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

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Introduction

Youth involved in the child welfare and juvenile justice systems are among the most vulnerable children in society. Youth who have contact with these systems are overwhelmingly poor, from minority populations,[1] and tend to have limited access to social supports and resources that might allow them to avert system involvement. In large part, youth come into contact with these systems when things are not going well. Involvement in the child welfare system can occur for multiple reasons, including abuse, neglect, family breakdown or crisis. Contact with the juvenile justice system can be for similar reasons, but is triggered by allegations of conduct that would be criminal if committed by an adult.

A youth's involvement in these systems can be positive and even life-saving. Success usually depends upon the nature, intensity and duration of services that these systems provide. In general, however, keeping youth in their own homes and providing their families with the tools and resources to address problems produces better outcomes. In both systems, separation from family and community and removal from home are among the harshest and most traumatic actions that the state can take.

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[1] *See* Richard P. Barth et al., *Placement Into Foster Care and the Interplay of Urbanicity, Child Behavior Problems, and Poverty*, 76 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 358, 364 (July 2006) (discussing the impact of poverty and other factors on child welfare system involvement); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 1 Washington (2007), *available at* www.gao.gov/cgi-bin/getrpt?GAO-07-816 (discussing racial disproportionality).

In dependency[2] and delinquency proceedings, youth have basic liberty interests in whether or not they are adjudicated dependent or delinquent, in whether they are removed from their homes, and in the nature, intensity, and duration of the services that courts order for them. Given the liberty interests at stake in these proceedings, youth must have meaningful access to counsel to provide a safeguard from the worst consequences of these systems. Despite the importance of counsel, delinquent youth are unrepresented every day across the country.[3] This may occur because a youth waives her constitutional right to counsel. Few states prohibit waiver of counsel, and numerous factors—from state funding schemes to parental pressure—lead many youth to appear unrepresented in juvenile court.[4] Dependent youth are also often unrepresented.[5] This may occur for several reasons: first, the Supreme Court has not established a constitutional right to counsel in dependency matters; second, many states do not provide a statutory right to representation; and finally, states that provide representation may not require that it be by a lawyer.[6]

[2] In this Article the term dependency refers to child welfare proceedings in which it is alleged that a child has been abused, neglected or not provided proper parental care. We will use the terms dependency and child welfare matters interchangeably.

[3] *See* ABA Juvenile Justice Center, Youth Law Center, & Juvenile Law Center, A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 21 (1995) *available at* www.njdc.info. Since 1995, the National Juvenile Defender Center has done numerous state assessments. These assessments show that many delinquent youth lack counsel.

[4] *See supra* note 3 and accompanying text. *See also* Juvenile Law Center, LESSONS FROM LUZERNE COUNTY: PROMOTING FAIRNESS, TRANSPARENCY AND ACCOUNTABILITY 4–15 (2010), available at *at* http://www.jlc.org/system/files/topic_related_docs/Juvenile_Law_Center_Report.pdf?download=1.

[5] Michael Dale, *Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated* 35 NOVA L. REV. 305, 338 (2010); Lucy Johnston-Walsh, Susan Kinnevy, Alan M. Lerner, & Jennifer Pokempner, ASSESSING THE QUALITY OF CHILD ADVOCACY IN DEPENDENCY PROCEEDINGS IN PENNSYLVANIA 1, 30–44 (2010), *available at* http://www.jlc.org/sites/default/files/publication_pdfs/Assessing_Quality_of_Child_Advocacy.pdf.

[6] Even states that provide a lawyer may allow counsel to substitute judgment for that of the client, rather than take direction from the client. *See, e.g.*, PA. CONS. STAT. ANN. § 6311 (West 2000) (appointing a guardian ad litem for child in court proceedings); *see also* Children's Advocacy Institute of the University of San Diego School of Law, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children* 18, 20–23 (2009) (summarizing role of counsel for dependent children for all states).

A meaningful constitutional right to counsel in juvenile justice and child welfare matters is a civil rights issue as well as a child and family well-being issue. Proceeding without representation puts youth at risk for poor outcomes in the justice and child welfare systems. It increases the chance that the state will be intervening with the wrong child for the wrong reasons. It increases the chances that the state will coercively intervene beyond what is necessary to address the problem that brought youth to the system's attention. It fails to give them a voice in matters affecting their lives.

In re Gault established a constitutional right to counsel in the juvenile justice system.[7] But for years legal scholars have debated how youth can meaningfully exercise that right in juvenile justice matters.[8] Comparatively, in child welfare matters, the Supreme Court has not reached the question of whether youth have the constitutional right to counsel. In recent years, the Supreme Court has recognized the significance of adolescent development to legal analysis in general, and to the due process analysis specifically.[9]

In this Article we address how that developmental analysis should affect youths' rights to counsel. We argue that the Supreme Court's recent jurisprudence supports finding a constitutional right to counsel for teens in child welfare matters. We also argue that the same jurisprudence requires that the constitutional right to counsel already provided in juvenile delinquency matters under *Gault* include a prohibition of waiver of counsel by youth.[10]

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[7] In re Gault, 387 U.S. 1, 41 (1967).

[8] For discussions of these debates and the recurring issues see generally Wallace J. Mlyniec, *In re Gault at 40: The Right To Counsel in Juvenile Court—A Promise Unfulfilled*, 44 No. 3, Crim. L. Bull. Art. 5 (2008); Ellen Marrus, *Gault 40 Years Later: Are We There Yet?*, 44 No. 3, Crim. L. Bull. Art. 6 (2008); Tamar R. Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 Buff. L. Rev. 1447 (2009).

[9] *See, e.g.*, J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011); Graham v. Florida, 130 S.Ct. 2011, 2026 (2010); *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

[10] In this Article, we focus on adolescents because of the significant developments in the law, social, and neuroscience related to this age group. While we do not believe this excludes younger children from our analysis, we do recognize that other developmental issues do come into play for attorneys representing very young children

Part I will describe the essential characteristics of adolescents as explained by developmental research and how science should inform the right to counsel in the child welfare and juvenile justice contexts. Furthermore, we address how this science has already influenced jurisprudence on youth issues.

Part II argues for an adolescent's constitutional right to counsel in child welfare proceedings using jurisprudential and social science developments to revisit the traditional *Mathews v. Eldridge* procedural due process analysis.[11] This constitutional right rests on theories of attachment and bonding, the unique aspects of youth, as well as the distinct characteristics of state action that removes youth from their homes and separates them from their parents to place them in substitute care. A youth's physical liberty interest, as well as her interest in family integrity and privacy, are at stake at every level of these proceedings. This Part argues that given the fundamental interests at stake in these proceedings, increasing the level of due process protections afforded to an adolescent by providing counsel is necessary to ensure more accurate fact-finding as well as full consideration of the voice of the youth.

Part III argues that although *In re Gault* guarantees the constitutional right to counsel in delinquency proceedings, this right cannot truly be fulfilled unless it cannot be waived. This Part will explore how the United States Supreme Court decision in *Faretta v. California*, which holds that a defendant has the right to represent herself, does not apply in the juvenile context. This Part will discuss how the vulnerabilities and capacities of youth relative to adults makes counsel a precursor to the exercise—including waiver—of all other rights guaranteed in juvenile justice proceedings. A system that allows juvenile waiver of counsel undercuts the right to counsel itself and this cannot withstand constitutional scrutiny.

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that we do not address in this article. When we use the term "youth" in this Article, we are referring to adolescents—minors who are roughly age 13 and older.

[11] Mathews v. Eldridge, 424 U.S. 319 (1976).

I. The Supreme Court's Consideration of The Unique Characteristics of Youth

A. Adolescent Development Research and its Relevance to the Right to Counsel

While under state care or scrutiny, youth are required to make decisions that will have great impact on their futures, but they are not generally well-equipped to make such important decisions. Not only do they lack the experiences of adults that help develop decision-making capacities, but their brains have not yet developed to the degree that allows them to process information and consider consequences in the same fashion as adults. In addition, psychosocial factors influence adolescents' perceptions, judgment, and decision-making and limit their capacity for autonomous choice.[12] As a result, they tend to make more impulsive decisions, engage in behavior that an adult would avoid, and be more affected by peer pressure than adults.[13] Youth may be less likely to perceive the long-term consequences of their decisions without guidance and feedback.[14] These findings are consistent with neuroscientific research, showing that areas of the brain associated with impulse control, judgment, and the rational

[12] 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); Kathryn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences in Delinquency*, 32 L. & HUM. BEHAV. 78, 79–80 (2008); Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 69 TEMP. L. REV. 1763, 1774–1780 (1995) (describing the impact of psychosocial factors and social context on adolescent decision-making). Importantly, one of the factors that assists youth develop good-decision making skills is the presence of a caring, supportive and consistent adult. *See* Cauffman, *supra*, at 1774–75 (noting adolescents continue to be influenced by parents on a variety of issues).

[13] Rates of impulsivity are high during adolescence and early adulthood and decline thereafter. *See* Steinberg, Cauffman, Banich & Graham, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCH. 1764. 1774–1776 (2008).

[14] As youth mature, so do their self-management skills, long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1011–12 (2003). Research shows that adolescents are generally less aware of risks because they have less knowledge and experience than adults, and they typically discount the long-term consequences of their decisions because of a developmental difference in temporal perspective; Elizabeth S. Scott, et al., *Evaluating Adolescent Decision-Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 222–23 (1995). *See generally* Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 304 (2000).

integration of cognitive, social, and emotional information do not fully mature until early adulthood.[15]

When children and adolescents are able to grow up in safe settings with positive family members, mentors, and social supports, they are in the best position to develop more thoughtful decision-making skills and avoid behavior that may be harmful to them.[16] Juveniles' responses to stress heighten their inability to consider a range of options.[17] Because adolescents often have less experience with stressful situations, they may have a diminished capacity to respond to such situations.[18] Being involved with the court—whether as a juvenile defendant or the subject of a child protection proceeding—is undoubtedly a stressful situation,[19] one where many *adults* may have difficulty making decisions. Adolescents have a particularly difficult time in these stressful proceedings because they often believe they only have one choice: "In situations where adults see several choices, adolescents may believe they have only one option. Sometimes a young person can generate alternative possibilities and weigh them in a rational decision-making process, but typically an inflexible either-or mentality prevails especially under stress."[20]

These age-appropriate limitations in decision-making skills have far-reaching impact in judicial proceedings where important rights are at stake. Having the assistance of counsel to more fully understand the proceedings and the consequences of decisions may be even more

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[15] Elizabeth S. Scott & Laurence Steinberg, RETHINKING JUVENILE JUSTICE 46–60 (2008).
[16] *See* He Len Chung & Laurence Steinberg, *Relations Between Neighborhood Factors, Parenting Behaviors, Peer Deviance, and Delinquency Among Serious Juvenile Offenders*, 42 DEVELOPMENTAL PSYCHOL. 319, 328–29 (2006).
[17] *Id*.
[18] Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court* in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9, 26 (Thomas Grisso and Robert Schwartz eds. 2000).
[19] It is also important to note that a youth's involvement with dependency or delinquency court is generally precipitated by a traumatic event or events and that the very removal from the home and placement in substitute care is traumatic. Research has also shown that these youth "often show increased susceptibility to stress, an inability to regulate emotions without outside support . . . ." Jim Casey Youth Opportunities Initiative, *The Adolescent Brain: New Research and Its Implications for Young People Transitioning from Foster Care* 1, 26 (2011).
[20] Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD RTS. J. 16, 17 (Summer 1999) (citation omitted); *see also* Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 26, 27 (Summer 2000).

important for adolescents than adults precisely because of these limitations that are characteristic of youth. Notably, best practices in the representation of children recommend an active counseling role for the lawyer.[21] The lawyer must actively engage with the child so that her wishes can be heard, but also so that the lawyer can help the client understand the legal standards and issues that may affect the determinations made by the judge.

B. The Supreme Court's Application of Principles of Adolescent Development

The United States Supreme Court has repeatedly recognized that constitutional doctrines are informed by juvenile status. As discussed below, the Supreme Court has accepted and relied upon the findings that youth are categorically less mature, more impulsive, and more vulnerable to the influence of authority figures than adults. In light of these findings, the Supreme Court has required that governmental power be calibrated to the developmental characteristics of youth.[22] How the difference between youths and adults manifests itself in the law is complicated because the Court must consider the impact of immaturity and vulnerability on the matter at issue, the legal and other importance of the right or interest at stake, and the competing interests involved. Thus, the Court will pay special attention to whether a fundamental interest is at stake

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[21] The ABA standards emphasize the active counseling role of the child's attorney:

> The child's lawyer helps to make the child's wishes and voice heard but is not merely the child's mouthpiece. As with any lawyer, a child's lawyer is both an advocate and a counselor for the client. Without unduly influencing the child, the lawyer should advise the child by providing options and information to assist the child in making decisions. The lawyer should explain the practical effects of taking various positions, the likelihood that a court will accept particular arguments, and the impact of such decisions on the child, other family members, and future legal proceedings.

Institute of Judicial Administration/ American Bar Association Juvenile Justice Standards: Standards Relating to Pretrial Court Proceedings, Commentary to Standard 7(c) (1980).

[22] *See* J.D.B. v. N.C., 131 S. Ct. 2394, 2398–99 (2011) ("It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the Miranda custody analysis"); *see also* Safford Unified Sch. Dist. v. Redding, 129 S. Ct. 2633, 2641 (2009) ("[T]he reasonableness of [a student's] expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure.").

as well as the degree to which the rights of parents and the state may be implicated or adverse to those of the youth.

