of the three factors."); Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1105 (2012) ("One of the many shortcomings of the *Mathews* balancing test is that it privileges error costs over other costs as the relevant deprivation.").

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

76. *See* Barbara Bennett Woodhouse, "*Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1036–50 (1992).

the Supreme Court put it in a case regarding pretrial detention, a juvenile's liberty interest "must be qualified" because "juveniles, unlike adults, are always in some form of custody."[77] The status of children, therefore, and the frequent presence of adults alongside child litigants, makes it easy for courts to undervalue the private interests at stake.

The state's *parens patriae* obligation further muddies the *Mathews* analysis when due process claims are brought by children. Because the child's interest in his own welfare and the state's interest in the child's welfare overlap, the *parens patriae* obligation might be thought to double the weight of the child's best interest in the *Mathews* due process balancing.[78] Often, courts consider the *parens patriae* interest as promoted by procedures that enhance the accuracy of proceedings.[79] Sometimes, however, courts have considered the *parens patriae* interest as weighing against additional procedures because the government interest in protecting the welfare of the child was thought vindicated by a speedy resolution of the proceedings.[80] In *Gault*, the Supreme Court held that the *parens patriae* nature of delinquency proceedings was not sufficient to protect an unrepresented child litigant's interests.[81] All of which is to say that courts struggled to consistently factor the *parens patriae* obligation into the *Mathews* balancing inquiry.

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77. Schall v. Martin, 467 U.S. 253, 265 (1984) (A juvenile's "interest in freedom from institutional restraints . . . is undoubtedly substantial . . . But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody.").

78. *See* Davis v. Page, 714 F.2d 512, 529 (5th Cir. 1983) (Vance, J., dissenting) ("The interest of the state as *parens patriae* is identical to the interest of the child."); *In re* Sanders, 852 N.W.2d 524, 555 (Mich. 2014); Good, *supra* note 15, at 141 (noting that the *parens patriae* interest therefore weighs on the private-interest side of the *Mathews v. Eldridge* balancing scale, and favors counsel for child litigants). As Benjamin Good has observed, the *parens patriae* interest as part of a *Mathews* balancing "is something of a paradox—though it belongs to the government, it is vindicated by the procedural safeguards sought by [children]" in due process litigation. Good, *supra* note 15, at 141.

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

80. *In re* Alexander V., 613 A.2d 780, 785 (Conn. 1992) ("We must, therefore, consider the state's interest, as parens patriae, in minimizing the delay that a competency hearing would occasion in promptly determining the child's uncertain future."); *see also* GPH v. Giles, 578 N.E.2d 729, 735 (Ind. Ct. App. 1991) ("The state, in exercising its *parens patriae* role and for the finite period specified in the emergency detention statute, may limit an alleged mental patient's constitutional right to counsel.").

81. *In re* Gault, 387 U.S. 1, 35–36 (1976) (finding that neither the probation officer nor the juvenile court judge could sufficiently protect the juvenile litigants' interests and that due process demanded counsel for juveniles).

To be consistent with due process jurisprudence generally, to avoid the blind spots of a *Mathews* balancing, and because the characteristics of youth that make counsel necessary are always present for child litigants, the right to appointed counsel for child litigants should be a categorical one.

C. "Significant Interest"

The due process clauses protect against deprivations of liberty and property.[82] Physical liberty is a significant, but not the only, liberty interest protected by due process.[83] Courts have also found that the right to family integrity is a significant interest held by children protected by due process.[84] Because of the broad scope of the interests protected by due process, judicial proceedings involving a child litigant that do not deal with a significant liberty or property interest are rare.

PART II: THE RIGHT TO APPOINTED COUNSEL FOR CHILD LITIGANTS: CURRENT LEGAL LANDSCAPE[85]

This Part explores the current legal landscape of a child litigant's right to appointed counsel. It shows a broad national consensus that fairness demands appointed counsel for juveniles in civil proceedings when significant rights or liberty are at stake.[86]

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82. U.S. CONST. amends. V, XIV. ("[N]o person shall be . . . deprived of life, liberty, or property, without due process of law."); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit [protected by the due process clause], a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.").

83. Washington v. Glucksberg, 521 U.S. 702, 719 (1997) (noting that the "liberty" protected by the due process clause "includes more than the absence of physical restraint"); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("[F]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

84. See Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 2000) (citing Supreme Court cases) ("Parents and children have a well-elaborated constitutional right to live together without governmental interference."); Wooley v. City of Baton Rouge, 211 F.3d 913, 923 (5th Cir. 2000) ("[A] child's right to family integrity is concomitant to that of a parent.")

85. The bulk of the content of this Part was compiled by the author for an *amicus curiae* brief submitted to the Ninth Circuit in the case of C.J.L.G. Amicus Curiae Brief of Professor Kevin Lapp, et al. in Support of Reversal, C.J.L.G. v. Sessions, No. 16-73801 (9th Cir. Mar. 15, 2018).

86. Many jurisdictions have not yet fulfilled the mandates of appointed counsel for juveniles, and many juveniles proceed *pro se* because courts permit them to waive appointed counsel. *See* Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175 (2007); Wallace J. Mlyniec, In re Gault *at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 No. 3 CRIM. L. BULL. no. 3, 2008, Art. 5 (2008).

A. Criminal and Delinquency Proceedings

Since the United States Supreme Court held in *Powell v. Alabama* (1932)[87] that "the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process" in a capital case,[88] the right to counsel at government expense in legal proceedings has spread widely. The right was expanded to all federal criminal defendants in *Johnson v. Zerbst* (1938).[89] In *Gideon v. Wainwright* (1963),[90] the Supreme Court held that due process demanded that all criminal defendants facing felony charges in federal or state court be provided with counsel.[91]

Shortly after *Gideon*, the Court held that due process demands appointed counsel for juvenile respondents at the adjudication stage of civil delinquency proceedings because of two factors: (1) juveniles are ill-equipped to perform the tasks necessary to defend themselves; and (2) the stakes were too high in delinquency proceedings to permit juveniles to defend themselves in court without a lawyer.[92] In delinquency proceedings, the government accuses a juvenile of

87. 287 U.S. 45 (1932).

88. *Id.* at 69 ("Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.").

89. Johnson v. Zerbst, 304 U.S. 458, 463 (1938). Despite the categorical approach in federal criminal cases, the Supreme Court initially limited the right to appointed counsel outside of federal criminal cases to the special circumstances of a particular case. Betts v. Brady, 316 U.S. 455, 466 (1942). Under this approach, the Supreme Court recognized that youth was a special circumstance that favored the appointment of counsel to young criminal defendants. For example, in *Wade v. Mayo*, the Supreme Court held under the special circumstances test that an eighteen-year-old defendant's youth made him incapable of adequately representing himself. 334 U.S. 672, 684 (1948) ("There are some individuals who, by reason of age, ignorance or mental capacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment."). Notably, Defendant Wade was 18 years old and had prior convictions and thus was "no a stranger to the Court Room." *Id.* at 683. Similarly, the Supreme Court held that a seventeen-year-old should have been provided counsel before pleading guilty to burglary. Uveges v. Pennsylvania, 335 U.S. 437, 442 (1948) ("Petitioner was young and inexperienced in the intricacies of criminal procedure when he pleaded guilty to crimes which carried a maximum sentence of eighty years.").

90. 372 U.S. 335 (1963).

91. *Id.* at 345 (limited only by the defendant's financial ability to retain his own counsel).

92. *In re* Gault, 387 U.S. 1, 27–28 (1967).

conduct that would be criminal if committed by an adult.[93] While juvenile courts aim for more rehabilitative dispositions for juveniles than the punitive focus of criminal courts, the consequences of delinquency proceedings can include fines, probation, and prolonged detention.[94] As the Supreme Court recognized, "[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."[95] Notably, the Supreme Court held that due process demanded counsel for juveniles in delinquency proceedings, even though Gerald Gault and other juveniles at the time did not face a prosecutor in their proceedings.[96] The due process right to appointed counsel in delinquency proceedings is a categorical one, and does not depend on the developmental characteristics of the juvenile before the court (subject only, in some states, to a juvenile's ability to pay).[97]

The right to appointed counsel for juveniles applies at transfer hearings as well, where juvenile court judges determine whether to transfer a delinquency case to adult criminal court.[98] Even though a transfer hearing does not, by itself, result in any penalties, the Supreme Court recognized that the decision to transfer a juvenile's case from juvenile court to criminal court was "critically important," and

93. Delinquency proceedings do not, however, result in criminal convictions. *See, e.g.*, CAL. WELF. & INST. CODE § 203 (West 2019) ("An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding.").

94. *See, e.g.*, CAL. WELF. & INST. CODE § 731 (West 2019) (detailing dispositional alternatives for those adjudicated delinquents, including physical confinement equal to the maximum period of imprisonment that could be imposed on an adult for the same offense).

