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From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation

Cover Page Footnote

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FROM VULNERABILITY TO VOICE: APPOINTING COUNSEL FOR CHILDREN IN CIVIL LITIGATION

Catherine J. Ross*

INTRODUCTION

THE notion that children are defined by their "peculiar vulnerabilities" dates back to Blackstone, whose terminology has long restricted children's legal status.¹ In general, the legal system has equated children's vulnerability with ineligibility for the full panoply of rights accorded to adults.² A long pedigree attaches to the tradition of depriving children of certain rights while assuming that constricting children's liberty did not harm them. Blackstone posited that the "very disabilities [of minors] are privileges . . ."³ By "disabilities," Blackstone was of course alluding to perceived differences in skills and judgment distinguishing the average child from the average adult.⁴ Blackstone went on to conclude that such vulnerabilities re-

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1. I William Blackstone, Commentaries on the Laws of England 452 (1992) (noting that children have certain legal "disabilities"); *see also*, Bellotti v. Baird, 443 U.S. 622, 634 (1979) (recognizing that children's constitutional rights cannot be equated with those of adults because of "the peculiar vulnerability of children").

2. The Supreme Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982) (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 732 (1978); *Ginsberg v. New York*, 390 U.S. 629, 633 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

3. I Blackstone, *supra* note 1, at 452. Blackstone actually uses the term "infants," but applies it to all children who have not yet achieved the age of majority, a status which he notes is achieved at different ages depending on the sex of the child and the purpose being considered. *Id.* at 448-52. Thus, in England during Blackstone's era, a 12-year-old boy could take the oath of allegiance, and at 14 could consent to marriage, choose a guardian, or execute a testament disposing of his personal estate, but did not achieve full majority until age 21. *Id.* at 451. A girl, in contrast, could be betrothed at age seven, but could not give or withhold consent to marriage until age 12, when she could also dispose of her personal estate "if proved to have sufficient discretion." *Id.* at 451. At 14, a girl could choose a guardian, and achieved majority for all purposes at age 21. *Id.* at 451.

4. The distinctions between children and adults that we take for granted were less entrenched in the 18th century. *See generally* Philippe Aries, *Centuries of Childhood: A Social History of Family Life* (Robert Baldick trans., 1962) (arguing that the contemporary western concept of childhood as a differentiated status, characterized by traits such as innocence, developed between the 16th and 18th centuries); Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800* (1977) (tracing the evolution of the family from 1450 and focusing on issues including parent-child relations).

quire that children be held "secure . . . from hurting themselves by their own improvident acts."⁵

This Article proposes to turn Blackstone's conclusion on its head. The author argues that children's peculiar vulnerabilities do not justify a regime of benevolent paternalism interpreted at the unreined discretion of judges. Instead, these perceived vulnerabilities provide the foundation for enhancing legal rights already accorded to children; in particular, children's vulnerabilities support their need for appointed counsel in civil litigation.⁶ Courts frequently decide matters affecting children's essential interests without providing an adequate opportunity for them to present their views, preferences, or justifications. This Article seeks to enhance children's claims to appointed counsel in civil litigation affecting essential interests—where no constitutional or statutory right to counsel currently exists—by building on precisely the vulnerabilities previously used to minimize a child's right to be heard in court. Although many authors have argued for children's rights to counsel based on moral and philosophical imperatives, the author of this Article aims to ground this right in the existing jurisprudence governing claims to counsel.

The "equality embodied by rights claims" is, as one leading scholar has observed, "an equality of *attention* . . . that makes those in power at least listen."⁷ In our society, the right to be heard may be rendered meaningless without access to counsel, and even more so for those whose particular vulnerabilities make it extremely difficult for them to marshal arguments on their own behalf. "[T]he adversary system functions best and most fairly only when all parties are represented by

5. I Blackstone, *supra* note 1, at 452.

6. See *Parham v. J.R.*, 442 U.S. 584, 627-28 (1979) (Brennan, J., dissenting) (noting that children may be entitled to more procedural protection than adults in the context of psychiatric commitment because "childhood is a particularly vulnerable time of life" and the results of erroneous decisions may be more harmful to children than to adults); see also Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 *Child Dev.* 1589, 1595-96 (1982) (finding that children as young as nine years old are "competent" to direct their own medical treatment).

7. Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* 297 (1990). The scope of the substantive rights accorded to children is beyond the extent of this Article. The focus here is limited to the right to be heard through counsel in the effort to exercise recognized substantive claims, or any cognizable claims that such counsel may be able to fashion. This Article emphasizes that the latter, the ability of competent counsel to craft workable claims to rights previously unrecognized or claims addressing uncompensated wrongs, constitutes an important justification for appointing counsel for litigants whose stories suggest the risk of real harm but who may not know how to frame a cause of action under law.