For example, in *Haley v. Ohio*, the Supreme Court articulated a legal distinction between minors and adults for the purpose of determining the voluntariness of juvenile confessions during custodial interrogation.[23] This case implicated a youth's constitutional interest and the interest of the parents did not figure significantly in the analysis. A youth's vulnerability and experience were of considerable concern for the Court because these precise characteristics put the youth at great risk for being subject to pressure in an interrogation. The scientific findings mentioned above explain the origin of the characteristics of youth recognized by the Court in 1948 bolstering its stance. The Court similarly observed those unique characteristics almost 50 years ago in *Gallegos v. Colorado*, a case that concerned custodial interrogations and confessions, that a juvenile "cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces."[24] The Court further reasoned that an adolescent "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. . . . Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had."[25]

The Court has "recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of

[23] Haley v. Ohio, 332 U.S. 596, 599 (1948).
[24] *Id*. at 53.
[25] Gallegos v. Colo., 370 U.S. 49, 54 (1962).

the parental role in child rearing."[26]

The critical case articulating children's due process rights in delinquency matters is *In re Gault*.[27] In *Gault*, the Court held that due process in delinquency proceedings required at a minimum: written notice of specific charges before the hearing,[28] application of the privilege against self-incrimination[29], and the right to counsel.[30] Although the distinction between children and adults justified separate courts, such a separation was constitutional because the Fourteenth Amendment's guarantee of due process applied to juvenile matters.[31] The Court "candidly appraised" the nature of juvenile proceedings and evaluated whether the procedural protections that existed were adequate to ensure due process for children.[32] After surveying a system that carried with it many of the indicia of the adult system in terms of penalties and long-term consequences without much of the benevolence initially associated with juvenile court, the Court determined that procedural protections, similar to those adults receive in criminal court, are necessary to ensure fundamental fairness.[33] The Court held that the guaranteed protections of notice of charges, right to counsel, confrontation, cross-examination, and protection from self-incrimination would enhance the fact finding and accuracy of the proceedings without impairing "the commendable principles relating to the processing and treatment of juveniles separately from adults…"[34] While enhanced procedural protections may change some aspects of juvenile court, its core values of rehabilitation and treatment could be sustained.[35] The due process revolution, in short, did not turn juveniles into adults.

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[26] Bellotti v. Baird, 443 U.S. 622, 634
[27] In re Gault, 387 U.S. 1 (1967).
[28] *Id.* at 33–34.
[29] Id. at 43–57.
[30] Id. at 34–42.
[31] *Id.* at 30.
[32] *Id.* at 21.
[33] *Id*.
[34] *Id*. at 22.
[35] *Id. See also* McKeiver v. Pennsylvania, 403 U.S. 528, 539–40 (1971).

The Court continued this balanced and nuanced approach to examining the treatment of youth in the justice system in *Roper v. Simmons*.[36] In *Roper*, the Court held that the Eighth Amendment prohibited capital punishment for minors.[37] Then in 2010, in *Graham v. Florida*, the Court ruled that the imposition of life sentences without the possibility of parole for youth convicted of non-homicide offenses was unconstitutional under the Eighth Amendment.[38] The Court recognized unique aspects of youth that are relevant to its analysis. The Court focused on the vulnerability of youth as well as the impediments they face to thoughtful decision-making.[39] In *Graham*, the Court further articulated the essential characteristics that distinguish youth from adults for culpability purposes,[40] noting that since *Roper v. Simmons*,[41] "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence."[42] As it would repeat in *J.D.B.*, the Court reasoned that children "are more vulnerable or susceptible to . . . outside pressures" than adults, and found no reason to "reconsider" these observations about the "common nature of juveniles."[43]

In 2011 the Court extended principles of adolescent development to the question of whether a juvenile would reasonably believe that she is in custody for purposes of *Miranda* analysis in *J.D.B. v. North Carolina*. In this case, thirteen-year-old *J.D.B*. was questioned by police at school in a closed door conference room without first being given *Miranda* warnings,

[36] Roper v. Simmons, 543 U.S. 551, 560–78 (2005).
[37] *Id.* at 578–79.
[38] Graham v. Florida, 130 S.Ct. 2011, 2033(2010).
[39] *Id*. at 2026, 2028.
[40] *Id*. at 2026–27 (2010); *see also* Roper v. Simmons, 543 U.S. 551, 570 (2005).
[41] 543 U.S. 551 (2005) (holding that categorically imposing the death penalty on juveniles is unconstitutional under the Eighth and Fourteenth amendments).
[42] *Graham*, 130 S. Ct. at 2027.
[43] *Id.* at 2026.

an opportunity to call his caretaker, or being told he was free to leave.[44] He eventually confessed his involvement in a series of break-ins.[45] The Court found that the conclusion that youth react differently than adults to law enforcement and judicial proceedings was both "self-evident to anyone who was a child once himself, including any police officer or judge" and significant to the legal analysis.[46] The "commonsense conclusions" about the way children think, act, and behave affected the Court's custody analysis:[47] "The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them."[48]

II. Due Process Requires the Right to Counsel in Child Welfare Matters

The stakes for children involved in the child welfare system are as high as in delinquency proceedings. If a child is at serious risk of harm and the court does not remove her from the home, the child may remain in a dangerous environment without supervision or services. If the court mistakenly adjudicates a child as dependent, she may be subjected to the trauma of removal from her home, family, friends, and familiar surroundings. Once adjudicated as a dependent child, she may languish in foster care for

[44] J.D.B. v. N.C., 131 S. Ct. 2394, 2399 (2011). Note that many studies confirm that juveniles do not understand the words of the Miranda warnings as well as adults, and do not appreciate the significance and function of Miranda rights. *See generally* Alan Goldstein & Naomi Goldstein, Evaluating Capacity to Waive Miranda Rights (2010); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1134–66 (1980).
[45] J.D.B. v. N.C., 131 S. Ct. 2394, 2400 (2011).
[46] J.D.B. v. N.C., 131 S. Ct. 2394, 2403 (2011).
[47] *Id.* While the Court in *J.D.B*. focused on the degree to which what makes youth distinct from adults is commonsense, it also noted that social and cognitive science also supported these conclusions. *Id*. at n.5 (referring to the neuroscience research cited in *Graham v. Florida*, 130 S.Ct. 2011, 2026 (2010)).
[48] *J.D.B.*, at 2397.

months or even years, be moved from place to place, and may be permanently separated from her biological family.[49]

A. Adolescent Development in the Child Welfare Context and Its Impact on the Due Process Analysis of the Right to Counsel

The social and neuroscience findings that bolster the right to counsel in juvenile justice matters have equal application in the child welfare context. In addition to the characteristics of adolescents that are applicable to both youth in child welfare matters and delinquency matters, this Section will introduce other elements of child and adolescent development that have an impact on the due process analysis.

Removal from an adolescent's family, friends, and community is at stake in dependency proceedings. Research establishing the importance of attachment and supportive relationships is thus particularly relevant in the child welfare context. Behavioral and neuroscience research establishes that children's healthy development depends on the development of healthy attachments to consistent and loving caregivers, usually parents.[50] While much of the attachment literature focuses on the formation of attachments in early childhood,[51] the importance of healthy attachment to adolescents cannot be underestimated. Theorists such as John Bowlby[52] and Mary

[49] *See* Sue Badeau and Sarah Gesiriech, *A Child's Journey Through the Child Welfare System* 6, 8, 9(Pew Charitable Trust July 2003), available at http://www.pewtrusts.org/our_work_report_detail.aspx?id=48990 (detailing a child's journey through the child welfare system and multiple decisions point in the process).
[50] Lisa J. Berlin & Jude Cassidy, *Relations Among Relationships: Contributions from Attachment Theory and Research*, in HANDBOOK OF ATTACHMENT, 688 (Jude Cassidy & Phillip R. Shavers eds., 1999).
[51] *See, e.g.*, Stacy S. Drury et al., *From Biology to Behavior to the Law: Policy Implications of the Neurobiology of Early Adverse Expericiences*, 10 WHITTIER J. CHILD & FAM. ADVOC. 25, 29 (2010) ("[A]ttachment theory stated that young children not only developed selective and powerful attachments to their parents or primary caregivers, but when there was a disruption of this relationship there were lifelong behavioral and psychiatric consequences.").
[52] *See generally* John Bowlby, ATTACHMENT AND LOSS (2ed. 1982).

Ainsworth[53] have established that attachment to a consistent and responsive caregiver is extremely important to an adolescent developing her identity.[54]

When healthy attachments do not form or are disrupted, children do not experience the security they need to develop in a healthy manner and do not adopt the protective factors that would help them withstand the adversity of life.[55] These healthy attachments help adolescents establish autonomy and contribute to adolescents' "self-esteem, social competence, emotional adjustment, behavioral self-control, and sense of identity."[56] Child welfare law and policy take into account these findings by setting appropriately high standards for removal of a child from the home[57] and establishing expedited time lines for case planning decisions for children in the child welfare system.[58] These laws support maintaining stable and healthy attachments when child safety can be maintained and finding such attachments as quickly as possible when they cannot be achieved in the home.

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[53] *See generally* Mary D. Salter Ainsworth *et. al*, PATTERNS OF ATTACHMENT: A PSYCHOLOGICAL STUDY OF THE STRANGE SITUATION (1978).

[54] *See generally* Joseph P. Allen & Deborah Land, *Attachment in Adolescence*, in HANDBOOK OF ATTACHMENT at 319 (discussing work by Bowlby and Ainsworth on importance of a consistent and nurturing caregiver to an adolescent's ability to establish identity and autonomy). Given that removal from an adolescent's family, friends, and community is at stake in dependency proceedings, research establishing the importance of attachment and supportive relationships is particularly relevant in the child welfare context.

[55] Joseph Goldstein et al., BEYOND THE BEST INTERESTS OF THE CHILD 33, 34 (2d ed. 1979) (describing impact on development of removal of a child from the home).

[56] Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child's Right to a Permanent Family*, 46 WAKE. FOREST. L.REV. 1, 26 (2011).

[57] In *Roe v. Conn*, the court considered the testimony of Dr. Albert J. Solnit on attachment to determine the appropriate standards and due process protections when a child is removed from the home. The court considered Dr. Solnit's testimony that: 1) "Summary removal of a young child from a parent who has been his major caregiver is a severe threat to his development. It disrupts and grossly endangers what he most needs, that is, the continuity of affectionate care from those to whom he is attached through bonds of love." And 2) "Summary removal should be allowed only under conditions in which physical survival is at stake." 417 F. Supp. 769, 776 (1976). The court referenced the landmark work, *Beyond the Best Interests of the Child* (1973), which Dr. Solnit co-authored with Dr. Goldstein and Dr. Anna Freud, which discussed the application in great detail.

[58] Child Abuse Prevention and Treatment Act of 1975 (CAPTA), 42 U.S.C. § 5101 et seq.; Adoption Assistance and Child Welfare Act of 1950, 42 U.S.C. § 620 *et seq*.; Adoption and Safe Families Act of 1997, 42 U.S.C. § 620 et seq.; *see generally* NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT, National Research Council and Institute for Medicine (2000).

The developmental tasks of adolescence must also be recognized when considering the contours of due process.[59] While a key aspect of due process is the right to be heard,[60] the Court has explained that the forum in which the individual is heard must be "meaningful"[61] and "appropriate to the nature of the case."[62] Courts must consider the nature of the child welfare court proceedings, as well as the fact that the case at issue involves a minor in determining whether the youth is provided a meaningful opportunity to be heard. Because "most theorists agree that central issues of adolescence in the United States revolve around identity and independence….,"[63] courts will have to consider the youth's role in the court process and the procedural protections they may need to ensure that their rights are protected. Emily Buss has written:

> Decision-making competence and identity formation are distinct developmental ends, but they are often served by a common set of experiences and interactions. Contexts in which young people are given decision-making authority over matters of importance to them and in which adults engage them in a manner that is supportive and respectful allow young people to develop decision-making skills, learn from and recover from their mistakes and build on their successes.[64]

For adolescents, this due process right is fully aligned with healthy development and can be significantly facilitated by the involvement of effective counsel.[65]

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[59] Juvenile court dependency proceedings are similar in structure to delinquency proceedings. The chief difference is that delinquency adjudications require proof beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). There are also differences in the consequences of adjudications in each system.

[60] Grannis v. Ordean, 234 U.S. 385, 394 (1914).

[61] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[62] Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313 (1950).

[63] Wendy B. Smith, YOUTH LEAVING FOSTER CARE: A DEVELOPMENTAL, RELATIONSHIP-BASED APPROACH TO PRACTICE 70 (Oxford University Press 2011). *See also* Emily Buss, *Failing Juvenile Courts, and What Lawyers and Judges Can Do About It*, 6 NW. J.L. & SOC. POL'Y 318, 322 (2011) (examining the interaction of juvenile court process and the tasks of adolescents "the first task is gaining the experience required for competent decision-making and autonomous action, and the second is the development of an understanding of self, as an individual and a member of various groups and communities that can guide those decisions and actions.").

[64] *Id.* at 323–24.

[65] Emily Buss has also noted that the change in federal law that requires that the court consult with the youth at the court reviews for their dependency case, 42 U.S.C.A. 675 (5)(c)(2008), has not resulted in a widespread change in practice in juvenile court related to the active participation of youth. Buss, at 330. She has stated "Along both these developmental dimensions [decision-making skills and identity formation], young people's [sic] experience in

B. The Constitutional Bases for a Right to Counsel for Dependent Teens

Taking into account the development of Supreme Court jurisprudence on the special relationship between the state and a child when placed in foster care, and the significance of youth in the due process analysis, the right to counsel for adolescents in child welfare matters should have the same constitutional basis and rationale as for youth in delinquency court.