95. *In re Gault*, 387 U.S. at 36 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)) ("[T]he child requires the guiding hand of counsel at every step of the proceedings against him.").

96. Josh Gupta-Kagan, *Rethinking Family-Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. CHI. L. REV. 743, 761 (2018) ("From family courts' origin at the turn of the twentieth century to the Supreme Court's 1967 decision in *Gault*, family courts had developed a unique system for making charging decisions in both child protection and juvenile delinquency cases, which placed court staff in decisive roles and excluded prosecutors and other executive-branch officials."). In Gault's case, he was questioned by the judge. Two probation officers were present, but no prosecutor. Today, juvenile delinquency proceedings are presented by the state by trained prosecutors. NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS 64 (3d ed. 2009) ("Entry-level attorneys in the juvenile unit should be as qualified as any entry-level attorney, and receive special training regarding juvenile matters.").

97. Some states require proof of indigence before they will provide a court-appointed lawyer to a juvenile in delinquency proceedings, while others presume indigence. *See, e.g.*, N.C. GEN. STAT. § 7B-2000 (2013) ("All juveniles shall be conclusively presumed to be indigent . . . .").

98. Kent v. United States, 383 U.S. 541, 557 (1966).

therefore it was "equally of 'critical importance' that the material submitted to the judge . . . be subjected . . . to examination, criticism, and refutation."[99] The Court held that only counsel for the juvenile would ensure that the transfer hearing was fundamentally fair.[100] Appointed counsel for youth in legal proceedings involving "such tremendous consequences," the Court declared, is part of "society's special concern for children."[101] The due process right to appointed counsel at transfer hearings is similarly is a categorical one, and does not depend on the developmental characteristics of the juvenile before the court.

To best protect juvenile litigants, numerous scholars and expert bodies go beyond urging a right to counsel and endorse prohibitions on waiver of counsel by juveniles.[102] For instance, the Institute for Judicial Administration and the American Bar Association Juvenile Justice Standards prohibit waiver of counsel by juveniles,[103] and both the National Juvenile Defender Center and the National Legal Aid and Defender Association similarly call for a ban on the waiver of counsel by juveniles.[104] These groups do so because effective assistance of counsel for juveniles is the precursor to a juvenile's ability to exercise all other important rights during the course of the juvenile justice process. Moreover, "[f]ew juveniles have the experience and understanding to decide meaningfully that the assistance of counsel would not be helpful."[105] A growing number of states have followed

99. *Id.* at 563.

100. *Id.*

101. *Id.* at 554.

102. *See* Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 609–622, 650 (2002) (advocating for the prohibition of juvenile waiver of counsel based on juveniles' lack of capacity and public policy, and rejecting concerns regarding the violation of juveniles' right to autonomy); Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1345 (1989) (arguing for a mandatory representation model in delinquency court).

103. INST. OF JUDICIAL ADMIN. & AM. BAR ASS'N, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO ADJUDICATION 14 (1980); *see also* Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 418–20 (2008) (arguing that young suspects lack the capacity to waive counsel and be interrogated without the presence of an adult).

104. AM. COUNCIL OF CHIEF DEFS. AND NAT'L JUV. DEF. CTR., TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH INDIGENT DEFENSE DELIVERY SYSTEMS 1, 2 (2005) ("The indigent defense delivery system should ensure that children do not waive appointment of counsel.").

105. INST. OF JUDICIAL ADMIN. & AM. BAR ASS'N, *supra* note 103, at 14 (recommending a prohibition on waiver of counsel at pretrial proceedings).

these recommendations and restrict or prohibit juveniles from waiving their right to counsel.[106]

The rest of this Part shows that in the decades since *Kent* and *Gault*, courts and legislatures have extended the right to appointed counsel far beyond the delinquency setting.

B. Status Offense Hearings

The bulk of states provide juveniles a right to appointed counsel in status offense hearings.[107] Status offenses are non-criminal, non-delinquent offenses that would not be offenses for an adult.[108] They include matters like curfew violations, truancy, alcohol or tobacco possession, incorrigibility, and running away.[109] Disposition can include court-ordered services, probation, and out-of-home

106. These states include: Georgia (GA. CODE ANN. § 15-11-103 (2018) (minors may not waive counsel in dependency proceeding)); Illinois (705 ILL. COMP. STAT. 405 / 5-170(b) (2018); 705 ILL. COMP. STAT. 405/5-115.5 (1987) ("[A] minor may not waive the right to the assistance of counsel in his or her defense [in delinquency proceedings].")); Iowa (IOWA CODE § 232.11(2) (2018) (minors may not waive counsel at detention, adjudicatory, waiver, or dispositional hearings)); Kentucky (D.R. v. Commonwealth, 64 S.W.3d 292, 296 (Ky. Ct. App. 2001) (juvenile may not waive counsel unless counsel is first appointed and consulted with)); Michigan (MICH. COMP. LAWS § 3.915(B) (juvenile may not waive counsel if court determines that best interests of juvenile or public require appointment)); New York (N.Y. FAM. CT. ACT § 249(a) (McKinney 2018) (juvenile presumed unable to waive counsel in delinquency or person in need of supervision proceeding; presumption can be rebutted only with clear and convincing evidence once attorney has been appointed)); Pennsylvania (PA. R. JUV. CT. P. 152(A) (juveniles may not waive counsel in detention, adjudicatory, transfer, dispositional or probation hearings)); Texas (TEX. FAM. CODE ANN. § 51.10(b) (2017) (prohibits juveniles from waiving counsel at any transfer, adjudicatory, disposition, detention, or mental health commitment review hearing)); and Wisconsin (WIS. STAT. § 938.23(1m)(a) (2018) (minors under fifteen may not waive counsel)).

107. AM. BAR ASS'N, THE RIGHT TO COUNSEL IN STATUS OFFENSE CASES (2010), https://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/right_to_counsel_factsheet.authcheckdam.pdf.

108. *Literature Review*, OJJDP (Sept. 2015), https://www.ojjdp.gov/mpg/litreviews/Status_Offenders.pdf.

109. *Id.* States use various terms to characterize status offenders: "Children in Need of Services," "Children in Need of Supervision," "Children in Need of Assistance," "Youth in Need of Intervention," "Family in Need of Services," "incorrigible youth," "unruly youth," "wayward youth" or simply "status offenses." In some states, status offense petitions fall under the delinquency jurisdiction, in others under the dependency jurisdiction. Status offense cases can represent a significant percentage of a juvenile court's caseload. *See, e.g.*, CAL. DEP'T. OF JUSTICE, JUVENILE JUSTICE IN CALIFORNIA 31 (2015), https://oag.ca.gov/cjsc/pubs#juvenileJustice (reporting over 11,000 status offense petitions filed in 2015, representing 16.6 percent of all petitions filed in juvenile court in 2015).

placement.[110] Secure detention is strongly disfavored in status offense proceedings, but does occur.[111]

Consistent with the theory advanced here, thirty-nine states and the District of Columbia have laws requiring judges to appoint counsel to juveniles in status offense proceedings either mandatorily or under certain circumstances, such as when counsel is requested.[112] Six additional states allows judges to appoint counsel in status offense proceedings at their discretion.[113]

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110. *See* Sarah Hockenberry & Charles Puzzanchera, *Juvenile Court Statistics 2013*, 2015 NAT'L CTR. FOR JUV. JUST. 81 (finding that the court ordered out-of-home placement in 8 percent of all adjudicated status offense cases in 2013).

111. *See* 34 U.S.C. § 11133(a)(11)(A) (2012). States holding status offenders in secure detention risk losing a significant portion of their juvenile justice block grant awards. *Status Offense Issues*, JJGPS, http://www.jjgps.org/status-offense-issues (last visited Jan 19, 2019). If it is alleged that a status offender violated a valid court order, a violation hearing may be held. At that violation hearing, secure detention may be imposed. 34 U.S.C. § 11133(a)(11)(A)(i), 11133(a)(23). Federal regulations require counsel at such violation hearings. *See* 28 C.F.R. § 31.303(f)(3)(v)(D) (2018) (Status offenders who have allegedly violated a valid order of the court must be afforded "the right to legal counsel, and the right to have such counsel appointed by the court if indigent" at the violation hearing.).