While the constitutional right to counsel in juvenile justice matters is well-established, the Supreme Court has not yet addressed whether youth have such a right in child welfare matters.[66] To date, only a few jurisdictions that have addressed this issue have found such a right.[67] The Supreme Court has been reluctant to expand the constitutional right to counsel in

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juvenile court runs from empty to negative. Juvenile court proceedings offer young people little to no opportunity to practice making choices and taking responsibility for those choices, despite the focus at those proceedings on their current and future plans." *Id*. at 324.

[66] The authors recognize that there continues to be debate in the field regarding whether the attorney for the child should advocate for the child's best interest or expressed wishes. The analysis in this Article assumes the traditional attorney-client model of expressed wishes representation that is contained in the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings. Adopted by the American Bar Association in August of 2011, the Model Act attempts to be true to the traditional attorney-client model without ignoring that children are not identical to adults and considerations must be made to ensure that youth are able to exercise their rights to their capacity. *See* ABA Model Act § 7 (c) (**"**When the child is capable of directing the representation by expressing his or her objectives, the child's lawyer shall maintain a normal client-lawyer relationship with the child in accordance with the rules of professional conduct. . . . . This includes advising the child as to options and eliciting the child's wishes in a developmentally appropriate manner."); ABA Model Act § 7(c)(2) ("When the child's capacity to make adequately considered decisions in connection with a representation is diminished, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.").

[67] *See* Matter of Jamie T.T., 599 N.Y.S.2d 892, 894 (1993); Roe v. Conn, 417 F. Supp. 769, 780 (M.D. Ala. 1976). In *Kenny A. v. Perdue*, the court provided the most comprehensive constitutional analysis of the right to counsel to date. 356 F. Supp. 2d 1353, 1356–64 (N.D. Ga. 2005). While the court referred to the Due Process Clause of the United States Constitution to support the right to counsel, it explicitly relied on the due process clause of the Georgia constitution for its holding. *Id*. at 1359–1360. To arrive at its holding, the court in *Kenny A*., first found that "children have fundamental liberty interests at stake in deprivation and TPR proceedings. These include a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents. On the one hand, an erroneous decision that a child is not deprived or that parental rights should not be terminated can have a devastating effect on a child, leading to chronic abuse or even death. On the other hand, an erroneous decision that a child is deprived or that parental rights should be terminated can lead to the unnecessary destruction of the child's most important family relationships." *Id*. at 1360. Second, it found that there was a significant risk of error in the proceedings in large part due to the subjective standards involved and the discretion of the court that could not be reduced without improved fact finding that other devices such as review boards and CASAs were not in as good a position as a lawyer to eliminate. *Id*. at 1361. Finally, the court found that the interest of the state in child protection and well-being was served by appointing counsel for the child and that the interest at stake for the child "far outweighs any fiscal or administrative burden that a right to appointed counsel may entail." *Id.* For an excellent analysis of the decision in

matters where physical liberty—in the archetypal form of institutionalization and imprisonment—are not obviously at stake. For example, in *Lassiter v. Department of Social Services*, the Court rejected the claim that parents in child welfare matters have a constitutional right to counsel when their rights may be terminated; rather it held that whether representation is constitutionally necessary to protect the interest at stake will be determined on a case-by-case basis.[68] In *Lassiter*, which directly addressed the right-to-counsel, and *Santosky v. Kramer*, which raised due process rights of parents in parental right termination proceedings, the Court indicated that the rights and interests at stake in child welfare proceedings were at least sometimes on par, in the constitutional sense, with the threat of loss of physical liberty where parents are concerned.[69]

Although the Supreme Court has not yet recognized a categorical constitutional right to counsel in dependency proceedings, the same unique aspects of youth that are outcome-determinative for the due process analysis distinguish the situation of youth who are removed from their homes, and placed in state care, from other unsuccessful right-to-counsel cases.[70] In evaluating what procedures are required by due process, courts apply the three-pronged *Mathews v. Eldridge*[71] balancing test which weighs the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[72]

Kenny A., see Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663 (2006).

[68] 452 U.S. 18, 24–32 (1981).

[69] 455 U.S. 745, 753–54 (1982).

[70] *See, e.g.*, Lassiter v. Department of Social Services of Durham County, N.C., 452 U.S. 18, 26 (1981) (holding that whether there is a constitutional right to counsel for parents in termination of parental proceedings must be determined on a case-by-case basis).

[71] 424 U.S. 319, 335 (1976).

[72] 424 U.S. 319, 335 (1976).

Furthermore, *Gault*[73] and its progeny[74] remind that, in the distinct setting of child welfare proceedings, "the applicable due process standard . . . is fundamental fairness" which is applied with an "emphasis on fact-finding procedures."[75]

B. The Due Process Analysis

1. Private Interest at Stake for Youth in Child Welfare Matters

a. The Interest of the Child as Distinguished from that of the Parent

The *Mathews* analysis begins with an analysis of the private interest. While the weight will vary case by case, adolescents in child welfare matters have a three-part private interest at stake: (1) a right to family integrity; (2) a right to not have liberty restricted by state actors (as opposed to parents/guardians); and (3) a right, if taken into state care, to a basic level of care and treatment that is of constitutional magnitude.[76] These interests are significant and distinguish the interests of the youth from the interests of the parents, which the Court has characterized as "commanding."[77]

The Supreme Court has made clear that the right to family integrity is of the highest constitutional weight and is a fundamental right.[78] Because this right is often described as a right to care and control, and discussed in the context of parents asserting their authority against the state or a decision the state has mandated, it is generally deemed to belong to the parent. But

[73] In re Gault, 387 U.S. 1 (1967).
[74] In re Winship. 397 U.S. 358 (1970).
[75] McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971).
[76] We agree with Pitchal that the nature of the interest of the child in family integrity may differ before and after an adjudication of dependency or finding of parental unfitness. *See* Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L.REV. 663, 674 (2006). However, due to space limitations we will discuss this interest generally.
[77] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981).
[78] *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972); Meyer v. Nebraska, 262 U.S. 390 (1933); Pierce v. Society of the Sisters of The Holy Names of Jesus and Mary, 268 U.S. 510, 534–35 (1925); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

arguably this right is a right belonging to the family unit. Although it is often asserted as a right of control by the parent, it is premised on the parent's duties of care and responsibility to the child.[79] While a child's interest in family integrity is clearly bound up with that of her parents, it seems clear that this, too, is an independent interest of the child and has great weight.[80] The child's right to family integrity takes on even more weight when one considers the specific needs and vulnerability of children. Children rely on their parents for their basic needs and care. They rely on them to meet their material needs and, to some degree, act for them in the world.

The loss of the parental relationship, even temporarily, has a significant impact on the child who now must depend on the state to meet her needs.[81] This is distinct from the loss that a parent faces in terms of identity and a breach in the relationship. Research shows that children removed from their home and community experience significant trauma, which can have a long-lasting impact on their development.[82] Removal from the home is also traumatic for youth. The trauma of being removed from home and all that is familiar can disrupt a teen's brain development and the maintenance of healthy attachments to adults and peers.[83] Many of these youth enter the system already experiencing "failures of nurture from the family system" and

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[79]*See Parham*, 442 U.S. at 602.

[80]*See Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) ("It seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation."). *See also Duchesne v. Sugarman,* 566 F.2d 817, 825 (1977) ("This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the 'companionship, care, custody and management of his or her children,' [citation omitted] . . . and of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association,' with the parent.") (citation omitted).

[81]Pitchal, *supra* note 76, at 676–80 for this discussion in detail; *see also* Santosky v. Kramer, 455 U.S. 745, 761 n.11 (1982) (citations omitted) ("For a child, the consequences of termination of his natural parents' rights may well be far-reaching. In Colorado, for example, it has been noted: 'The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period . . . , but forever.'").

[82]Goldstein, Freud & Solnit, BEYOND THE BEST INTERESTS OF THE CHILD, *supra* note 55, at 24–26. The trauma resulting from removal is, of course, combined with the trauma they experience as a result of child abuse and neglect, which necessitate removal. *See generally* Child Welfare Information Gateway, *Long Term Consequences of Child Abuse and Neglect* (April 2008), http://www.childwelfare.gov/pubs/factsheets/long_term_consequences.pdf

[83] Wendy B. Smith, *Youth Leaving Foster Care: A Developmental, Relationship-Based Approach to Practice* 69, 79 (Oxford University Press 2011).

find instability rather than the "reparative relationship[s]" that could buffer the harm that comes from the trauma of removal.[84] These are harms that the parent does not face. The parent also has more skills, experience, and supports to deal with and understand the separation.[85]

At the same time, a youth has a heightened interest in an accurate determination regarding whether state intervention is proper when maltreatment is alleged. The court was acutely aware of the child's interest in *Matter of Jamie T.T.* where the child faced return to the custody of an allegedly abusive parent whom she feared:

> The effect of Family Court's exoneration of respondent was to restore to him the primary right to custody of Jamie…We would be callously ignoring the realities of Jamie's plight during the pendency of this abuse proceeding if we failed to accord her a liberty interest in the outcome of that proceeding, entitling her to the protection of procedural due process. Notably, Jamie had a strong interest in obtaining State intervention to protect her from further abuse and to provide social and psychological services for the eventual rehabilitation of the family unit in an environment safe for her. Furthermore, Jamie's interest in procedural protection was heightened because of the irreconcilably conflicting positions of her and her parents in this litigation.[86]

b. Supreme Court Precedent and Federal Court Application of the Liberty Interest of Youth

Youth also have a liberty interest that is significantly affected once placed in state care. While youth do not have an identical physical liberty interest to adults (given that they are, to some degree, always in the custody of adults),[87] placement in state care cannot be deemed equivalent to being cared for by parents outside of a state sponsored and regulated system. As Erik Pitchal has noted, "[a] salient feature of all foster care systems…..is that decisions about

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[84] *Id.* at 67.
[85] Pitchal *supra* note 76, at 676–77. *See also* Section II (A) for more on the connection between attachment and development.
[86] 599 N.Y.S.2d 892, 894 (1993)
[87] Schall v. Martin, 467 U.S. 253, 265 (1984) (stating that "juveniles, unlike adults, are always in some form of custody.")

where children will live are made by caseworkers, agency officials, and judges—as opposed to parents, relatives, or people who have some lasting connection to them."[88] For children who are dependent on adults for their care, the dependency on state decision-makers must be acknowledged as a different from the restriction on liberty that is experienced by parental decision-making that is part of the natural status of childhood.[89]

The Court confronted the liberty interest of youth and the concomitant due process protections required in *Parham v. J.R*, a case involving the commitment of children to mental institutions by their parents or state custodians.[90] The Court acknowledged in *Parham* the distinction between the state and parent as caregiver and its impact on the treatment and care that a child received.[91] The Court stated that "[t]he absence of an adult who cares deeply for a child" may have an impact on how long a child is hospitalized, putting the youth at risk of an unnecessarily long period of commitment.[92] The Court noted how the concerns of family and friends would "provide continuous opportunities" for an erroneous or bad decision made by the hospital about committing the child to be corrected, indicating that the lack of such concern and pressure could result in the child lingering in institutional care without cause.[93] The Court acknowledged that there were due process implications to this status: "For a child without natural parents, we must acknowledge the risk of being 'lost in the shuffle.'"[94] Indeed, several children in *Parham* who were in state care and had no parental involvement were lingering in institutional

[88] Pitchal, *supra* note 76, at 682.
[89] As the Court in *Parham* explained, the assumption, which the law supports, that parents act in the best interest of their child is based on the "natural bonds of affection" between parent and child. *Parham,* 442 U.S. at 602. The state as parent does not have those same type of bonds to the child.
[90] 442 U.S. 584 (1979)
[91] *Parham v. J.R*, 442 U.S. at 619.
[92] *Id*.
[93] *Id*. at 619–20.
[94] *Id*. at 619 (citation omitted).

care when it was not needed because no other placement was available.[95] The Court perceived that a foster child's liberty interest might be put at risk in such situations where no parental advocate was present if proper due process protections were not put in place. Moreover, courts have recognized that a child's placement in state care is a significant intrusion on and restriction of the liberty interests of the child by the state that is akin to involuntary commitment or incarceration.[96] This restriction on liberty is significant in the right-to-counsel analysis because the Court has recognized this right most clearly where the individual's physical liberty is at risk.[97] The Court's treatment of children and acknowledgement of their special needs and characteristics suggests that care should be taken in examining the degree to which placement in state care restricts children in ways that are similar to the incarceration of an adult.[98]

A child's physical liberty interest is also implicated when she is placed in state care and moved between foster homes. This was made clear in S*mith v. OFFER*, where the Court highlighted the high degree of authority of the child welfare agency to move children.[99] The Court recognized that the system was typically structured by contracts that gave the agency broad plenary authority, including the right to recall the child "upon request."[100] Indeed, the data presented in *Smith* demonstrated that children were frequently moved between placements while in care.[101] Many cases and data following *Smith* continue to demonstrate that large numbers of

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[95] *Id.* at 619–20.
[96] *See, e.g.*, *Taylor ex rel. Walker v. Ledbetter,* 818 F.2d 791, 795 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1065 (1989) ("The liberty interest in this case is analogous to the liberty interest in *Youngberg* [where an individual was involuntarily committed]. In both cases, the state involuntarily placed the person in a custodial environment, and in both cases, the person is unable to seek alternative living arrangements."); *see also Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (quoting *Taylor*, 818 F.2d at 795) (same); B.H. v. Johnson, 715 F. Supp. 1387, 1396 (N.D. Ill. 1989) (same)
[97] *Lassiter*, 452 U.S. at 25.
[98] In fact, courts have indicated that "defenseless children" taking into state care because of abuse and neglect should receive "at least the same protection afforded adults who are imprisoned as a result of their own misdeeds." *Taylor ex rel. Walker v. Ledbetter,* 818 F.2d 791, 797 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1065 (1989).
[99] Smith v. OFFER, 431 U.S. 816 (1977).
[100] *Id.* at 860 (Stewart, J., concurring).
[101] *Id*. at 837.

children in foster care suffer from multiple moves and long stays in care.[102] As discussed above, these frequent moves disrupt important developmental processes and have also been tied to poor outcomes, such as lower rates of placement in a family setting and poor educational achievement.[103] Cases from *Smith* to *Braam* continue to show that once in the system, the lives of children are rife with a level of instability and lack of control of day-to-day activities that children living in their own homes do not face; these consequences follow directly from state involvement.[104] The degree of restriction on liberty is magnified for adolescents, 36% of whom are placed in group homes or institutions, not in family settings.[105]

Because the Court has made clear that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel,"[106] the fact that the youth's physical liberty is impinged upon when placed in state care is significant to the analysis.[107] Furthermore, the

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[102]*See, e.g.*, U.S. Department of Health and Human Services Administration for Children and Families Administration on Children, Youth and Families Children's Bureau, *Child Welfare Outcomes 2004-2007: Report to Congress* 32 (reporting that states continue to struggle with reducing the number of placement changes youth in care experience, especially youth who have been in care for longer periods of time, with almost 60% of youth who had been in care for at least two years having more than two placement moves), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cwo04-07/cwo04-07.pdf; Barber. J.G. et al. *The Predictors of Unsuccessful Transition to Foster Care,* in *The Journal of Child Psychology and Psychiatry, 42,* 785–790 (2001) (describing the link between multiple placements and behavioral, emotional, and educational problems); Center for Advanced Studies in Child Welfare, University of Minnesota School of Social Work, *Promoting Placement Stability* (Spring 2010) (journal issue focuses on high levels of placement instability in the child welfare system, its long-term consequences for children in terms of hard skills such as education and likelihood of achieving permanency and family and exiting the system), available at http://www.cehd.umn.edu/ssw/cascw/attributes/PDF/publications/CW360_2010.pdf.

[103] Peter J. Pecora, *Why Should Child Welfare Focus on Promoting Placement Stability*, in Center for Advanced Studies in Child Welfare, University of Minnesota School of Social Work, *Promoting Placement Stability* 4–5 (Spring 2010).

[104]*See, e.g.*, *B.H. v. Johnson*, 715 F. Supp. 1387, 1392 (N.D. Ill. 1989) (harm from multiple placements); *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993) (noting negative outcomes from prolonged stays in care); *Braam ex rel. Braam v. State*, 81 P.3d 851, 854 & n.1 (Wash. 2003) (noting that frequent movement of children in foster care "may create or exacerbate existing psychological conditions, notably reactive attachment disorder").

[105]*Kids Count Data Snapshot on Foster Care Placements* 2 (Annie E. Casey Foundation May 2011), http://www.aecf.org/~/media/Pubs/Initiatives/KIDS%20COUNT/D/DataSnapshotFosterCarePlcmnt/DataSnapshot_FinalWeb.pdf

[106] *Lassiter*, 452 U.S. at 26.

[107] The Court has held that even in the case of prosecution of petty offenses, if imprisonment is imposed, there is a constitutional right to counsel. Argersinger v. Hamlin, 407 U.S. 25 (1972); *see also* Baldwin v. New York, 399 U.S. 66, 73 (1970) ("[T]he prospect of imprisonment for however

unique restriction on a youth's liberty resulting from placement in state-sponsored foster care has constitutional implications above and beyond the connection between the restriction of physical liberty and the right to counsel. This is important because the Court demonstrated in *Lassiter* that when loss of interests that have constitutional magnitude—such as the fundamental right to family integrity—are involved, there may be a constitutional right to counsel even if physical liberty is not at risk. To the degree that youth in the child welfare system are exposed to proceedings where their constitutional interests are put at risk, counsel may be required to protect those interests. It is this restriction of liberty that creates an interest held by the youth in appropriate treatment and care by the state. While the Supreme Court has not yet reached this issue, it indicated in *Deshaney* that placement in foster care is substantially similar to the "incarceration, institutionalization, or other similar restraint of personal liberty."[108]

Moreover, a majority of federal courts of appeal have found that foster care places sufficient limits on the child's liberty to invoke due process protections; that is, the state has an affirmative duty of care to children in foster care under the Fourteenth Amendment.[109] It is the State's affirmative act of restraining the individual's freedom to act on his own behalf that is the "deprivation of liberty" triggering the protections of the Due Process Clause.[110] Children by nature do not have the same capacity as adults to seek alternative means of care and subsistence

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short a time will seldom be viewed by the accused as a trivial or 'petty' matter, and may well result in quite serious repercussions affecting his career and his reputation.").

[108]Deshaney v. Winnebago, 489 U.S. 189, 201, n.9 (1989) ("Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. Indeed, several Courts of Appeals have held, by analogy to *Estelle* [*v. Gamble*, 429 U.S. 97 (1976)] and *Youngberg [v. Romeo,* 457 U.S. 307 (1982)] that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents.")

[109]*See, e.g*., Taylor ex rel. Walker v. Ledbetter, 818 F.2d 791, 795 (11th Cir.1987) (declaring that like the plaintiff in *Youngberg*, foster children are "involuntarily placed . . . in a custodial environment, and . . . unable to seek alternative living arrangements."); Nicini v. Morra, 212 F. 3d 798, 808 (3d Cir. 2000) (same); Doe ex. Rel. Johnson v. South Carolina Dept. of Social Services, 597 F. 3d 163, 175 (4th Cir. 2010) (same); Norfleet v. Arkansas Dep't of Soc. Servs., 989 F. 2d 289, 291 (8th Cir. 1993) (same); Marisol A. ex. Rel. Forbes v. Giuliani, 929 F. Supp. 662, 674-75 (S.D.N.Y. 1996), *aff'd*, 126 F. 3d 372 (2d Cir. 1997).

[110]*Deshaney*, 489 U.S at 200.

both due to their minority (inability to sign contracts, work in many situations, consent to many things needed for health and welfare) and lack of experience. Their reliance on a custodian—in this case the state-- for care is not just by virtue of the restriction of their physical liberty, but also of their minority.

2. Risk of Erroneous Deprivation of Interest and Degree to Which Enhanced Protections Will Reduce Risk

The great risk of an erroneous deprivation—the second prong of the *Mathews* analysis—of a youth's interest in the outcome of child welfare matters comes from several sources: the legally complex nature of the proceedings, the realities of the juvenile court, the inability and impropriety of other parties representing the interest of the youth, and the nature of a youth's understanding and decision-making discussed in Part I above. These factors make the risk of error exceedingly high and make providing youth independent counsel a prime strategy for reducing the risk of error.

a. Realities of the Child Welfare System

Today, the most crucial decisions about the fate of youth and their parents coming into contact with the child welfare system are made in the courtroom. The oversight role of the court in child welfare matters has increased in the last thirty years, resulting in the court addressing "a greater complexity of issues and an increased number of hearings."[111] Child protection and child welfare proceedings are, by design, complicated, multi-step proceedings that are tailored to balance child safety and the rights of parents.[112] The court makes decisions about the legal rights

[111] Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1, 42 (2001).
[112] *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972); Santosky v. Kramer, 455 U.S. 745 (1982).

as well as the day-to-day life of the child and family. The procedures and substance of child welfare proceedings come from federal[113] and state child welfare law and case law.

As the Court demonstrated in *Gault*, the realities of the juvenile court must be "candidly appraised" to arrive at an accurate determination of what process is due children who are at the center of these proceedings.[114] All of these important decisions must be made in the context of usually crowded courtrooms and dockets, overworked case workers, and highly emotional proceedings.[115] Moreover, these proceedings are often typified by standards such as "best interests" that are potentially vague and provide the court with much discretion in the decisions that are made.[116] In addition to the informal and insular nature of these proceedings, they are typically closed to the public, which eliminates a potential source of accountability.[117] The risk of an erroneous result is inherent in the system, requiring special attention to due process protections that will provide accountability. [118]

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[113] *See e.g.*, 42 U.S.C.A. 670 *et seq*. (Title IV-E of the Social Security Act, which has been amended by the Adoption and Safe Families Act and most recently by the Fostering Connections to Success and Increasing Adoptions Act); 42 U.S.C.A. 5106a(b)(2)(A)(xiii) (Child Abuse Prevention and Treatment Act, which requires as a condition of federal funding for states to have systems to respond to reports of child abuse, including the provision of guardian ad litems to all children in dependency matters).

[114] *Gault*, 387 U.S. at 21.

[115] Bean, *supra* note 111, at 49–55 (describing many of the forces, such as overcrowded dockets, informality in proceedings, imbalance in power between the state and other parties, and emotionally charged proceedings, that risk inaccurate and inequitable results); *see also* Amy Sinden, '*Why Won't Mom Cooperate?': A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339 (1999) (discussing how the informality of dependency court often exacerbates the power imbalance between parent and state and does not necessarily result in accurate fact finding and results); Melissa L. Breger M*aking Waves Or Keeping The Calm: Analyzing The Institutional Culture Of Family Courts Through The Lens Of Social Psychology Groupthink Theory*, 34 LAW & PSYCHOL. REV. 55 (2010) (exploring the impact of family court culture on the assertion of rights among parents and children).

[116] Pitchal, *supra* note 76, at 687–88.

[117] Bean, *supra* note 111, at 1–3; *see also* Michael Dale, *Representing the Child Client* § 4.19 (2) (1987).

[118] The risks are especially high for older foster youth who are close to "aging out" of the system. The proceedings that involve adolescents vary in kind and each present significant risks to unrepresented youth. The nature of these proceedings change as youth age. The stakes are different, and the consequences of immature decisions—such as whether to remain in foster care—may be irrevocable. Thus, while all teens have interests in the nature, intensity and duration of services they receive from the child welfare system, these considerations are accentuated for older teens. These youth have long been entitled to special planning to help them make a smooth transition to adulthood. Pitchal, *supra* note 76, at 687–688. More recently with the enactment of the Fostering Connections to Success and Increasing Adoptions Act, PL 110–351, October 7, 2008, states have greater ability than ever before to create more options and support for older youth in care. These options may include a right to return to care after leaving the child welfare system. In large part, these youth are discharged due to age—"aging out"—not because they are

b. The Role of Counsel In Reducing The Risk of Error

The risk that the juvenile court will not reach the most accurate decision and most appropriate disposition can be significant because of the complicated nature of the proceedings and the impact of the typical context of juvenile court.[119]

An attorney following the standards of practice, as well as the traditional codes of ethics,[120] such as those enumerated in the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings,[121] is in the best position to ensure that the risk of error is reduced from the child's perspective. Under the Model Act, counsel must take on all the traditional roles of a lawyer—zealous advocacy, undivided loyalty, confidentiality—as well as a particular obligation to and understanding of child development.[122] This understanding includes an obligation not only to try to maintain the traditional attorney-client relationship to the greatest extent possible, but also to acknowledge that in certain areas or for youth of a certain age their clients may be operating with a diminished capacity to make decisions, something to which counsel must adjust.[123]

Without counsel, the youth is left simply to be a subject of the proceedings without having any real voice. Especially when a youth is nearing the age of majority, her interests may

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moving to permanency such as reunification or adoption. For that reason, this plan is to describe how this young person will sustain themselves on their own without the support of a family or the child welfare system. Many of the decisions made for and by youth who are aging out of care will be irrevocable and thus the advice of counsel is particularly important. *See* 42 U.S.C.A. § 675 (1)(D) (for a child age 16 or over, the case plan must include a written description of the programs and services which will help such child prepare for the transition from foster care to independent living).

[119] *See, e.g.*, Bruce A. Boyer, *Jurisdictional Conflicts Between Juvenile Courts and Child Welfare Agencies: The Uneasy Relationship Between Institutional Co-Parents*, 54 MD. L. REV. 377, 377 (1995) ("Juvenile courts, particularly in large urban areas, have been swamped by increasing caseloads that challenge their ability to provide effective oversight of dependent, neglected, and abused children.").

[120] *See* ABA Model Rules of Professional Responsibility 1.14 Comment.

[121] *ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, Adopted by the ABA, August 2011, available at http://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf

[122] *Id.* at § (d) (duties).

[123] *Id*. at § (e) (diminished capacity); ABA Model Rules of Professional Responsibility 1.14.

not be represented by others such as the parent, the social worker, or a guardian *ad litem* simply because these parties have other interests to protect, in addition to those of the youth.[124] This can result in the court not being fully apprised of the youth's living situation, needs, or perspective regarding the plan the child welfare agency is putting in place, which could result in the court making a determination that neither meets the needs of the child nor moves the youth and family toward permanency. However, when a youth has an attorney to represent her interests independently of those of the other parties, the court can have confidence that the youth's position is being presented and that the parties are not compromised by having to divide their loyalties. Courts have acknowledged that having zealous legal advocacy for the child, parent, and state serves the interests of all parties and produces results in which the courts have confidence:

> The matter of independent representation by counsel, so that a child may have his own attorney when his welfare is at stake, is the most significant and practical reform that can be made in the area of children and the law. The rights and sometimes the interests of children are frequently jeopardized in court proceedings because the best interests of a child are determined without resort to an independent advocate for the child. Courts may fail to perceive children will be affected by the outcome of the litigation, or that potential conflicts between the interests of the children and the interests of other parties require that the child have separate counsel. Too often the judge assumes the child's interests are adequately protected by [the child welfare agency]. This position is undermined when, as here, [the child welfare agency] is challenged and as such it becomes an interested party, the source of the inquiry.[125]

As the *Gault* Court articulated, even more than adults, a child needs the "guiding hand of counsel" given her developmental capacities.[126] Counsel's role is central in these proceedings: Counsel helps the child understand the process and consequences and guides the child in making

[124] See Pitchal, *supra* note 76, at 678, 685, 688–90 for a more comprehensive discussion of the interests that the parent and state are likely to have that could be at odds with those of the child.
[125] *Matter of T.M.H.*, 613 P.2d 468, 470 (Okla. 1980).
[126] *Gault*, at 36.

decisions that best represent the child's position. In addition, many dependent children are "status offenders," that is, youth who may be ungovernable, truant, or runaways.[127] *Gault* holds sway here because prior to the Juvenile Justice and Delinquency Prevention Act of 1974,[128] these youth were typically categorized as delinquent.[129] Under *Gault*, they were afforded a right to counsel because they were subject to the same loss of liberty as delinquents.[130] Even independent of the *Mathews* analysis, application of *Gault* requires that these youth have a Fourteenth Amendment right to counsel.