112. Twenty-eight states and the District of Columbia have enacted laws requiring judges to appoint counsel to juveniles in status offense proceedings: Arkansas (ARK. CODE ANN. § 9-27-316 (2018)); California (CAL. WELF. & INST. CODE § 634 (West 2018)); Colorado (COLO. REV. STAT. § 19-3-203 (2018)); D.C. (D.C. CODE § 16-2304(a) (2018)); Georgia (GA. CODE ANN. § 15-11-402 (2018)); Idaho: (IDAHO CODE ANN. § 20-514 (2018)); Illinois (705 ILL. COMP. STAT. 405/1-5 (2018)); Indiana (IND. CODE § 31-32-4-2 (2018)); Kansas (KAN. STAT. ANN. § 38-2205 (2018)); Kentucky (KY. REV. STAT. ANN. § 610.060 (West 2018)); Maryland (MD. CODE. ANN., CTS. & JUD. PROC. § 3-8A-20 (West 2018)); Massachusetts (MASS. GEN. LAWS ch. 119, § 39F (2018)); Michigan (MICH. COMP. LAWS § 712A.17c(2) (2018) (court shall appoint attorney unless child waives right)); Mississippi (MISS. UNIF. R. YOUTH CT. P. 24 (2018)); Montana (MONT. CODE ANN. § 41-5-1413 (2017) (counsel mandatory in formal proceedings)); Nevada (NEV. REV. STAT. § 62D.030 (2018)); New Hampshire (N.H. REV. STAT. ANN. § 169-D:12 (2018)); New Mexico (N.M. STAT. § 32A-3B-8 (2019) (counsel mandatory if juvenile over age 14)); New York (N.Y. FAM. CT. ACT § 741 (McKinney 2018)); Ohio (OHIO REV. CODE ANN. § 2151.352 (West 2018)); Oklahoma (OKLA. STAT. tit. 10A, § 2-2-301 (2018)); Pennsylvania (42 PA. CONS. STAT. ANN. § 6337 (2018)); Rhode Island (R.I. GEN. LAWS § 1-41-31 (2002)); South Carolina (S.C. CODE ANN. § 36 (2018)); South Dakota (S.D. CODIFIED LAWS §§ 26-7A-31 (2018) (court shall appoint attorney if child can't afford)); Utah (UTAH CODE ANN. §§ 78A-6-1111 (2018)); Vermont (VT. STAT. ANN. tit. 33, § 5112 (2017)); Washington (WASH. REV. CODE § 13.32A.192(1)(C) (2018)); West Virginia (W. VA. CODE § 49-4-708 (2017)). An additional eleven states provide a qualified right to counsel for juveniles in status offense proceedings: Arizona (ARIZ. REV. STAT. ANN. § 8-221(A) (2018)); Connecticut (CONN. R. SUP. CT. JUV. § 30a-1(b)(2) (2019)); Iowa (IOWA CODE § 232.89 (2019)); Maine (ME. REV. STAT. ANN. tit. 15, § 3306 (2017)); Minnesota (MINN. R. JUV. DELINQ. P. 3.02 (2018)); Nebraska (NEB. REV. STAT. § 43-272 (2018)); New Jersey: (N.J. STAT. ANN. § 2A:4A-39 (West 2018)); North Dakota (N.D. CENT. CODE § 27-20-26 (2017)); Texas (TEX. FAM. CODE ANN. § 51.10 (West 2017)); Virginia (VA. CODE ANN. § 16.1-266(C) (2018)); Wyoming (WYO. STAT. ANN. § 14-6-422(a) (2018)).

113. *See* Alaska (ALASKA STAT. § 47.10.010 (2018)); Hawaii (HAW. REV. STAT. § 571-87(a) (2018)); Louisiana (LA. CHILD. CODE ANN. art. 810 (2018)); Missouri (MO. SUP. CT. R. 115.02 (2018)); Tennessee (TENN. CODE ANN. § 37-1-126 (2018)); Wisconsin (WIS. STAT.

C. Dependency Proceedings

Every state has provisions for appointing a lawyer to juveniles in dependency proceedings.[114] In dependency proceedings (also known as child welfare, or abuse and neglect, proceedings), the state brings allegations of abuse or neglect against parents or guardians. Dependency proceedings do not result in any finding of wrongdoing by the minor. Nevertheless, dependency proceedings can result in a child's temporary or permanent removal from her family to foster homes and group residential institutions.[115]

Recognizing the importance of the juvenile's interests in the outcome of such proceedings, thirty states and the District of Columbia mandate appointing a lawyer for juveniles in dependency proceedings.[116] Another fourteen have a qualified right, providing a

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§ 938.23(1m)(a) (2018) (The court has discretion to appoint counsel in a "youth in need of intervention" case but a child must be represented by counsel before she can be placed outside the home.)).

114. Federal law has long required that all minors have, at least, a guardian ad litem (GAL) in dependency proceedings. 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2018). A GAL need not be an attorney, and for many reasons is not the equivalent of an attorney. *Id.* A primary difference is that guardians ad litem are typically expected to advocate for the minor's best interests, as perceived by the GAL, instead of being client-directed as in the typical attorney-client relationship. *Id.* While this undoubtedly makes sense for infant clients, it is increasingly problematic as the age of the juvenile respondent increases.

115. DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 200–01, 201 n.9 (1989) (noting that placement in foster care can be substantially similar to "incarceration, institutionalization, or other similar restraint of personal liberty"); *see also* Jennifer K. Pokempner et al., *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 HARV. C.R.-C.L. L. REV. 529, 537–38 (2012) (explaining that a link exists between healthy child development and consistent, supportive relationships, which is disrupted by dependency proceedings, where "[r]emoval from an adolescent's family, friends, and community is at stake").

116. Alabama (ALA. CODE §§ 12-15-102(10), 12-15-304(a), 26-14-11 (2018)); Arkansas (ARK. CODE ANN. §§ 9-27-316(f), 9-27-401 (2018)); Colorado (COLO. REV. STAT. §§ 19-1-103(59), 19-3-203(1) (2018)); Connecticut (CONN. GEN. STAT. §§ 46b-129(c)(2), 46b-136, 51-296 (2018)); Delaware (DEL. CODE ANN. tit. 13, § 2504(f) (2018); DEL. CODE ANN. tit. 29, § 9007A (2018)); District of Columbia (D.C. CODE ANN. § 16-2304(b)(5) (West 2018)); Georgia (GA. CODE ANN. § 15-11-103 (2018)); Iowa (IOWA CODE §§ 232.89(2), 232B.5(16) (2019)); Kansas (KAN. STAT. ANN. § 38-2205 (2018)); Kentucky (KY. REV. STAT. ANN. §§ 610.060, 620.100(1)(a) (West 2018)); Louisiana (LA. CHILD. CODE ANN. art. 607 (2018)); Maryland (MD. CODE. ANN., CTS. & JUD. PROC. § 3-813 (2017)); Massachusetts (MASS. GEN. LAWS ch. 119 § 39F (2012)); Michigan (MICH. COMP. LAWS §§ 712A.17c(7), 722.630 (2017); MICH. CT. R. 3.915(B) (2019)); Mississippi (MISS. CODE ANN. § 43-21-201, (2009); MISS. UNIF. R. YOUTH CT. PRAC. 13(a) (2018)); Missouri (MO. ANN. STAT. §§ 210.160, 211.211 (West 2018)); Nebraska (NEB. REV. STAT. § 43-272 (2018)); Nevada (NEV. REV. STAT. § 432B.420 (2013)); New Jersey (N.J. STAT. ANN. §§ 9:6-8.21, 9:6-8.23, 30:4C-15.4, 30:4C-85(a)(2) (West 2018)); New York (N.Y. JUD. LAW § 35(7) (McKinney 2018); N.Y. FAM. CT. ACT §§ 241, 249(a), 1120(b) (McKinney 2018)); North Carolina (N.C. GEN. STAT. § 7B-601 (2018)); Oklahoma (OKLA. STAT. tit. 10a, § 1-4-306 (West 2018));

lawyer under certain conditions, such as when parental rights have been terminated[117] or when the juvenile is over a certain age.[118] The remaining six states permit, but do not require, appointed counsel for minors in dependency proceedings.[119]

In those minority of jurisdictions where appointing a lawyer is not mandatory, courts often ensure that minors are represented by appointed counsel. For example, California law provides that, in dependency proceedings, "the court shall appoint counsel for the child or nonminor dependent, unless the court finds that the child or nonminor dependent would not benefit from the appointment of counsel."[120] Despite the discretionary nature of the right to appointed counsel, dependency courts rarely, if ever, invoke this provision to deny appointed counsel to a child of any age.[121]

Because every state has statutory provisions regarding the appointment of counsel for children in dependency proceedings, the Supreme Court has never had occasion to decide whether due process requires the appointment of counsel to children in dependency proceedings. A number of state and federal courts, however, have held that minors have a right to counsel under the due process clause of a

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Oregon (OR. REV. STAT. § 419B.195 (West 2003) (counsel must be appointed upon request)); Pennsylvania (42 PA. CONS. STAT. § 6311 (2018), PA. R. JUV. CT. P. 1151 (2019)); South Dakota (S.D. CODIFIED LAWS §§ 26-7A-31, 26-8A-18 (2018)); Tennessee (TENN. CODE ANN. §§ 37-1-126, 37-1-149 (2018)); Utah (UTAH CODE ANN. §§ 78A-6-317, 78A-6-1111, 78A-6-902(2) (West 2018)); Vermont (VT. STAT. ANN. tit. 33, § 5112 (2017); VT. R. FAM. P. 6(b) (2018)); Virginia (VA. CODE ANN. § 16.1-266(A) (2010)); West Virginia (W. VA. CODE ANN. §§ 49-4-601(a), 29-21-2 (2018)); Wyoming (WYO. STAT. ANN. § 14-3-211 (2018)).