To a large degree, arriving at an equitable result in dependency court rests on solid and accurate factual findings, which, in turn, depend upon professional and skilled presentations, the stock and trade of competent counsel.[131] Accurate fact-finding is important to the determination of whether the child should enter the child welfare system at all and, if she is in the system, what living arrangement and services would be best for her. There has been substantial litigation over the conditions of confinement and adequacy of services as well as damage actions for injury to children while in foster care.[132] The importance of this advocacy is even more clear given that

[127] While a majority of states create a separate legal category for status offenders—such as "child in need of supervision," or "person in need of supervision," a minority of states treat status offenders like other dependent children. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 6302 (West 2011) (defining a dependent child to include a child who is truant or incorrigible); MASS. GEN. LAWS ANN. 119 § 21 (West 2011) (defining children in need of services to include those who have committed status offenses such as running away and being incorrigible, treating them as non-delinquent offenses.)

[128] P.L. 93-415, 88 Stat. 1109.

[129] Gwen A. Holden and Robert A. Kapler, *Deinstitutionalizing Status Offenders: A Record of Progress*, JUVENILE JUSTICE 3–11 (Fall/Winter 1995) (describing the mandate of the Juvenile Justice and Delinquency Prevention Act of 1974 to deinstitutionalize juvenile status offenders as a condition of receipt of federal funding).

[130] *Gault*, 387 U.S. at 41.

[131] *See* Jean Koh Peters, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* (3rd Ed. 2007); Marvin Ventrell, "Trial Advocacy for the Child Welfare Lawyer Telling the Story of the Family," National Institute for Trial Advocacy (2011); Sherrie Bourg Carter, "Children in the Courtroom: Challenges for Lawyers and Judges," National Institute for Trial Advocacy, 2nd ed. (2009).

[132] *See* Joel A. v. Giuliani, 218 F. 3d 132 (2d Cir. 2000); Marisol v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996); LaShawn A. v. Kelly, 887 F. Supp. 297 (D. D.C 1995); LaShawn A. v. Dixon, 762 F. Supp. 959 (D. D.C 1991).

several federal appellate courts consideration child welfare matters have limited class-action lawsuits on abstention grounds.[133]

Counsel is further necessary in dependency proceedings to ensure that the court makes accurate findings of fact, especially given the substantial potential consequences of being placed in foster care. Under *Mathews*, improving fact-finding is one of the central inquiries of the due process analysis.[134] Just as in delinquency proceedings, counsel in child welfare matters is integral to arriving at accurate fact-finding that helps to ensure that decisions about a youth's removal from the home and subsequent case decisions that the court makes are based on the most accurate information.

The Court in *Lassiter* stated, almost as a truism, that representation of the relevant legal interests in dependency matters results in more accurate, and therefore more just, results.[135] The duties of a youth's attorney, informed by research on adolescent and child development, put counsel in the best position to reduce the risk of error in protecting the child's interest and producing more just results.[136]

3. Governmental Interest

[133]31 Foster Children v. Bush, 329 F.3d 1255 (11th Cir. 1003); J.B. ex rel. Hart v. Valdez, 186 F. 3d 1280, 1291 (10th Cir. 1999) (federal court abstains from jurisdiction on federal claims because of ongoing statutorily required review hearings in juvenile court).

[134] 424 U.S. 319, 344 (1976).

[135] Lassiter v. Dep't of Social Servs. of Durham County, N.C., 452 U.S. 18, 28 (1981).

[136] The court and *Kenny A*. described the limitations of other child welfare actors that made counsel for children in a position most likely to reduce error in these proceedings: "Contrary to County Defendants' argument, juvenile court judges, court appointed special advocates (CASAs), and citizen review panels do not adequately mitigate the risk of such errors. Judges, unlike child advocate attorneys, cannot conduct their own investigations and are entirely dependent on others to provide them information about the child's circumstances. Similarly, citizen review panels must rely on facts presented to them by state and county personnel, including local DFCS offices. As a result, their reviews are only as good as the information provided to them by DFCS and other state and local agencies. CASAs are also volunteers who do not provide legal representation to a child. Moreover, CASAs are appointed in only a small number of cases. The Court concludes that only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and TPR proceedings." *Kenny A*., 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005); *see also Lassiter*, 452 U.S. at 29, n.5 (citing survey of New York Family Court judges in which 72.5% reported that it was more difficult to conduct a fair hearing and 66.7% reported that it was more difficult to develop the facts when parents were not represented in termination of parental cases).

In the final prong of the *Mathews* test, a court must consider "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[137] The state has an interest in accurate decision-making regarding the nature, intensity, and duration of a youth's placement. Indeed, the state has an "urgent interest in the welfare of the child" and therefore in "an accurate and just decision."[138] The accuracy of these decisions depends on many factors, including the youth's appreciation of the choices before her, her willingness to participate in court-ordered programs, her feelings of safety and respect while in care, and her ambitions, needs, and insights. All of these are the sorts of factors that lawyers are well-suited to present to the court—indeed, they are less likely to get before the court if the presentation is left to a case worker or other adult.

Also implicated in the government's interest is the additional cost the government will have to bear if all youth have a constitutional right to counsel in dependency proceedings.[139] "This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, [counsel in dependency proceedings]."[140] "Financial cost alone is not a controlling weight in determining whether due process requires a

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[137] *Mathews*, 424 U.S. at 335.
[138] *Lassiter*, 452 U.S.at 27.
[139] The actual "cost" of counsel for children is not itself clear. First, many advocates have argued that effective representation of all parties can reduce long term costs by reducing the time a youth may spend in foster care by avoiding improper removals and expediting either reunification or adoption. Several studies of the provision of representation for parents have shown these common sense hypotheses to be valid. *See, e.g.*, U.S. Dep't of Health and Human Servs., 2 Feasibility of Evaluating the State Court Improvement Program: Final Report II.B (2003), available at http://www.acf.hhs.gov/programs/cb/pubs/statecip/volume2/ar_2b.htm (Arkansas); "Improving Parents' Representation in Dependency Cases: A Washington State Pilot Program Evaluation," available at www.pppncjfcj.org/html/TAbrief_washstatepilotprog.html. One study of the representation of children by counsel following the traditional attorney client model also found that youth represented by this project 1) had a significantly higher rate of exit to permanency than children not served due to much higher rates of adoption and long-term custody and 2) taking into consideration the estimated costs of substitute care, ongoing adoption subsidies, and FCP representation, the net cost of FCP associated with each additional day of permanency was estimated to be as low as $32. *See* Andrew E. Zinn & Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County* 1 (Chapin Hall 2008). Second, many states provide some form of an advocate for children in child welfare matters though not necessarily a lawyer obligated to play the traditional role of an attorney with all associated ethical responsibilities. Already allocated funds could be redeployed to fund the legal representation this Article argues is constitutionally required.
[140] *Mathews*, 424 U.S. at 347

particular procedural safeguard prior to some administrative decision."[141] While the cost of providing counsel to children in child welfare matters is an issue of *political* importance, case law suggests that cost should not be a factor of *constitutional* consequence.[142] Financial cost must be considered along with the nature of the interest at stake in the proceeding. In its analysis, the Court has indicated that cost cannot be a reason to withhold procedural protections that are identified as necessary to protect an important constitutional right or to prevent its violation. While it will obviously cost money to provide counsel, the child's interest is great enough[143] and the risk of error is great enough,[144] to overcome any governmental interest to the contrary.[145]

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[141] *Mathews*, 424 U.S. at 348.

[142] *See, e.g.*, *Mathews*, at 347–49 (while the cost providing pre-determination evidentiary hearings was acknowledged, that current procedures, including a pre-termination de novo review, post-termination hearing, and judicial review were sufficient to protect the interest at stake was the Court's main focus); *Parham*, at 605–06, 613 (while the cost of providing more procedures prior to admitting children to inpatient mental health treatment was noted, the Court's holding that procedural protections were sufficient were largely founded on the determination that "the independent medical decisionmaking process" in place was sufficient and that enhanced procedures were unlikely to arrive at a more accurate decision given the interests involved, which included the interest of parents in controlling the treatment decisions of their children).

[143] *See* Lassiter v. Dept' of Social Servs. of Durham County, N.C., 452 U.S. 18, 27 (1981) (stating that the interest in family integrity "undeniably warrants deference and, absent a powerful countervailing interest, protection." (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972))).

[144] In *Lassiter*, the *Mathews* balancing would result in finding a constitutional right to counsel for a parent in termination cases when "the complexity of the proceeding and the incapacity of the uncounseled parent [was] . . . great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high." *Lassiter*, 452 U.S. at 31. As discussed above, the proceedings will always be complex to a youth and the "incapacity" of a youth based on developmental immaturity will always make the risk of error when uncounseled insupportably high given the weight of the interests at stake.

[145] In *Goldberg v. Kelly*, 397 U.S. 254 (1970) the Court found the nature of the interest at stake—cash assistance for the very poor—an important consideration in the due process analysis. The Court found that the "governmental interests in conserving fiscal and administrative resources," while important, were "not overriding in the welfare context." *Id*. at 265, 266. The Court concluded that "Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. As the District Court correctly concluded, '(t)he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal.'" *Id.* at 266 (citations omitted). In child welfare matters, the stakes are similarly high for children who may be separated from family and placed in foster care or remaining in abusive homes, and the risk of error too high for a youth to remain without counsel. These combined interests overcome countervailing governmental interests such as cost.

Thus, the Court in *Lassiter* noted that while the state's fiscal interest might not be served by mandating counsel for parents in termination proceedings because it would incur a cost, the Court concluded that "though the State's pecuniary interest is legitimate, *it is hardly significant enough to overcome the private interests as important as those here*…."[146] Cost was not presented as significant in leading the *Lassiter* Court to its holding that counsel was not constitutionally required in all termination cases. Rather, the holding flows, in large part, from a) the Court's evaluation that the risk of error would not be unreasonably high in all cases,[147] and b) the presumption against the right to counsel in cases where the state did not restrict physical liberty.[148]

The Court reiterated the *Lassiter* analysis in *M.L.B. v. S.L.J.*, where the Court evaluated whether due process and equal protection required the provision of transcripts without cost when obtaining the transcripts was a condition of appealing a termination of parental rights.[149] The Court stated that "we inspect the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other."[150] Cost is thus a factor that can be overcome.

The Court's analysis of cost in *Lassiter* indicates that the cost of providing counsel would not preclude a finding that due process requires the provision of counsel for teens in dependency matters for several reasons. First, similar to *Lassiter*, the fundamental right to family integrity is involved in dependency matters for children. Distinct from, and in addition to parents' interests, the child has another fundamental right at stake—the Fourteenth Amendment right to care and

[146] *Lassiter*, 452 U.S. at 27 (emphasis added).
[147] *Id.* at 31–32.
[148] *Id*. at 26–27.
[149] 519 U.S. 102 (1996).
[150] *Id.* at 120–21.

protection while in state care, as described above. As in *Lassiter*, protection of these interests colors the assessment of cost, reducing its constitutional significance.

III. The Unwaivable Right to Counsel in Juvenile Delinquency Proceedings

A. The Establishment of the Right: *In Re Gault*

Unlike the child welfare context, children in the juvenile justice system have a right to counsel under *In re Gault*.[151] Prior to the Supreme Court's decision in *Gault*, counsel was deemed unnecessary for youth as proceedings were informal and not adversarial.[152] Furthermore, the primary focus of court involvement was to determine the child's best interests and probation officers and judges were considered the protectors of children's rights. *Gault* established that the stakes in juvenile court were too high for informality. Procedural protections must be present, including the right to counsel.