117. Arizona (ARIZ. REV. STAT. ANN. § 8-221 (West 2018)); Florida (FLA. STAT. § 39.01305 (2018); FLA. R. JUV. P. 8.217)); Illinois (705 ILL. COMP. STAT. 405 / 1-5(1) (2007)); Minnesota (MINN. STAT. § 260C.163(3)(b) (2018); S. 1386, 90th Leg., 2017–2018 (Mn. 2017)); Montana (MONT. CODE ANN. §§ 41-3-425, 47-1-104(4) (2018)); New Hampshire (N.H. REV. STAT. ANN. § 169-C:10 (2018)); North Dakota (N.D. CENT. CODE §§ 27-20-26, 27-20-48.4(4) (2017)); Ohio (OHIO REV. CODE ANN. § 2151.352 (West 2018); (OHIO JUV. R. 4(A), (C)(1)); Rhode Island (R.I. GEN. LAWS §§ 40.1-5-8(d)(2), 40-11-7.1(b)(3) (2018); R.I. GEN. LAWS § 21-28.2-3(4) (2018); R.I. R. JUV. P. §§ 15(c)(3), 18(c)(3)); Texas (TEX. FAM. CODE ANN. § 107.012 (West 2017)); Washington (WASH. REV. CODE § 13.34.100 (2017)); Wisconsin (WIS. STAT. § 48.23(1m) (2019)).

118. *See* IDAHO CODE § 16-1614(2) (2009) (providing a right to appointed counsel for those 12 and older in dependency proceedings); N.M. STAT. ANN. § 32A-4-10(C) (1978) (providing a right to appointed counsel for those 14 and older in dependency proceedings); KING CTY. L. JU. C.R. 2.4 (providing a right to appointed counsel for those 12 and older in dependency proceedings).

119. Alaska (ALASKA STAT. §§ 47.10.050, 47.10.010 (2018); ALASKA CHILD IN NEED OF AID R. 12(b)(3)); California (CAL. WELF. & INST. CODE § 317(c) (West 2018)); Hawaii (HAW. REV. STAT. §§ 587A-17(a) (2018)); Indiana (IND. CODE § 31-32-4-2(b) (2018)); Maine (ME. REV. STAT. ANN. tit. 22, § 4005(1) (2010); ME. R. GUARDIANS AD LITEM 2); South Carolina (S.C. CODE ANN. § 63-7-1620 (2018)).

120. CAL. WELF. & INST. CODE § 317(c)(1).

121. The author's research turned up no instances.

state's constitution in dependency proceedings. For example, a Georgia court found a due process right to counsel in dependency proceedings because of the fundamental liberty interests at stake and the state's *parens patriae* interest in protecting children could only be adequately ensured if the child is represented by counsel throughout the proceedings.[122] Similarly, an Alabama court found a statute that did not provide for the appointment of independent counsel to represent a child in a neglect proceeding violated due process.[123] A New Jersey court concluded that the due process clause of the federal and New Jersey Constitutions include a right to appointed counsel for minors in dependency proceedings "to protect the interests of a minor incapable of speaking for himself."[124]

In civil delinquency, status offense, and child welfare proceedings, courts and legislatures have agreed that, given the stakes of those proceedings, the developmental characteristics of youth, and the state's *parens patriae* obligation to secure a child's best interests, fairness demands that child litigants be provided with counsel in those proceedings.

D. Termination of Parental Rights

Proceedings to terminate parental rights can "sever completely and irrevocably the rights of parents in their natural child."[125] While the proceeding primarily concerns the right held by the parent, the interests of the minor in termination proceedings are likewise fundamental. Not only can the proceedings terminate the legal connection between a parent and child, they often effectively end the parent-child relationship.[126] Because of the significant interests at stake, courts across the country have acknowledged that minors whose parents face termination of their parental rights "are entitled to and

122. Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1356–62 (N.D. Ga. 2005).

123. Roe v. Conn, 417 F. Supp. 769, 780 (M.D. Ala. 1976); *see also In re* Jamie TT, 599 N.Y.S.2d 892, 894–95 (App. Div. 1993) ("[T]he Due Process Clauses of the Federal and State Constitutions . . . mandate that there be *some form* of legal representation of [a child's] interests in the proceedings on the [abuse] petition [brought against the parent].").

124. N.J. Div. of Youth & Family Servs. v. Wandell, 382 A.2d 711, 713 (N.J. Juv. & Dom. Rel. Ct. 1978); *In re* Dependency of J.A., No. 45134-4-II, 2014 WL 2601713 (Wash. Ct. App. June 10, 2014) (holding that due process demanded an attorney for the child because a non-attorney representative could not adequately protect the legal interests of the child).

125. Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

126. *See* Curnow *ex rel.* Curnow v. Ridgecrest Police, 952 F.2d 321, 325 (9th Cir. 1991) (recognizing that "a child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest").

need the assistance of counsel."[127] As the Massachusetts Supreme Judicial Court put it, "[t]he decision whether to terminate is of enormous consequence to the child. The child cannot have a meaningful opportunity to be heard in a contested proceeding without the assistance of counsel, regardless whether the case is initiated by the department or other agency or by a private party.[128]

The majority of states require appointed counsel for the minor in TPR proceedings,[129] and another sixteen have a qualified right to appointed counsel.[130]

127. *In re* Christina M., 877 A.2d 941, 950 (Conn. App. Ct. 2005); *see also In re* Adoption/Guardianship No. A91-71A, 640 A.2d 1085, 1095 (Md. 1994) (finding the need for counsel in termination proceedings to represent the interest of the juvenile "compelling").

128. *In re* Meaghan, 961 N.E.2d 110, 113 (Mass. 2012) (also acknowledging children's right to appointed counsel "in a variety of circumstances where the parent-child relationship is at stake").

129. Mandatory right to appointed counsel in privately and state-initiated adoption proceedings: Connecticut (CONN. GEN. STAT. §§ 46b-121(a)(1), 46b-129a(2)(A), 46b-136 (2019)); Louisiana (LA. CHILD. CODE ANN. arts. 1016, 1244.1(B) (2018)); Massachusetts (MASS. GEN. LAWS ch. 119, § 29 (2011); *In re* Meaghan, 961 N.E.2d 110 (Mass. 2012)); Missouri (MO. ANN. STAT. § 453.025 (2004); MO. ANN. STAT. § 211.211 (West 2018); MO. R. 30 CIR R. 22.1). Mandatory right to appointed counsel in state-initiated termination of parental rights proceedings: Alabama (ALA. CODE § 12-15-304(a) (West 2018)); Colorado (COLO. REV. STAT. § 19-3-602 (LexisNexis 2018)); Delaware (DEL. CODE ANN. tit. 13, § 2504(f) (2018)); Georgia (GA. CODE ANN. § 15-11-262 (2018)); Iowa (IOWA CODE § 232.113 (2019)); Kansas (KAN. STAT. ANN. § 38-2205 (West 2018)); Maryland (MD. CODE ANN., FAM. LAW § 5-307(b) (West 2018)); Michigan (MICH. COMP. LAWS § 712A.17c(7) (2017), MICH. CT. R. 3.915(B)(2)); Mississippi (MISS. CODE ANN. § 43-21-201(1) (2004)); Nebraska (NEB. REV. STAT. § 43-272(2)-3 (2016)); New Jersey (N.J. STAT. ANN. § 30:4C-15.4 (West 2018)); New Mexico (N.M. STAT. ANN. § 32A-4-10(C) (2005) (minors aged 14 or older)); New York (N.Y. FAM. CT. ACT § 741 (McKinney 2018); N.Y. JUD. LAW § 35(7) (McKinney 2018)); North Carolina (N.C. GEN. STAT. § 7B-601 (2018)); Pennsylvania (23 PA. CONS. STAT. § 2313(a) (2018)); South Dakota (S.D. CODIFIED LAWS § 26-8A-18 (2018)); Tennessee (TENN. CODE ANN. § 37-1-149 (2012)); Texas (TEX. FAM. CODE ANN. § 107.012 (West 2017)); Virginia (VA. CODE ANN. § 16.1-266(A) (2010)); West Virginia (W. VA. CODE ANN. § 29-21-2 (West 2018)); Utah (UTAH CODE ANN. § 78A-6-1111 (West 2018)). Mandatory right to appointed counsel in privately initiated adoption proceedings: Vermont (VT. STAT. ANN. tit. 15A, § 3-201 (2018)).

130. Arizona (ARIZ. REV. STAT. ANN. § 8-221(A) (2018)); California (CAL. FAM. CODE § 7861 (West 2018)); Florida (FLA. R. JUV. P. 8.217 (mandatory in certain cases pursuant to H.R. 561, 2014 Leg., Reg. Sess. (Fla. 2014))); Idaho (IDAHO CODE § 16-1614 (2009)); Illinois (705 ILL. COMP. STAT. 405 / 1-5 (2007)); Minnesota (MINN. STAT. § 260C.163(3)(b) (2018)); Montana (MONT. CODE ANN. § 41-3-425 (2018)); New Hampshire (N.H. REV. STAT. ANN. § 169-C:10 (2018)); North Dakota (N.D. CENT. CODE § 27-20-26 (2017)); Oklahoma (OKLA. STAT. tit. 10A, § 2-2-301(D) (2018)); South Carolina (S.C. CODE ANN. § 63-7-2560 (A)–(B) (2008)); Vermont (VT. STAT. ANN. tit. 33, § 5112 (2017)); Washington (WASH. RULE JUV. CT. R. 9.2(c)(1)); Wisconsin (WIS. STAT. § 48.23(1m) (2019)); Ohio (*In re* Williams, 805 N.E.2d 1110, 1111, 1113 (Ohio 2004)); Oregon (*In re* D., 547 P.2d 175 (Or. Ct. App. 1976)).

E. Judicial Bypass Hearings

Another civil proceeding in which juvenile litigants have a right to appointed counsel is a non-adversarial judicial bypass hearing. Judicial bypass hearings must be available if a state requires a minor to notify or obtain consent from one or both parents before she can receive an abortion.[131] These proceedings are not adversarial, do not result in any finding of wrongdoing by the minor, and there is no possibility of detention or similar punishment. Nevertheless, of those states that provide judicial bypass procedures for minors seeking an abortion, all enable the appointment of counsel to the minor.

In over three quarters of the states that provide judicial bypass hearings (thirty out of thirty-seven), juveniles have a statutory right to appointed counsel in such hearings.[132] Courts recognize that the right to counsel is essential to protect the pregnant juvenile's right to receive an abortion.[133] Four states have a qualified right to appointed counsel

131. Bellotti v. Baird, 443 U.S. 622 (1979) (introducing the requirement of bypass hearings).

132. Alabama (ALA. CODE § 26-21-4(b) (West 2018)); Alaska (ALASKA STAT. § 18.16.030(d) (2018)); Arizona (ARIZ. REV. STAT. ANN. § 36-2152(D) (2018)); Arkansas (ARK. CODE ANN. § 20-16-809(1)(B) (2018)); Florida (FLA. STAT. § 390.01114(4)(a) (2018)); Georgia: (GA. CODE ANN. § 15-11-684(a) (2018)); Idaho (IDAHO CODE § 18-609A(3) (2004)); Illinois (750 ILL. COMP. STAT. ANN. 70 / 25(b) (West 2009)); Indiana (IND. CODE § 16-34-2-4(e) (2017)); Iowa (IOWA CODE § 135L.3(3)(b) (2018); IOWA CT. R. 8.24); Kansas (KAN. STAT. ANN. § 65-6705(b) (2014)); Kentucky (KY. REV. STAT. ANN. § 311.732(3)(c) (West 2018)); Massachusetts (MASS. GEN. LAWS ch. 112, § 12S (2019)); Michigan (MICH. COMP. LAWS § 722.904(2)(e) (2018); MICH. CT. R. 3.615(F)); Mississippi (MISS. CODE ANN. § 41-41-55(2) (West 2018)); Missouri (MO. REV. STAT. § 188.028(2)(1) (2018)); Montana (MONT. CODE ANN. § 50-20-509 (2017)); Nebraska (NEB. REV. STAT. ANN. § 71-6903(7) (West 2018)); New Hampshire (N.H. REV. STAT. ANN. § 132:34(II)(a) (2018)); North Carolina (N.C. GEN. STAT. § 90-21.8(c) (2011)); Ohio (OHIO REV. CODE ANN. § 2151.85(B)(2) (West 2018)); Oklahoma (OKLA. STAT. tit. 63, § 1-740.3(B) (2018)); Pennsylvania (18 PA. CONS. STAT. ANN. § 3206(e) (1992)); South Carolina (S.C. CODE ANN. § 44-41-32(3) (2018)); South Dakota (S.D. CODIFIED LAWS § 34-23A-7.1 (2019)); Tennessee (TENN. CODE ANN. § 37-10-304(c)(1) (2018)); Texas (TEX. FAM. CODE ANN. § 33.003(e) (West 2017)); Virginia (VA. CODE ANN. § 16.1-241(W) (West 2018)); West Virginia (W. VA. CODE § 16-2F-4(d) (2017)); Wisconsin (WIS. STAT. § 48.23(1m)(cm) (2018)). Maine no longer requires parental consent prior to seeking an abortion. A statutory procedure remains in place for a minor to seek judicial approval for the abortion, and that procedure contains a right to counsel for the minor. *See* ME. REV. STAT. ANN. tit. 22, § 1597-A(6)(A) (2018). Judicial bypass proceedings are not required in states that do not require parental consent.

133. Planned Parenthood v. LaWall, 189 F. Supp. 2d 975, 981 (D. Ariz. 2001) ("[T]he minor's right to establish maturity is sufficiently protected by her statutory right to counsel."); *In re* Anonymous, 531 So. 2d 901, 904 (Ala. 1988) ("[T]he minor's conditional right to exercise her constitutional choice of an abortion is further protected by her right of legal counsel."); *In re* T.W., 551 So. 2d 1186, 1196 (Fla. 1989) ("In [parental consent hearings] wherein a minor can be wholly deprived of authority to exercise her fundamental right to privacy [by obtaining an abortion], counsel is required under our state constitution."); *In re* Moe, 523 N.E.2d 794, 795 (Mass. App. Ct. 1988) ("Counsel for the applicant, with foreknowledge of the case, may be able to draw out salient information which the judge's questioning will miss.").

in judicial bypass hearings.[134] As a result, in over ninety percent of judicial bypass states, the minor has a right to appointed counsel by default, by asking for one, or by petitioning for a hearing before the court. In the remaining three states that have judicial bypass hearings, the right to appointed counsel is discretionary.[135]

F. Other

In a variety of other contexts, child litigants have a right to counsel. Sometimes, it is because they are in a proceeding in which all litigants are entitled to counsel, such as mental health commitment proceedings.[136] In other proceedings, such as civil protection order proceedings that may lead to criminal violations, courts found that the characteristics of youth supported a due process right to appointed counsel.[137] At other times, legislatures have granted child litigants a right to appointed counsel to protect the child's interest in family relationships.[138]

G. No Right to Counsel

There are at least two types of proceedings in which child litigants do not have a right to appointed counsel: student discipline hearings and immigration removal proceedings.

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134. Delaware (DEL. CODE ANN. tit. 24, § 1784(e) (2011)); Minnesota (MINN. STAT. § 144.343, subd. 6 (2004)); Montana (MONT. CODE ANN. § 50-20-509 (2017) (counsel assigned upon request)); Nevada (NEV. REV. STAT. § 442.255 (2017) (minor has a right to appointed counsel if the judge initially denies the minor's request following an interview, and the minor files a petition with the court requesting a formal hearing)).

135. Colorado (COLO. REV. STAT. § 12-37.5-107(2)(b) (2010)); Utah (UTAH R. JUV. P. 60(c)); Wyoming (WYO. STAT. ANN. § 35-6-118(b)(iii) (2018)).

136. ARIZ. REV. STAT. ANN. § 36-529(B) (2018) (requiring appointment of counsel for all persons facing civil commitment for a mental disorder); *In re* Roger S., 569 P.2d 1286, 1296 (Cal. 1977) (applying *Gault* to hold that children are entitled to counsel in civil commitment proceedings); *see, e.g.*, ARIZ. REV. STAT. ANN. § 8-221(C) (West 2018) (providing a right to appointed counsel to juveniles in "any court appearance which may result in institutionalization or mental health hospitalization").

137. *In re* D.L., 937 N.E.2d 1042, 1047 (Ohio Ct. App. 2010) (stating that the juvenile's "young age alone would indicate that he should have been appointed counsel" in civil protection order proceedings that may lead to criminal violations).

138. OR. REV. STAT. § 107.425(b) (2011) (right to counsel for children involved in divorce proceedings upon request); VT. STAT. ANN. tit. 15, § 594(b) (2018) (mandating courts to appoint counsel for a minor child when the child is called as a witness in a divorce or annulment proceeding).