The question then becomes whether youth also have a constitutional right to waive their right to counsel. Attorneys play a critical role in ensuring that the adversarial system produces "just results,"[153] and that an accused's constitutional and statutory rights are respected. *Gault* recognized a juvenile's right to counsel not because it was a right specifically guaranteed by the Bill of Rights—as opposed to the Fifth Amendment privilege against self-incrimination—but because the right to counsel was essential to the due process required of any court proceeding.[154] The Supreme Court in *Gault* stated:

> [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. The child "requires the guiding hand of counsel at every step in the proceedings against

[151] 387 U.S. 1, 47 (1967).
[152] *See Juvenile Justice: A Century of Change*, Office of Juvenile Justice and Delinquency Prevention (December 1999), available at www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf.
[153] *Strickland v. Washington*, 466 U.S. 668, 685 (1984).
[154] *In re Gault*, 387 U.S. 1, 39 (1967); *see also* Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 639 (2002).

him."[155]

Today, the need for the assistance of counsel in juvenile court is even more important, as greater numbers of youth are at risk of adult prosecution, dispositions have become longer and more punitive, and as delinquency adjudications carry collateral consequences that follow the youth into adulthood and, in some cases, for the rest of their lives.[156] Of equal if not greater importance, as the stakes in juvenile court have risen, social science research has confirmed that most youth lack the capacity, on their own, to fully appreciate the nature of those stakes and to make intelligent decisions about how to navigate the increasingly complex dimensions of the modern juvenile court.[157]

Attorneys are necessary to help young clients invoke their due process rights, hold the state to its burden of proof, advocate for fair dispositions, appeal adverse rulings, and protect their clients' interests while incarcerated or on probation.[158] Counsel's involvement during the pretrial phase of a juvenile case is critical to obtaining a favorable outcome for her client.[159] With counsel, juveniles are more likely to receive fair hearings. Counsel can advise about pre-trial motions to suppress statements or evidence, issues of which few teens will even be aware. Counsel provides guidance about plea agreements and their consequences—both direct and collateral. At hearings, counsel can adequately confront and cross-examine witnesses. The

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[155] *In re Gault,* 387 U.S. 1, 36 (1967) (footnotes omitted).
[156] *See* Pennsylvania Juvenile Indigent Defense Action Network, "The Pennsylvania Juvenile Collateral Consequences Checklist" (May 2010), *available at* http://www.pacourts.us/NR/rdonlyres/C7EC3A2C-FC73-4820-AC93-A48A1B5B1D50/0/CollateralConsequencesChecklist.pdf.
[157] *See* Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders,* in Grisso and Schwartz, YOUTH ON TRIAL 73–103 (2000).
[158] *In re Gault*, 387 U.S. at 38–39, n.5.
[159] Puritz, P., Burrell, S., Schwartz, R., Soler, M., Warboys, L., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, American Bar Association, 32 (1995). Moreover, to ensure that a child is fully aware of the importance of counsel, the National Council of Juvenile and Family Court Judges recommends that when a child is served with a summons, information should also be provided to the child and his or her family as to why counsel for the youth is important, and what the child's options are for obtaining legal representation prior to the adjudication hearing. *Juvenile Delinquency Guidelines: Improving Court Practice in Delinquency Cases*, National Council for Juvenile and Family Court Judges 1, 74 (2005) *available at* http://www.ncjfcj.org/content/view/411/411.

attorneys can also provide a juvenile guidance on whether to pursue appellate remedies and advice on when and how to expunge her juvenile record. Without counsel, the risk of unfairness increases dramatically.[160] Juveniles as a class are ill-equipped to understand, manage, and navigate the complexities of the system on their own. The research on adolescent development discussed below demonstrates that youth misunderstand the legal system and need the assistance of lawyers to advise them not only of their rights, but also of the process they are undergoing. Youth need lawyers to ensure that the rehabilitative focus of the juvenile court system is primary and that the youth have access to programs, services, and opportunities designed to meet their individual needs for treatment and rehabilitation. They also need attorneys to ensure that discharge and release occur in a timely and appropriate manner. With the increasingly punitive consequences imposed on youth, lawyers are necessary to ensure the punitive edge does not obscure the court's rehabilitative purpose.[161]

B. Adolescent Development in the Delinquency Context

In today's juvenile court, a judge typically conducts a colloquy in the courtroom to effectuate the juvenile's waiver of counsel.[162] Many states permit parents to waive their child's right to counsel or require the juvenile to be counseled by her parent prior to waiving her right to counsel.[163] Few states place the waiver decision completely on the child.[164]

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[160] The Luzerne County scandal, discussed below, is an acute example.
[161] 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, 182 (2007).
[162] Although there is much debate over the effectiveness of the oral or written colloquy, discussion of this is outside the scope of this Article.
[163] *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-221 (West 2012); FLA. R. JUV. P. 8.165; N.H. REV. STAT. ANN. § 169-B:12 (West 2011); N.J. STAT. ANN. § 2A:4A-39 (West 2011).
[164] *See, e.g.*, WASH. REV. CODE. ANN. § 13.40.140 (West 2012) (providing right to waive counsel to juvenile twelve years of age or older); UTAH R. JUV. P. 26(e) ("A minor 14 years of age and older is presumed capable of intelligently comprehending and waiving the minor's right to counsel . . . ."); WIS. STAT. ANN. § 938.23 (West 2011) ("A juvenile 15 years of age or older may waive counsel . . . .").

However, the waiver decision becomes more complicated when the youth is required to act in the presence of her parents or the judge. Especially when faced with a decision in the presence of an authority figure, "[a]dolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures."[165] Scholarship on moral development explains why a juvenile would be more inclined than an adult to acquiesce to authority. Adolescence is marked by "conventional" morality—"conforming to and upholding the rules and expectations and conventions of society or author just because they are society's rules, expectations, or conventions."[166] Youth are likely to go along with a suggestion to waive counsel because a probation officer has told them the charges are minimal and they will not need an attorney, or because their parents have told them that they should just take the easy route and appear without counsel. This susceptibility to coercion heightens the need for assistance of counsel in juvenile proceedings such that the right should be unwaivable.

Furthermore, in order to meaningfully participate in the legal system, one must have certain cognitive and emotional capacities that young people typically lack.[167] The psychological and developmental factors of adolescence merely exacerbate this disadvantage. For over thirty years, forensic psychologists have tried to determine whether juveniles can understand and comprehend the complexities of their rights in the legal system. The findings are consistent across the board—juveniles frequently misunderstand their legal rights.[168] In fact, most juveniles misconstrue the very concept of a *right*, believing that it is conditional and can be

[165] Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 357 (2003).
[166] Lawrence Kohlberg, *The Psychology of Moral Development: The Nature and Validity of Moral Stages* 172–73 (1984).
[167] Michele Peterson-Badali & Rona Abramovich, *Grade Related Changes in Young People's Reasoning About Plea Decisions*, 17(5) L. & HUM. BEHAV. 537, 537 (1993) (noting that these capacities typically increase with age).
[168] *See generally* Alan Goldstein & Naomi S. Goldstein, *Evaluating Capacity to Waive Miranda Rights* (2010); Thomas Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competence* (1981).

later revoked by the judge.[169] Even if a juvenile can demonstrate an accurate understanding of her rights and the legal process, she often fails to appreciate either how the rights apply to her own circumstances or the consequences of waiving those rights.[170]

In addition to cognitive levels that affect a youth's ability to understand and process information so that she can make thoughtful decisions, youth are also present-oriented,[171] which affects their ability to interact with counsel and thus interferes with the effectiveness of their representation. A youth's focus on the immediate makes intuitive sense—adolescents have had less experience with long-term consequences due to their age and they may be uncertain about what the future holds for them. In the context of waiving rights, one commentator has noted that the court must assess the child's "cognitive ability to determine: 1) whether the child processed the information received about the rights involved; 2) whether the child engaged in rational decision making; and 3) whether the child waived the right volitionally."[172] Without this thorough analysis or counseling as to the importance of the right to counsel, juveniles are more likely to believe, to her detriment, that the right is revocable by the justice system.

C. The Contours of the Constitutional Right to Counsel in Juvenile Justice Matters

1. The *Faretta* Right to Self-Representation

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[169] *See e.g.*, Jodi L. Viljoen, Patricia A. Zapf, & Ronald Roesch, *Adjudicative Competence and Comprehension of Miranda Rights in Adolescent Defendants: A Comparison of Legal Standards*, 25 BEHAV. SCI. & L. 1 (2007); Thomas Grisso, *What We Know about Youths' Capacities as Trial Defendants*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 139, 148 (Thomas Grisso & Robert G. Schwartz eds. 2000).
[170] *See* Michele Peterson-Badali & Rona Abramovich, *Grade Related Changes in Young People's Reasoning About Plea Decisions*, 17 L. & HUM. BEHAV. 537, 547, 549–550 (1993) (finding that there was no difference in an adolescent's decision to plead guilty based on the seriousness of the charges, thus suggesting a lack of awareness of the implications for punishment).
[171] Elizabeth S. Scott, N. Dickon Repucci & Jennifer L. Woolard, *Evaluatinq Adolescent Decision Making in Legal Contexts*, 19 L. & HUM. BEHAV. 221, 231 (1995).
[172] Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1896 (1996).

Proponents of juvenile waiver of counsel suggest that waiver is a "right" protected by the federal Constitution, relying upon the Supreme Court's holding in *Faretta v. California*.[173] However, an analysis of *Faretta* in light of adolescent development research and subsequent case law makes clear that there is no juvenile right to waiver of counsel or self-representation. In *Faretta v. California*, the Supreme Court held that an adult criminal defendant's Sixth Amendment right to counsel implies a right to self-representation.[174] Notably, the Court held that the Constitution required a right of self-representation, not necessarily the right to waive counsel and proceed without a defense.[175] An adult defendant who chooses to proceed *pro se* is not dispensing with the protections of the Sixth Amendment. The Court views the waiver of an attorney not as the abandonment of a right, but as the assertion of a separate and competing right – a demand to "make one's own defense personally."[176] In these situations, the Sixth Amendment's protections are still in full force. It is thus a choice of the manner of defense, not a choice to have no defense at all.

The *Faretta* Court rested its holding upon the language and history of the Sixth Amendment as well as English and Colonial case law.[177] Prior to the late 1600s, self-representation was the only means of representation for accused individuals.[178] Once counsel

[173] 422 U.S. 806, 836 (1975).
[174] 422 U.S. at 819.
[175] *See* Martinez v. Court of Appeal, 528 U.S. 152, 162 (2000) ("[A]n individual's decision to represent himself is no longer compelled by the necessity of choosing self-representation over incompetent or nonexistent representation; rather, it more likely reflects a genuine desire to "'conduct his own cause in his own words.'" quoting *Faretta*, 422 U.S. at 823)).
[176] *Faretta*, 422 U.S. at 819. *See also McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984) ("Faretta's [sic] holding was based on the longstanding recognition of a right of self-representation in federal and most state courts…").
[177] *Faretta*, 422 U.S. at 818.
[178] *Id*. at 823–24.

was provided to defendants, the ability to conduct one's own defense was still carefully protected.[179]

However, the right to self-representation expressed in *Faretta* is not unfettered. Courts in criminal cases "are reluctant to grant a waiver unless the accused understands the nature of the charge and its statutory requirements, the range of punishments, the possible defenses and circumstances of mitigation."[180] A court may impose standby counsel upon a criminal defendant who wishes to conduct her own defense.[181] Additionally, standby counsel's uninvited participation in the proceedings is constitutionally permissible, so long as the participation is not such as to destroy a jury's perception that the defendant retains control over her own defense.[182] The right of self-representation is not absolute; "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."[183]

The Supreme Court significantly limited the scope of the *Faretta* rule in its recent decision in *Indiana v. Edwards*.[184] In *Edwards*, the defendant had undergone numerous competency hearings and was finally deemed competent to stand trial but incompetent to represent himself.[185] On appeal, Edwards claimed that this denial violated his right to self-representation, as declared in *Faretta*. The Court held that the Constitution permits a state to

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[179] *Id*. at 825. The importance of self-representation, the Court explained, was even more fervently defended in the Colonies where attorneys were viewed as being "bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions." *Id*. at 826 (quoting C. Warren, A history of the American Bar 7 (1911)).
[180] Wallace J. Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court – A Promise Unfulfilled*, 44(3) Crim. L. Bull. 1, 7 (2008) (citing *Faretta*, 422 U.S. 806).
[181] *McKaskle*, 465 U.S. at 188.
[182] McKaskle v. Wiggins, 465 U.S. 168, 179 (1984) ("*Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the *pro se* defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel.")
[183] Martinez v. Court of Appeal of California, 528 U.S. 152, 162 (2000).
[184] 554 U.S. 164 (2008).
[185] *Id.* at 167–69.

limit the right of self-representation by evaluating the defendant's mental capacity to conduct his own defense.[186] In holding that a state may deny a defendant the right to self-representation based upon mental capacity, the *Edwards* Court highlighted the difference in the assessment of competence to stand trial and competence to conduct one's own defense, finding that states may take realistic account of the mental capacities of individuals and insist upon representation.[187] As such, the *Faretta* right is inapplicable to individuals who have compromised mental capacities and limited abilities to handle, without assistance, the complexities of trial and self-representation.[188]

a. The Importance of History to the Right of Self-Representation

The *Faretta* Court relied extensively on the history of criminal proceedings – dating to English common law – to find support for the right to self-representation.[189] Specifically, the Court looked to the entrenched practice of ensuring defendants' ability to conduct their own defense. The importance of history in the Court's decision is underscored by the Court's holding in *Martinez v. Court of Appeal*.[190] There the Supreme Court held that the right to represent oneself did not extend to direct appeal, stating, "unlike the inquiry in *Faretta*, the historical evidence does not provide any support for an affirmative constitutional right to appellate self-representation."[191]

The unique history of juvenile courts requires a much different focus in discussing waiver

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[186] *Id*. at 174.
[187] *Id.* at 175–78.
[188] We are not suggesting that youth are incompetent because of mental illness; rather that because of developmental immaturity, they lack capacities that are similar to the shortcomings of adults who incompetent because of mental illness. *See generally* Grisso et al., *supra* note 165.
[189] *Faretta*, 422 U.S. at 823. It should not be overlooked that, even in the criminal context, this foundation has been subsequently questioned by the Supreme Court. *See* Martinez v. Court of Appeals, 528 U.S. 152, 158 (2000) ("Therefore, while *Faretta* is correct in concluding that there is abundant support for the proposition that a right to self-representation has been recognized for centuries, the original reasons for protecting that right do not have the same force when the availability of competent counsel for every indigent defendant has displaced the need — although not always the desire—for self-representation.").
[190] 528 U.S. 152 (2000).
[191] *Id.* at 159.

of counsel. Historically, children possessed no independent rights, only the duty to serve and obey their parents.[192] Under the doctrine of *parens patriae*, states acted *in loco parentis*—assuming the custodial responsibilities of parents. Accordingly, the deprivation of liberty by the state was legally viewed as nothing more than a logical extension of the natural and inherent control possessed by parents.[193] While this concept had no support in the history of criminal law, these theories of state control over children served as the theoretical foundation for juvenile courts.[194]

Even as juveniles' rights evolved, history is replete with denial of basic procedural due process. As stated in *Gault,* "the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context."[195] Over sixty years after the formation of the first juvenile court in 1899, the Court held that the Constitution required the juvenile right to counsel.[196] While the fundamental procedural requirements mandated by *Gault* marked a significant shift in the practice and formalization of juvenile courts, the implementation of this right did not happen uniformly or promptly.[197]

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[192] *See* Brown v. EMA, 131 S. Ct. 2729, 2757 (2011) (Thomas, J., dissenting) (stating that "[t]he law [at the time of the Revolution] entitled parents to 'the custody of their [children],' 'the value of th[e] [children's] labor and services,' and the 'right to the exercise of such discipline as may be requisite for the discharge of their sacred trust.'" [citation omitted]. Children, in turn, were charged with 'obedience and assistance during their own minority, and gratitude and reverance during the rest of their lives'") (citing Chancellor James Kent, Commentaries on American Law).