1. Student Discipline Hearings

Courts and legislatures have recognized the tremendous importance of education in a child's development.[139] Consistent with this, courts have recognized that a child's "legitimate entitlement to a public education . . . [is] a property interest protected by the Due Process clause."[140] Therefore, when school officials move to exclude a juvenile from the classroom, for either a short-term suspension or an expulsion, the juvenile has a right to some process. The Supreme Court set the procedural floor for school suspensions quite low when it held that due process only required an informal hearing in which the child has the opportunity to "present his side of the story."[141] The Court held that due process does not require a right to confront and cross-examine witnesses, or a right on behalf of the student to call his own witnesses to verify his version of the incident, much less that the government provide the child with a lawyer at the suspension hearing.[142] According to the Court, such rights risked overwhelming administrative resources, and the Court worried that "escalating [suspension hearings'] formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."[143]

The Court did concede that suspensions lasting longer than ten days "may require more formal procedures" to satisfy due process.[144] And in many jurisdictions across the country, authorities have imposed procedural requirements above and beyond the minimal floor

139. Goss v. Lopez, 419 U.S. 565, 576 (1975) ("[T]he total exclusion from the educational process for more than a trivial period . . . is a serious event in the life of the suspended child."); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments."). Education is not, however, considered a fundamental right under the U.S. Constitution. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). Some states have decreed that education is a fundamental right in their state constitution, or state courts have interpreted education under the state constitution to be a fundamental right. *See, e.g.*, CAL. CONST. art. IX, § 5; FLA. CONST. art. IX, § 1; MONT. CONST. art. X, § 1; Sch. Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, 667 A.2d 5, 9 (Pa. 1995) ("[P]ublic education in Pennsylvania is a fundamental right."); Rose v. Council for Better Educ., 790 S.W. 2d 186, 212 (Ky. 1989) ("A child's right to an adequate education is a fundamental one under our Constitution.").

140. *Goss*, 419 U.S. at 574.

141. *Id.* at 581.

142. Indeed, the Supreme Court did not even require that states afford the child the opportunity to secure counsel. *Id.* at 583.

143. *Id.* at 583.

144. *Id.* at 584.

set in *Goss v. Lopez* (1975).[145] None, however, afford a juvenile facing exclusion from school a right to appointed counsel.[146]

To the extent that expulsions and short-term suspensions do not involve a complete denial of access to public education, however, it is arguably consistent with the theory advanced here. When students are expelled from a school, they typically retain their right to a public education, and are provided an alternative school placement.[147] When students are suspended from school, they may not attend school on site, but still may receive work from the school so that they do not fall behind during the suspension.[148] What is lost as a result of an expulsion or suspension is the ability to receive education at a particular school, not the right to a public education. Nevertheless, the lack of a right to counsel in school suspension and expulsion hearings is, at the very least, troubling, and given the stakes and limited abilities of youth to assert their rights and interests, arguably violates due process.[149]

2. Immigration Proceedings

Tens of thousands of minors appear as respondents in immigration removal proceedings annually. According to the Transactional Records Access Clearinghouse (TRAC), the number of juveniles in immigration court removal proceedings had been approximately 60,000 annually for the last few years.[150] In Fiscal Year (FY) 2018, the number reached the highest ever recorded. As of November 2018, the United States had brought removal proceedings

145. 419 U.S. 565 (1975); Waterstone, *supra* note 15, at 487 ("[M]ost states have enacted hearing procedures for long-term school exclusions that allow students an opportunity to introduce evidence, confront witnesses, and make statements on their own behalf.").

146. *Id.* at 488.

147. This is not always true. *Id.* at 492 (identifying New Mexico, North Carolina, and Wisconsin as states where students are not necessarily offered an alternative educational placement during an expulsion or suspension).

148. At least, this is the way it is supposed to happen. Often, suspended students do not receive assignments during their suspension.

149. Waterstone, *supra* note 15, at 477.

150. *Juveniles — Immigration Court Deportation Proceedings*, *supra* note 3.

against over 247,000 juveniles in FY 2018.[151] Some are as young as two years old.[152]

In immigration removal proceedings, Congress has declared that respondents have "the privilege of being represented, *at no expense to the Government*, by counsel of the [respondent's] choosing."[153] There is no carve-out from this rule for child respondents. For FY 2018, two-thirds of juvenile respondents in removal proceedings were not represented.[154]

While some state and local jurisdictions with large immigrant populations, including the states of New York and California, and cities such as San Francisco, Los Angeles, Washington, D.C., New York City, Baltimore, and Austin, have taken steps designed to ensure that non-citizens are provided legal representation in removal proceedings,[155] courts have yet to recognize that due process demands appointed counsel for every child litigant. Indeed, over the years, courts have rejected both Fifth and Sixth Amendment claims to appointed counsel in removal proceedings.[156] And while several

151. *Id.* For FY 2018, case counts in TRAC's Immigration Court "juvenile cases" include all juveniles. Unlike prior years, they do not distinguish between children who arrive unaccompanied and those who arrive as part of a family unit. *Distinguishing Unaccompanied Children from Children in Family Units*, TRAC IMMIGRATION (June 8, 2018), https://trac.syr.edu/phptools/immigration/juvenile/note.html.

152. *See* Vivian Yee & Miriam Jordan, *Migrant Children in Search of Justice: A 2-Year-Old's Day in Immigration Court*, N.Y. TIMES (Oct. 8, 2018), https://www.nytimes.com/2018/10/08/us/migrant-children-family-separation-court.html.

153. 8 U.S.C. § 1229a(b)(4)(A) (2012).

154. *Juveniles — Immigration Court Deportation Proceedings*, *supra* note 3 (of 228,874 juveniles, 153,079 were not represented). From 2014 to 2016, approximately two-thirds of juvenile respondents in immigration proceedings were represented by a lawyer. *Id.* (63 percent represented in FY 2014, 66 percent represented in FY 2015 and FY 2016). But as the number of juveniles in removal proceedings has grown, so too has the number and percentage of those who do not obtain counsel. The figure for FY 2017 was 57 percent unrepresented (35,197 of 61,917). Prior to the recent spike in the number of removal proceedings brought against juveniles, more juveniles than not managed to secure some form of representation.

155. *See New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation*, VERA INST. JUST. (Apr. 7, 2017), https://www.vera.org/newsroom/press-releases/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation; *see also* Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L. REV. 1, 6 (2017) (noting that "some states and localities with large numbers of noncitizen residents have begun to provide funding for immigrant representation").

156. *See, e.g.*, Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (holding that the Sixth Amendment's guarantee of counsel to criminal defendants does not apply to respondents in civil removal proceedings); Al-Saka v. Sessions, 904 F.3d 427, 434 (6th Cir. 2018) ("[T]he Due Process Clause does not guarantee a right to government-provided counsel in [removal proceedings]."); Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008) ("[T]here is

federal courts of appeals have observed that, in particular cases, due process may demand a right to counsel in removal proceedings,[157] no court has found that due process required counsel at government expense in the case before the court.

Several recent decisions have addressed a minor respondent's procedural rights in removal proceedings, including a right to appointed counsel. The Ninth Circuit held in *Flores-Chavez v. Ashcroft* (2004)[158] that children cannot accept service of a charging document because "minors generally cannot appreciate or navigate the rules of or rights surrounding final proceedings that significantly impact their liberty interests."[159] Relatedly, in *Jie Lin v. Ashcroft* (2004),[160] the Ninth Circuit found a due process violation when an asylum hearing was conducted despite minor's counsel's insufficient preparation for the hearing.[161] The case involved a fourteen-year-old who "could not speak English, and had no knowledge of the American legal system."[162] He had retained counsel, but counsel did little in the way of preparation or advocacy during the hearing.[163] Indeed, the representation was so deficient that the court stated that proceeding under the circumstances "flirted with denial of counsel altogether."[164] The court noted that "minors are entitled to trained legal assistance so their rights may be fully protected."[165] Because it was a "near-certain prospect" that the minor respondent was "unable to present his case fully and fairly if unrepresented,"[166] the Ninth Circuit found that the

no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding.").

157. *See* Michelson v. Immigration & Naturalization Serv., 897 F.2d 465, 468 (10th Cir. 1990) (noting that a due process claim to appointed counsel could be shown where sufficient prejudice from the lack of counsel was shown); United States v. Campos-Asencio, 822 F.2d 506, 509 (5th Cir. 1987) (holding that a respondent in removal proceedings "has a right to counsel if the absence of counsel would violate due process under the fifth amendment").

158. 362 F.3d 1150 (9th Cir. 2004).

159. *Id.* at 1160.

160. 377 F.3d 1014 (9th Cir. 2004).

161. *Id.* at 1024–27.

162. *Id.* at 1019.

163. The Ninth Circuit found that the minor's counsel had limited, if any, contact with her client, unreasonably failed to investigate and present the factual and legal basis of the minor's asylum claim, failed to appear in court for the asylum hearing, conducted little advocacy via her telephonic appearance, and failed to pursue a direct appeal to rectify the errors made at the hearing. *Id.* at 1024–26.

164. *Id.* at 1033.

165. *Id.* (quoting Johns v. County of San Diego, 114 F.3d 874, 877 (9th Cir. 1997)).

166. *Id.*

decision to proceed while the minor was effectively unrepresented violated due process.[167]

These cases provide strong support for a due process right to appointed counsel for child litigants. Although *Flores-Chavez* is not about counsel, one doubts how children who lack the competence to accept service in immigration cases may simultaneously be able to represent themselves in immigration court against trained prosecutors. And *Jie-Lin* declared that "minors are entitled to trained legal assistance so their rights may be fully protected,"[168] and found the effective denial of counsel to amount to a violation of due process.[169]

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167. *Id.* at 1033–34 ("[T]he IJ could not let [the minor's] hearing proceed without counsel."); *see also* Franco-Gonzalez v. Holder (*Franco-Gonzalez II*), No. 10-cv-02211-DMG-DTB, 2013 WL 3674492 (C.D. Cal. April 23, 2013) (holding that non-citizens who are not competent to represent themselves by reason of a serious mental disorder or defect and who are detained during their removal proceedings are entitled to the appointment of a qualified representative). The court held that those respondents are not able to meaningfully exercise their rights under the Immigration and Nationality Act to "examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government." *Franco-Gonzalez II*, 2013 WL 3674492 at *4. The court located the right not in the Due Process clause, but instead in section 504 of the Rehabilitation Act, which prohibits discrimination against those with disabilities. *Id.* at *3; 29 U.S.C. § 794 (2017). Hewing to the doctrine of avoiding constitutional questions when it is unnecessary to reach them, the court did not reach the plaintiffs' claim for a right to appointed counsel under the Due Process Clause of the United States Constitution. *Franco-Gonzalez II*, 2013 WL 3674492 at *9. As interpreted by the Supreme Court, section 504 of the Rehabilitation Act requires than an individual with disabilities be provided with meaningful access to the benefit offered by the government. Alexander v. Choate, 469 U.S. 287, 309 (1985). The court found that plaintiffs were "unable to meaningfully access the benefit offered—in this case, full participation in their removal and detention proceedings—because of their disability." *Franco-Gonzalez II*, 2013 WL 3674492 at *4. Rather than require the appointment of counsel, however, the court required the appointment of a "qualified representative." *Id.* at *3. The court defined "qualified representative" as "(1) an attorney, (2) a law student or law graduate directly supervised by a retained attorney, or (3) an accredited representative, all as defined in 8 C.F.R. 1292.1." Franco-Gonzalez v. Holder (*Franco-Gonzalez I*), 828 F. Supp. 2d 1133, 1147 (C.D. Cal. 2011). Federal regulations define an "accredited representative" as "a person who is approved by the Board to represent aliens before the Board, the Immigration Courts, and DHS. He or she must be a person of good moral character who works for a specific nonprofit religious, charitable, social service, or similar organization which has been recognized by the Board to represent aliens." BD. OF IMMIGRATION APPEALS, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 25 (last revised Oct. 16, 2018), https://www.justice.gov/eoir/page/file/1103051/download. To receive accreditation, an individual must demonstrate that he or she works for a qualifying organization that "has at its disposal adequate knowledge, information, and experience" in immigration law and procedure and the qualifying organization must "set forth the nature and extent of the proposed representative's experience and knowledge of immigration and naturalization law and procedure." 8 C.F.R. § 1292.2(a), (d) (2017).

168. *Jie Lin*, 377 F.3d at 1033 (quoting Johns v. County of San Diego, 114 F.3d 874, 877 (9th Cir. 1997)).

169. *Id.* at 1027.

Nevertheless, no federal court has held that minor respondents in removal proceedings have a categorical due process right to counsel.[170] In the most recent, and directly on point, case, a minor who appeared in immigration court accompanied only by his mother asserted on appeal a due process right to appointed counsel.[171] Sitting *en banc*, the Ninth Circuit declined to address the constitutional claim.[172] Judge Paez authored a concurrence that would have decided the right to appointed counsel claim, and would have recognized the right under the *Mathews* balancing test.[173]

PART III: THE THEORY APPLIED TO IMMIGRATION REMOVAL PROCEEDINGS

Part I articulated a theory for a due process right to counsel for child litigants. It drew on society's and the law's longstanding and renewed special concern for children, and the distinguishing characteristics of youth. Part II showed that the law regarding the right of child litigants to counsel generally coheres with the theory advanced here. One notable exception, involving tens of thousands of child litigants annually, are immigration removal (deportation) proceedings. This Part argues that, because immigration removal proceedings are complex, adversarial proceedings in which significant liberty interests are at stake, and the respondent faces a trained

170. *Cf.* Partial Judgment and Permanent Injunction, *Franco-Gonzalez II*, No. 10-cv-02211-DMG-DTB, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013) (holding that non-citizens in removal proceedings who are incompetent due to mental disabilities are entitled to a qualified representative as a reasonable accommodation under section 504 of the Rehabilitation Act).

171. C.J.L.G. v. Barr, 923 F.3d 622 (9th Cir. 2019) (en banc).

172. *Id.* The Ninth Circuit remanded the case to the immigration court because the immigration judge failed to advise the minor respondent that he was apparently eligible for a form of relief from removal. *Id.* The court avoided deciding the fully-briefed right to appointed counsel claim by noting that C.J.L.G. had since secured counsel and would be represented before the Immigration Court on remand. *Id.* Strikingly, C.J.L.G.'s case demonstrates exactly why child respondents need lawyers to ensure the fairness of their proceedings. Neither the presence of a friendly adult nor the immigration judge's duty to develop the record were sufficient to prevent error. Moreover, if C.J.L.G. had not secured counsel after he was ordered deported, the error in his case would have never come to light. He would have been just another child deported after an unfair hearing. Nevertheless, because of C.J.L.G.'s fortune in securing a lawyer, and the Ninth Circuit's unwillingness to address the right to appointed counsel issues, thousands of children who do not share C.J.L.G.'s good luck will continue to go without a lawyer in proceedings that are just as likely as his to be unfair.

173. *Id.* at 629 (Paez, J., concurring).

prosecutor, fairness demands that child respondents be provided with counsel.[174]

A. Significant Interests at Stake

Numerous courts have acknowledged that "[t]he private liberty interests involved in deportation proceedings are indisputably substantial."[175] According to the Supreme Court, "[t]he impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence."[176] Removal proceedings, like delinquency proceedings, can involve secure detention pending resolution of the case.[177] They can result not only in separation of the juvenile from family and community, but in deportation, a consequence more severe than any that a juvenile court can impose.[178] The severity of the potential sanction is magnified in cases involving children seeking asylum, where removal may place their lives in danger.[179] In short, like delinquency proceedings and dependency proceedings,[180] where juveniles have a right to appointed counsel, substantial liberty interests are at stake for child respondents in removal proceedings.[181]

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174. Other scholars have asserted a similar claim, though typically arguing for a right to appointed counsel within the context of the *Mathews v. Eldridge* balancing test. *See, e.g.*, *Representation in Removal Proceedings*, 126 HARV. L. REV. 1658, 1678 (2013) ("The group with the strongest claim to a right to appointed counsel based on Supreme Court precedent is juvenile noncitizens."); Linda K. Hill, *The Right to be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 44 (2011); Good, *supra* note 15, at 156.

175. *See, e.g.*, Flores-Chavez v. Ashcroft, 362 F.3d 1150, 1160 (9th Cir. 2004).

176. Bridges v. Wixon, 326 U.S. 135, 164 (1945).

177. *See* Reno v. Flores, 507 U.S. 292, 298 (1993) (noting existence of agreement limiting, but not prohibiting, secure detention of child immigrants); *see also* Plaintiffs-Appellees' Answering Brief at 2–8, Flores v. Sessions, 862 F.3d 863 (2017) (No. 17-55208) (describing immigrant children held in secure custody pending their removal proceedings).

178. Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (recognizing "[t]he severity of deportation—the equivalent of banishment or exile").

179. Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.").

180. *Compare* Wash. Dep't of Soc. & Health Servs. v. Luak (*In re* Dependency of MSR & TSR), 271 P.3d 234, 242 (Wash. 2012) (en banc) ("[T]he child in a dependency or termination proceeding may well face the loss of a physical liberty . . . ."), *with* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (Deportation "deprives [the individual] of liberty" and may "result also in loss of both property and life, or all that makes life worth living."), *and Bridges*, 326 U.S. at 154 (acknowledging that in deportation proceedings, "the liberty of an individual is at stake").

181. *Bridges*, 326 U.S. at 154.

Yet, the right to appointed counsel for juveniles is not limited to the juvenile delinquency context. As shown above, child litigants have a right to appointed counsel in a variety of civil proceedings, some of which do not carry the potential for detention or family separation.[182] Removal proceedings involve no less significant interests than those in which child litigants have a right to appointed counsel.