[193] *Ex parte Crouse*, 4 Whart. 9, 11–12 (Sup. Ct. Pa. 1839) ("As to abridgment of indefeasible rights by confinement of the person, it is no more than what is borne, to a greater or less extent, in every school; and we know of no natural right to exemption from restraints which conduce to an infant's welfare. Nor is there a doubt of the propriety of their application in the particular instance. The infant has been snatched from a course which must have ended in confirmed depravity; and, not only is the restraint of her person lawful, but it would be an act of extreme cruelty to release her from it").

[194] *See Gault*, 387 U.S. at 16 ("[T]here is no trace of the [*parens patriae*] doctrine in the history of criminal jurisprudence. At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders").

[195] *Id.* at 17.

[196] *Id.* at 29–30.

[197] *See* 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, 1189 (1989) (discussing surveys and research regarding the appearance of attorneys in juvenile matters); Barry C. Feld, In re Gault *Revisited: A Cross-State*

b. The Inapplicability of *Faretta* to Juveniles

While the criminal courts have a history of self-representation, the juvenile system has a history of non-representation.[198] Historically, the benevolent arm of the state was the only protection the juvenile presumably needed.[199] As juvenile courts became increasingly more punitive and as the sanctions available against juveniles came to mirror those available against adults, this presumption of non-representation became obsolete. The right to counsel was one of the first constitutional rights guaranteed to juvenile defendants, as counsel is the primary vehicle through which youth can realize the full array of constitutional rights available to them.[200] The *Faretta* Court also relied on the language of the Sixth Amendment in reaching its holding. Specifically, the Court found that the right to self-representation is "necessarily implied by the structure of the [Sixth] Amendment."[201] However, only some requirements of the Sixth Amendment, such as the right to confront witnesses and the right to counsel,[202] have been applied to juveniles.[203] These rights have been derived from the Fourteenth Amendment's guarantee of due process,[204] extending the fair administration of justice to juvenile court proceedings.[205]

Comparison of the Right to Counsel in Juvenile Court, 34 CRIME & DELINQ. 393, 401 (1988) (of half of the six states surveyed, only 37.5%, 47.7%, and 52.7% of the juveniles were represented).

[198] *See Gault*, 387 U.S. at 17 ("[P]roceedings involving juveniles were described as 'civil' not 'criminal' and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty") (footnote omitted).

[199] *See id.* at 25–26 ("The early conception of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help 'to save him from a downward career.'") (citation omitted).

[200] *Id*. at 36.

[201] Faretta v. California, 422 U.S. 806, 819 (1975).

[202] *Id.*

[203] The Court in *In re Gault* found the source of these rights for juveniles in the Fourteenth Amendment. *Gault*, 387 U.S. at 41–43.

[204] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971).

[205] *Gault*, 387 U.S. at 28.

Moreover, the Court in *Faretta* clearly limits its holding to defendants in criminal trials.[206] The Supreme Court has never equated juvenile matters with criminal proceedings.[207] The Supreme Court's decision in *McKeiver v. Pennsylvania* held that juveniles have no constitutional right to a jury trial. This is important, not only because of the applicable limits the Court placed on the extension of the Sixth Amendment, but also because of the focus the Court has placed on the importance of the right to represent oneself before a jury.[208]

> *Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between [mandated standby] counsel and the *pro se* defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel."[209]

As previously discussed, the scope of the *Faretta* right to self-representation has been substantially limited. For example, the Supreme Court has held that it is constitutionally permissible to limit this right in situations where an adult defendant is competent to stand trial but whose severe mental illness compromises his ability to represent himself.[210] In *Edwards*, the Court cited the American Psychiatric Association *amicus* brief, explaining the importance of a different rule: "[D]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, [and] anxiety… can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant."[211] The Court explained, "insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context

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[206] *Faretta*, 422 U.S. at 834 ("It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. . . . The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction").
[207] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971) ("[T]he juvenile court proceeding has not yet been held to be a criminal prosecution . . . .") (internal quotation marks omitted).
[208] *McKaskle v. Wiggins*, 465 U.S. 168, 179 (1984).
[209] *Id.*
[210] Indiana v. Edwards, 554 U.S. 164 (2008).
[211] *Edwards*, 554 U.S. at 176.

undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial."[212] The Supreme Court has made similar findings regarding the mental capacities of juveniles in the context of sentencing. In *Roper v. Simmons*,[213] the Court held that the death penalty may not constitutionally be applied to individuals who committed offenses when they were under the age of eighteen, citing the "diminished capacity" of juveniles.[214] The Court stated:

> "[A]s any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'"[215]

2. The Effect of Juvenile Waiver

The Supreme Court has held that the Fourteenth Amendment does not operate identically for juveniles as it does for adults.[216] This is true of waiver of rights, as well as the exercise of those rights. "To preserve the protection of the *Bill of Rights* for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights."[217] A youth's waiver of counsel is almost never a signal that the youth wants to act as her own lawyer in *trying* the case. The exercise of a right to represent oneself is far difference from the waiver of a right to be represented by a trained professional. More often, in juvenile court the waiver of counsel is a precursor to an admission of guilt. The literature of adolescent development has taught us that youth are unlikely to understand substantive criminal law.[218] They won't appreciate, for

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[212] *Id*. at 176–77. As noted above, note 207, the legal issue is one of *capacity*. Numerous factors affect capacity to exercise rights. These include mental retardation, mental illness and, in the case of youth, developmental immaturity.
[213] 543 U.S. 551 (2005)
[214] *Id.* at 571 ("[o]nce the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults").
[215] *Id.* at 568 (citation ommitted)
[216] McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).
[217] Glasser v. United States, 315 U.S. 60, 70 (1942).
[218] *See generally* Alan Goldstein & Naomi S. Goldstein, *Evaluating Capacity to Waive Miranda Rights* (2010); Thomas Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competence* (1981).

example, that a lawyer might make the case for "simple," rather than "aggravated" assault. They won't understand the intricacies and complexities of the entire judicial process.

The recent scandal in Luzerne County, Pennsylvania[219] highlights the importance of ensuring an unwaivable right to counsel to youth.[220] Children in Luzerne County were pawns in a kickback scheme where two judges conspired to send the juveniles to a private placement facility for their own pecuniary gain. This occurred primarily because juveniles routinely appeared without attorneys; the rate of waiver of counsel in Luzerne County was well over the state average.[221] Youth who waived counsel were three times more likely to be placed out of their homes than youth who had lawyers.[222] In many instances, these unrepresented youth were adjudicated delinquent and placed in residential care for minor offenses or for conduct not rising to the level of a crime. These delinquency sanctions were of indeterminate nature. Even when youth were placed on probation, they lacked zealous advocates to negotiate either the conditions of probation or its duration.[223] Many youth who were placed in programs that did not match their needs "failed to adjust," entering a revolving door that continually returned them to juvenile court where they received harsher and longer dispositions.[224]

In Luzerne County, the absence of counsel also meant that youth could not challenge the corrupt judge's repeated violations of other significant rights. For example, the judge failed to ensure that children's guilty pleas were knowing and voluntary.[225] He regularly failed to inform

[219] *In re J.V.R.*, 81 M.M. 2008 (Pa.); *H.T. v. Ciavarella*, No. 3:09-cv-0357, consolidated as No. 3:09-cv-0286 (M.D. Pa.). For a further discussion of the Luzerne County scandal and its lessons for implementing the right to counsel, see Robert Schwartz and Marsha Levick, *When a "Right" is Not Enough: Implementation of the Right to Counsel in an Age of Ambivalence*, 9 CRIMINOLOGY & PUB. POL'Y 365 (2010).
[220] *See* www.jlc.org/luzerne for background information and all pleadings.
[221] *H.T. v. Ciavarella*, No. 3:09-cv-0357, consolidated as No. 3:09-cv-0286, Master Complaint, para 689, (M.D. Pa.).
[222] *Id.* at para 688 & 689.
[223] *H.T. v. Ciavarella*, No. 3:09-cv-0357, consolidated as No. 3:09-cv-0286, Master Complaint, passim (M.D. Pa.)
[224] *H.T. v. Ciavarella*, No. 3:09-cv-0357, consolidated as No. 3:09-cv-0286, Master Complaint, passim (M.D. Pa.)
[225] *Id.* at para 740-741, 747.

youth of their right to a trial, their right to confront and cross-examine witnesses, and the government's burden of proving every element of its case beyond a reasonable doubt.[226] He regularly failed to ask if youth understood that they were giving up these rights before pleading guilty.[227] He did nothing to confirm that youth understood the acts to which they were pleading guilty.[228] Although what occurred in Luzerne County was in many ways an aberration, it was able to occur because of the lack of attorneys in the courtroom.[229]

In Luzerne County, failing to provide an unwaivable right to counsel was tied to the inevitable admission that followed. In this corrupt courtroom, youth routinely answered "yes" when asked, "Did you do this?" This is problematic and unfair for several reasons. Like Gerald Gault, the youth did not have the protections of counsel to advise them of the consequences of admitting to their offenses. Youth without counsel may be influenced by probation officers, prosecutors or judges, none of whom are in a position to provide disinterested advice, and, indeed, have no professional obligations to do so.[230]

Indeed, the anecdotes we have heard from youth in Luzerne County include examples of prosecutors advising youth and their families prior to trial. Such advice does not have to come from malign motives. In practice, courts routinely fail to ensure that youth understand the magnitude of the decision they are making when they waive counsel.[231] Even in the small number of states that have strict requirements regarding juvenile waiver of counsel, it appears

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[226] *H.T. v. Ciavarella*, No. 3:09-cv-0357, consolidated as No. 3:09-cv-0286, Master Complaint, passim (M.D. Pa.)
[227] *H.T. v. Ciavarella*, No. 3:09-cv-0357, consolidated as No. 3:09-cv-0286, Master Complaint, passim (M.D. Pa.)
[228] *H.T. v. Ciavarella*, No. 3:09-cv-0357, consolidated as No. 3:09-cv-0286, Master Complaint, passim (M.D. Pa.)
[229] *Id.*
[230] *See, e.g.*, *Fare v. Michael C.*, 442 U.S. 707, 722–23 (1979) ("[A probation officer] is significantly handicapped by the position he occupies in the juvenile system from serving as an effective protector of the rights of a juvenile suspected of a crime.") .
[231] Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue To Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL'Y 543, 562 (2009); *see also* Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 601 (2002) (citing *Zerbst*, 304 U.S. at 464 (1938)).

that judges often fail to provide juveniles with even the most basic of advisories about their rights.[232] Even the best juvenile court stakeholders feel pressure to clear cases from their calendars. Youth may be further pressured by family members to waive counsel in order to avoid further delay and processing time in court. These pressures may occur even if parents are not paying for lawyers; many parents mistakenly believe that proceeding without a lawyer will lead to a better result.

Uncounseled youth are also unlikely to appreciate short- and long-term consequences of admitting offenses, such as potential incarceration or a criminal history record. They are unlikely to understand that juvenile courts can impose dispositions of indeterminate duration and that minor technical probation violations can lead to long periods of incarceration.[233] Youth are particularly unlikely to be aware of the collateral consequences of an adjudication, including its impact on their education, financial aid, future employment and access to public housing.[234] Ironically, at a time when courts are imposing comprehensive obligations on defense counsel to inform their clients about collateral consequences of convictions, including immigration,[235] sex offender registration,[236] and notification consequences, permitting waiver of counsel leaves the most vulnerable population – youth – without this essential counseling.

a. The Consequences of Proceeding Without Representation

In the very rare circumstances where a child does seek to represent herself at a trial, it is an absolute certainty that she will lack the skills and knowledge necessary to do so as effectively

[232] Berkheiser, *Fiction of Juvenile Right to Counsel*, at 617.
[233] *See generally Juvenile Justice: A Century of Change*, Office of Juvenile Justice and Delinquency Prevention at 12 (December 1999) available at www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf (describing sanctions that may be imposed upon juveniles).
[234] An adjudication of delinquency may hinder a juvenile's future plans to seek higher education, obtain employment, or enlist in the military. *See generally*, Robert E. Shepard Jr., *Collateral Consequences of Juvenile Proceedings: Part II*, 15 CRIM. JUST. 41 (Fall 2000) (discussing potential negative consequences of a juvenile adjudication, including barriers to higher education, eligibility for federal financial aid, and employment).
[235] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).
[236] *See* State v. A.N.J., 225 P.3d 956, 965–70 (Wa. 2010).

as a trained attorney. Attorneys in juvenile court require specialized knowledge about the juvenile justice system. For example, a distinct body of case law has developed around motions to suppress, juvenile competency, *mens rea* and culpability, in addition to the standard case law.[237] The attorneys must know nomenclature unheard of in adult court and they must be familiar with the wide array of services available to juvenile offenders.[238] One commentator has noted that the representation of juvenile offenders requires specialized skills and knowledge that even even counsel accustomed to dealing with adult defendants may not possess.[239]

The right to counsel in juvenile proceedings was a relatively recent protection – extended only eight years before *Faretta*. Just one year before *Faretta* was decided, Congress passed the Juvenile Justice and Delinquency Prevention Act,[240] recognizing the problem of the absence of counsel in juvenile court. Congress found that "understaffed, overcrowded juvenile courts, probation services, and correctional facilities are not able to provide individualized justice or effective help."[241] Many of these barriers to justice have persisted and been reported by advocacy groups and researchers:

> In its 1993 report, *America's Children at Risk: A National Agenda for Legal Action*, the Working Group decried the fact that many thousands of children each year are adjudicated delinquent and incarcerated in facilities resembling jails or prisons, without the benefit of counsel, and that among those who have counsel, many are represented by lawyers untrained in the complexities of representing children.[242]

In 1995, *A Call for Justice* found that "34% of the public defender offices surveyed reported that some percentage of youth in the juvenile courts in which they work 'waive' their right to counsel

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[237] Sue Burrell, "Juvenile Delinquency: The Case for Specialty Training." California Daily Journal, January 14, 2010.
[238] *Id.*
[239] Joanna S. Markman, *In re Gault: A Retrospective in 2007: Is it Working? Can it Work?*, 9 BARRY L. REV. 123, 135 (2007). quoting Marvin R. Ventrell, Essay, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 272–73 (1995).
[240] P.L. 93-415, 88 Stat. 1109.
[241] *A Call for Justice*, *supra* note 159, at 20.
[242] *Id.*

at the detention hearing. Reports by appointed counsel are very similar." Additionally, it appears that while many courts may have been reporting that juveniles elected to "waive" their right to counsel, the juveniles never meaningfully expressed a desire to proceed without counsel.[243] The inescapable conclusion is that "waiver of counsel" has often been a means to justify denial of counsel. If waiver of counsel is permitted to continue—with the illusion that it is its own constitutional right—the Due Process promise of counsel will continue to be nothing but an empty promise; its language contorted to erase all meaning.

The right to counsel is not merely a procedural right; it is the gateway through which substantive rights are accessed. At each stage of the juvenile justice process, juveniles must make decisions about whether to move to suppress certain evidence, whether to proceed to trial or enter an admission, what type of trial strategy to pursue, whether to move for a finding of incompetency or diversion to the mental health or dependency system, and what type of disposition best meets the goals and purposes of the state's statute governing delinquency matters Good lawyers take the range of future possibilities into account when preparing for each stage in the process. For this reason, although we permit juveniles to assert or waive certain other rights in juvenile court—such as the right to a trial or the right against self-incrimination—the assertion or waiver of these other fundamental rights is made only *after* the juvenile has the opportunity to consult with counsel to assess the ramifications of each decision. It is only after she receives the advice of counsel that such decisions are knowing, intelligent, and voluntary. Juvenile waiver of right to counsel impairs the fairness of delinquency proceedings because lawyers are themselves the means of securing a fair trial and maintaining due process throughout

[243] *See id.*, at 7 ("46% of the public defenders say there is a colloquy only 'sometimes' or 'rarely.' In addition, 45% of public defenders say the colloquy is only 'sometimes' or 'rarely' as thorough as that given to adult defendants and is often a meaningless technicality.").

the proceedings.[244] As the right to counsel is the precursor for ensuring that all rights are exercised throughout the juvenile court process, the line prohibiting waiver is appropriately drawn at eighteen.

b. Client Direction

Many lawyers may feel that a ban on waiver would undermine the philosophy of juvenile defense representation—that lawyers are to be "client directed."[245] Mandating representation by counsel, however, does not deny juveniles the opportunity to exercise their autonomy. It is not paternalistic, nor does it diminish the capabilities of the juvenile. Rather, it is the most effective way to advocate for the support juveniles need to fully realize their autonomy. Although experts argue that lawyers for juveniles should be client-directed,[246] those authorities do not undermine a "no waiver" argument. "Client direction" merely means that after counseling from a lawyer who has established a lawyer-client relationship, a client has the right to control the direction of the case, and to direct the lawyer on several key issues. The client controls whether to plead and whether to take the witness stand; the client directs whether to ask for a jury;[247] the client also directs the lawyer regarding disposition—informing the lawyer of where he wants to live and

[244] Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 640 (2002).
[245] *See, e.g.,* Linda D. Elrod, *Client-Directed Lawyers for Children: Is it the "Right" Thing to Do?*, PACE LAW REVIEW, Paper 556, at 910 (2007).
[246] *See, e.g.*, National Juvenile Defender Center and National Legal Aid and Defender Association, "Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems" (2005) ("The Indigent Defense Delivery System must provide training regarding the stages of child and adolescent development… Expectations, at any stage of the court process, of children accused of crimes must be individually defined").
[247] *See* American Bar Association Model Rule of Professional Conduct 1.2: "(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."

what type of facility he would like to be placed in if placement is ordered.[248] However, all of the "client-directed" decisions are made only *after* a lawyer-client relationship has been established. As clients, juveniles maintain the ability to actively participate in the judicial process and to accept personal responsibility for their decisions concerning whether to accept a plea and waive the right to a trial and whether to testify at trial. Prohibiting a waiver of counsel will not detract from those rights.

c. National Standards on Juvenile Waiver

Four states provide for an unwaivable right to counsel in certain proceedings. Illinois' Juvenile Court Act is the most broad; the juvenile code specifies that minors charged with a crime "shall have all the procedural rights of adults in criminal proceedings, unless specifically precluded by laws that enhance the protection of such minors."[249] Among the rights specifically afforded all minors under the Act, including those charged with a crime, is the right to be represented by counsel.[250] Underscoring the importance of this right, this same section provides that "[n]o hearing . . . under th[e] Act may be commenced unless the minor who is the subject of the proceeding is represented by counsel."[251] In 2005, the Illinois General Assembly further protected this right by amending the Act to provide that, in delinquency proceedings, "a minor may not waive the right to the assistance of counsel in his or her defense."[252]

Three other states provide for an unwaivable right to counsel in most delinquency hearings. First, Texas law provides that a juvenile's right to representation by an attorney cannot be waived at any transfer, adjudicatory, disposition, detention, or mental health commitment

[248] *See* "Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems," *supra* note 246 ("Indigent defense delivery system counsel have an obligation to consult with clients and independent from court or probation staff, to actively seek out and advocate for treatment and placement alternatives that best serve the unique needs and dispositional requests of each child.").
[249] 705 ILL. COMP. STAT. ANN. 405 / 5-101(3) (West 2011).
[250] 705 ILL. COMP. STAT. ANN. 405 / 1-5 (1) (West 2011).
[251] 705 ILL. COMP. STAT. ANN. 405/1-5(1) (West 2011).
[252] 705 ILL. COMP. STAT. ANN. 405 / 5-170(b) (West 2011); 705 ILL. COMP. STAT. ANN. 405/5-115.5 (West 2011).

review hearing.[253] Second, the Pennsylvania Supreme Court has adopted a Rule of Juvenile Court procedure that prohibits juvenile waiver of counsel in many cases.[254] The Rule provides that children under the age of fourteen may never waive counsel,[255] and prohibits waiver for all youth during detention, transfer, adjudicatory, disposition, and probation modification hearings.[256] If the juvenile does waive counsel, the waiver only applies to that single proceeding and she may later revoke that waiver.[257] Furthermore, the Court may appoint standby counsel if the juvenile waives. While this is not an absolute prohibition on waiver for juveniles, it goes far in protecting the rights of youth in juvenile proceedings. Finally, Iowa has a similar statutory provision that prohibits a child of any age from waiving his or her right to counsel at a detention, waiver, adjudicatory, disposition, or disposition modification hearing.[258] However, Iowa's right is weakened by an exception stating that a child under age sixteen may not waive the right to counsel without written consent of a parent, guardian or custodian.[259] And, if the child is age sixteen or older, the waiver can be valid if there was a good faith effort made to notify the parent.[260]

Moreover, national standards and best practices support requiring an unwaivable right to counsel for juveniles. Five years *after* the Supreme Court in *Faretta* gave adult defendants a constitutional right to represent themselves, the Institute for Judicial Administration/American Bar Association Juvenile Justice Standards ("the Standards") explicitly rejected *Faretta*'s

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[253] TEX. FAM. CODE. ANN. § 51.10(b) (West 2011).
[254] *See* PA. R. JUV. CT. P. 152(A), effective March 1, 2012.
[255] *Id.*
[256] *Id.*
[257] PA. R. JUV. CT. P. 152(C).
[258] IOWA CODE ANN. § 232.11(2) (West 2011).
[259] IOWA CODE ANN. § 232.11(1)-(2) (West 2011).
[260] *Id.* While Iowa's right to counsel is protective, it does not provide a fully unwaivable right to counsel. As discussed earlier in this Article, the Iowa law also fails to consider that a child and parent's interests may diverge and a parent may put undue pressure on a child to waive his or her right to counsel in an effort to speed the process along.

application to juveniles.[261] The Standards, which prohibit waiver of counsel, recognize that effective assistance of counsel for juveniles is different. It is the precursor to a juvenile's ability to exercise all other important rights during the course of the juvenile justice process.[262] The Standards further distinguished *Faretta* and *Gault*: An adult defendant's right of self-representation grows out of the Sixth Amendment, while the right to counsel in *Gault* stems directly from the Due Process Clause of the Fourteenth Amendment.[263]

Furthermore, both the National Juvenile Defender Center and the National Legal Aid and Defender Association call for systems that ban waiver of counsel by juveniles. Their *Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems*, a series of recommendations endorsed by both organizations, includes an admonition that states ensure that children do not waive appointment of counsel.[264] And, the Federal Advisory Committee on Juvenile Justice recently emphasized that providing counsel to every child can remedy some of the most egregious problems in the juvenile justice system, including disproportionate minority contact, inhumane conditions of confinement, inappropriate transfers to the adult system, and inadequate rehabilitative services.[265]

Conclusion

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[261] Institute of Judicial Administration/ American Bar Association Juvenile Justice Standards (1980). The IJA/ABA Standards insist that the "court should not begin adjudication proceedings unless the respondent is represented by an attorney who is present in court" and the commentary explains that this means "that the right to counsel [is] unwaivable." *Id*. at 3. Standard 1.2 of Adjudicatory Proceedings. Standard 6.1.A. of the Standards Relating to Pretrial Proceedings is even more explicit with its insistence that "a juvenile's right to counsel may not be waived," *even though other rights may be waived under certain circumstances.*

[262] *See* Institute of Judicial Administration/ American Bar Association Juvenile Justice Standards: Standards Relating to Pretrial Court Proceedings, Commentary to Standard 6.1, at 99 (1980).

[263] *See* Institute of Judicial Administration/ American Bar Association Juvenile Justice Standards: Standards Relating to Adjudication, Commentary to Standard 1.2, at 15 (1980).

[264] *See* "Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems," *supra* note 246 ("The indigent defense delivery system should ensure that children do not waive appointment of counsel.").

[265] Fed. Advisory Comm. on Juvenile Justice, Annual Report 2008, at 26, available at http://www.facjj.org/annualreports/FACJJ%20Annual%20Report%2008.pdf (quoting ABA Presidential Working Group on the Unmet Legal Needs of Children and their Families, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION (Washington, DC: American Bar Association, 1992)).

The Supreme Court has consistently held that children and youth have a unique place in society that deserves an equally unique place in the law. Unlike most other statuses to which the law gives significance, youth is a transitional phase. We provide juveniles special protection in child welfare and juvenile justice because they are still developing. They are acquiring cognitive skills. They are developing psycho-social capacities. They are becoming socialized as they develop adherence to the rule of law. It is in society's interest to treat them fairly.

While recent case law has continued to recognize the relevance of adolescent development, it has not directly addressed the right to counsel and the meaningful exercise of that right. Rather, the Court has focused on the significance of youth to issues such as culpability, punishment, and interrogation. *In re Gault* was a seminal declaration of the due process rights of youth, but neither *Gault* nor its progeny help us understand how characteristics of youth should affect implementation of the right to counsel.

Child welfare and delinquency cases are complex. The facts shift over time as youths age. Youths' behavior is protean—the youth who appeared in court last year will be a different person today. The varieties of custodial status—and the duration of youths' stay in placement—will have enormous consequences for youths' futures. Youths are not only the subject of these proceedings, but also the participants.

It is not surprising, then, that Supreme Court jurisprudence, behavioral science and neuroscience reinforce the importance of fundamental fairness for youth in the child welfare and justice systems. As we have argued—looking at the stakes and interests of youth, parents, and the state—law and science point to fundamental fairness requiring a right to counsel for teens in child welfare matters. The sources support prohibiting the waiver of counsel for youth in delinquency proceedings. We have argued that these rights are grounded in the Constitution, and

that they importantly recognize the emerging autonomy and personhood of youths, as well as their vulnerability.