B. Adversarial Proceeding Against Trained Government Counsel

Immigration removal proceedings are adversarial proceedings—they are initiated with a charging document, in which the government asserts and must prove allegations against the respondent. In removal proceedings, the government presents its case through trained legal counsel. Numerous courts have considered the adversarial nature of the proceedings in deciding whether due process requires appointment of counsel.[183] As the Supreme Court observed, "[w]here an individual's liberty interest assumes sufficiently weighty constitutional significance, and the State by a formal and adversarial proceeding seeks to curtail that interest, the right to counsel may be necessary to ensure fundamental fairness."[184] Moreover, the presence of government counsel in a proceeding favors a right to appointed counsel.[185]

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182. Numerous state and federal courts have relied on *Gault* to recognize a right to appointed counsel in civil proceedings. *See, e.g.*, Sarzen v. Gaughan, 489 F.2d 1076, 1085 n.15 (1st Cir. 1973) (applying *Gault* to sexually dangerous civil commitment proceedings, and commenting, "Although the full panoply of criminal due process is not necessarily applicable to c. 123A proceedings . . . we follow the Supreme Court's directive in *In re Gault*, . . . not to allow the 'civil' label to deflect us from the fundamental interest at stake."); Heryford v. Parker, 396 F.2d 393, 395–96 (10th Cir. 1968) (civil commitment proceedings); State v. Collman, 497 P.2d 1233, 1236 (Or. Ct. App. 1972) (same).

183. *See* Lassiter v. Dep't of Soc. Servs. of Durham Cty., 452 U.S. 18, 37 (1981) (Blackmun, J., dissenting) ("[W]here the prescribed procedure involves informal decisionmaking without the trappings of an adversarial trial-type proceeding, counsel has not been a requisite of due process."); Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967) ("The requirement of counsel as an ingredient of fairness is a function of all of the other aspects of the hearing. Where the proceeding is noncriminal in nature, where the hearing is investigative and not adversarial and the government does not proceed through counsel, where the individual concerned is mature and educated, . . . and where the other aspects of the hearing taken as a whole are fair, due process does not require representation by counsel.").

184. *Lassiter*, 452 U.S. at 37.

185. *See* Turner v. Rogers, 564 U.S. 431, 448–49 (2011) (explicitly noting that its holding rejecting a due process claim to appointed counsel in civil contempt cases does not apply to proceedings where the government is likely to have counsel); *Wasson*, 382 F.2d at 812 ("[W]here the hearing is investigative and not adversarial and the government does not proceed through counsel, where the individual concerned is mature and educated, . . . and where the other aspects of the hearing taken as a whole are fair, due process does not require representation

Indeed, removal proceedings are arguably more adversarial than juvenile delinquency proceedings.[186] The most notable difference between juvenile court proceedings and removal proceedings is that one is brought for the benefit of the respondent (juvenile delinquency proceedings), and the other is not. This difference is most evident at disposition, after the charges are proven. In delinquency proceedings, the government must show that the juvenile is in need of supervision, treatment, or confinement, and the judge is to choose the least restrictive alternative consistent with the needs and best interest of the respondent and the need to protect the community.[187] Similarly, the government in dependency proceedings, status offense proceedings, and judicial bypass hearings, acts with the child litigant's best interests in mind.[188] There is no comparable *parens patriae* or best interest superstructure to removal proceedings, and no obligation on the part of the judge to choose the least restrictive outcome or one that is in the best interest of the child respondent.[189] To the contrary, once removability is shown, the respondent bears the burden in removal proceedings to show eligibility for relief and convince a judge to favorably exercise discretion in her favor.[190]

Of course, adversariness is not a requirement for a right to appointed counsel. Judicial bypass proceedings, where most juveniles receive appointed counsel, do not involve accusations of wrongful

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by counsel."); State *ex rel.* Cody v. Toner, 456 N.E.2d 813, 814 (Ohio 1983) (holding that denial of court-appointed counsel for an indigent paternity defendant who faces the state as an adversary violated due process).

186. In denying juvenile respondents a right to a jury trial in delinquency proceedings, the Supreme Court stated that it did not want to "remake the juvenile proceeding into a fully adversary process." McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

187. *See, e.g.*, N.Y. FAM. CT. ACT § 352.2(2)(a) (McKinney 2012) ("[I]n determining an appropriate order [of disposition] . . . the court shall order the least restrictive available alternative . . . which is consistent with the needs and best interests of the respondent and the need for protection of the community."); *In re* D.T., 818 N.E.2d 1214, 1230 (Ill. 2004) ("[I]n juvenile delinquency proceedings, the sentencing hearing *is* a best-interests hearing, albeit one in which the best interests of both the juvenile and the public are considered.").

188. *See, e.g.*, *In re* Interest of Karlie D., 811 N.W.2d 214, 224 (Neb. 2012) ("The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the code must be construed to assure the rights of all juveniles to care and protection.").

189. *Cf. In re* Dependency of S.K-P., 401 P.3d 442 (Wash. Ct. App. 2017) (denying a constitutional due process claim for appointed counsel in dependency proceedings because the child protective aim of dependency proceedings meant that the child's relationship with the state in such proceedings was not adversarial), *aff'd sub nom*, *In re* Dependency of E.H., 427 P.3d 587 (Wash. 2018).

190. 8 U.S.C. 1229(c)(4)(A) (2012).

conduct by the minor that will be proven by a trained prosecutor. Indeed, there is no party adverse to the minor in judicial bypass hearings. Nor may they result in court-ordered separation from family or any kind of detention or court-ordered supervision. Nevertheless, the vast majority of states that provide judicial bypass hearings mandate the appointment of counsel, and all make the appointment of a lawyer for the minor possible.[191]

C. Complex Governing Law

"Courts have repeatedly recognized . . . that the immigration laws are 'second only to the Internal Revenue Code in complexity.'"[192] According to the Ninth Circuit Court of Appeals, "[a] lawyer is often the only person who [can] thread the [immigration-law] labyrinth."[193] While complexity of the governing law has not been an articulated reason for providing child litigants a right to appointed counsel, the complexity of immigration law further underscores the need for appointed counsel for child respondents.

That an immigration judge has a duty to explain procedures, develop the record, and identify possible relief does not diminish the need for appointed counsel for child litigants.[194] These obligations are not insignificant, but they are not sufficient to ensure that the proceedings are fair for child litigants. Immigration judges cannot conduct independent fact investigation outside of hearings on the record, as a lawyer would do. Immigration judges cannot interview child respondents *ex parte* in an environment more conducive to disclosure of private facts than an open courtroom, as a child's counsel would do.[195] Simply put, whatever laudable efforts immigration judges may make in individual proceedings to develop the record and enable the respondent to understand the proceedings cannot make up for the incapacity of child litigants to assert their rights and present their cases.

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191. *See supra*, Part II(E).

192. Baltazar-Alcazar v. Immigration & Naturalization Serv., 386 F.3d 940, 948 (9th Cir. 2004).

193. *Id.*

194. Immigration judges have an affirmative duty to develop a clear record for appeal. 8 U.S.C. § 1229a(b)(1) (2006); 8 C.F.R. § 1240.11(a)(2), (b) (2019); *see also* Jacinto v. Immigration & Naturalization Serv., 208 F.3d 725, 733 (9th Cir. 2000) (holding that an IJ has an independent obligation to "fully and fairly develop the record").

195. Chris Newlin et al., *Child Forensic Interviewing: Best Practices*, JUV. JUST. BULL., Sept. 2015, https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248749.pdf.

On account of the law's special concern for vulnerable minors and the broad consensus favoring appointed counsel for juvenile litigants, the absence of provisions for appointed counsel for juveniles in immigration removal proceedings is anomalous. Not only are they adversarial proceedings that involve complex statutory, constitutional, and procedural issues, they carry with them the potential for a consequence more severe than any civil proceeding in which juveniles already enjoy a right to appointed counsel. Given the potentially dire consequences of removal proceedings, no sound justification exists to exclude immigration removal proceedings from that consensus.

CONCLUSION

As Justice Felix Frankfurter put it long ago: "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children."[196] Consistent with this approach, a substantial body of doctrine recognizes that minor litigants are entitled to counsel in civil proceedings when significant interests are at stake. Some of these proceedings involve allegations of wrongdoing, but not all of them do. Some of these proceedings can result in separation from family and deprivations of liberty, but not all of them do. Some of these proceedings are adversarial, with the government represented by trained prosecutors, but not all of them are. Indeed, some of the proceedings do not even involve an opposing party. What they all share are child litigants. And common sense and science tell us that children are simply unable to represent themselves in judicial proceedings.

Immigration removal proceedings are adversarial, they are complex, they put the respondent's liberty interest at stake, and they are presented by a trained prosecutor on behalf of the government. Consistent with decades of jurisprudence, a broad national consensus on the imperative of counsel for children, and the theory outlined here, child litigants in removal proceedings should be provided with counsel.

196. May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).