In this respect, the author agrees with the suggestion that we first must "be clear that it makes sense to ascribe rights to children at all before we go on to work out substantive theories as to the rights they should be accorded." Neil MacCormack, *Children's Rights: A Test-Case for Theories of Right*, 62 *Archives for Phil. L. & Soc. Phil.* 3, 20 (1976). The author is indebted to Katherine Hunt Federle for sharing with her Professor MacCormack's article.

competent counsel."⁸ Indeed, the absence of counsel in an adversary system severely diminishes the odds of justice being served.

The intellectual boundaries of rights theory tend to follow practical imperatives arising from real world problems. In the case of children, practice and theory converge neatly. Children's autonomy claims emerge as children mature, creating an expanding category of demands that cry out to be heard.⁹ Nonetheless, even as children demonstrate a practical need to be heard, separate and apart from their parents, on diverse issues regularly played out in courts, children still remain perhaps the most marginal political group in our society. The reasons for their marginal status are many, including traditional patriarchal conceptions of the family and an ideology of family privacy that reinforces the rights of parents in preference to those of their children. Children also lack a franchise or other means of affecting decision makers.

This Article argues that existing jurisprudence actually supports the appointment of counsel for children. The logic of decisions interpreting the rights of other marginal and powerless groups—coupled with the extension of rights in the noncivil domains of juvenile justice—provide ample precedents supporting the appointment of counsel for children in civil proceedings.

Children are unique because, unlike adults, the law does not allow them to remove themselves from an unsatisfactory environment when their needs remain unfulfilled. Despite sensational press reports, they cannot "divorce" their parents,¹⁰ except by committing the status offense¹¹ of running away, which could result in their own confinement. Similarly, until children reach a certain age, they are required to attend school; they cannot tell the school to "take this job and shove it," adapting the language of worker discontent.¹² Resulting pressures often mount until the problems surrounding or emanating from the child end up before a court of law.

8. *Argersinger v. Hamlin*, 407 U.S. 25, 65 (1972) (Powell, J., concurring) (discussing the criminal justice system).

9. See *Polovchak v. Meese*, 774 F.2d 731, 736-37 (7th Cir. 1985) (finding that minor's individual rights claims grow more compelling with age, continuing to expand during the course of the litigation).

10. See George H. Russ, *Through the Eyes of a Child, "Gregory K.": A Child's Right to be Heard*, 27 *Fam. L.Q.* 365, 365 & n.3 (1993) (noting that contrary to reports in the press, Gregory K. did not seek to divorce his mother, but rather sought to terminate her parental rights in accordance with state law so that the foster family with which he had lived for several years could adopt him).

11. "Status offenses" are activities that violate laws only because they are engaged in by children. Virginia J. Hopkins, *Baudy Ballads and MTV: In Juvenile Crimes the More Things Change the More They Stay the Same*, W. Va. Law., Nov. 1995, at 14, 15. Examples include missing school, staying out late, and "incurability" reported by parents. *Id.*

12. Johnny Paycheck, *Take This Job and Shove It*, on Johnny Paycheck Golden Classics (Hollywood 1987).

By taking seriously the notion that children are persons under the law, and applying to the case of children precedents that guide the exercise of judicial discretion in appointing counsel for indigent adults and other petitioners to the courts, this Article frames a theoretical basis for appointing counsel for children in a wide variety of circumstances. The author proceeds on the premise that law for children should not result in a separate jurisprudential system—a “children’s law” which quickly deteriorates into the disparaging “kiddie law”—but should instead rest squarely in our common law. Appointments of counsel for children that are predicated on principles drawn from the mainstream of our jurisprudence will have a sounder basis than appointments made at a judge’s unguided discretion or as a result of unarticulated value preferences.

Part I of this Article provides examples of the types of civil cases in which children may need independent counsel. This part argues that children have pressing needs for representation in a variety of matters where the facts or the underlying issues provide transparent evidence that the parents do not speak for the child in the particular circumstance. Part II analyzes judicial views concerning the nature of juvenile vulnerability. Part III argues that an analysis of the factors that guide judicial discretion in appointing counsel for indigent adults reveals that if those factors were applied to children, they would frequently point toward appointment of counsel. Part IV turns to a special vulnerability of children—the view expressed by the Supreme Court that children are analogous to prisoners because they are always in someone’s custody. This Article argues that if followed to its logical conclusion, this line of reasoning necessarily supports appointment of counsel for children, especially if viewed in conjunction with the First Amendment right of petition and the concomitant right of access to the courts as applied to prisoners. Finally, part V explores why the argument in parts I through IV supports the appointment of counsel who would follow normative rules governing attorney-client relations as closely as possible in representing child clients.

* * * *

Existing Rights and Unaddressed Needs. Children have a recognized right to counsel in certain types of judicial proceedings.¹³ The basic fundamental right to counsel is grounded in the United States Constitution and applied to juveniles by judicial interpretation. For

13. See American Bar Association Working Group on the Unmet Legal Needs of Children and Their Families, *America’s Children at Risk: A National Agenda for Legal Action 4* (1993) [hereinafter *America’s Children at Risk*]. This report notes that resources for and public commitment to providing counsel for children may vary with the source of the claim to counsel, depending on whether the claim stems from a clear constitutional right, a federal or state statute, or the child’s essential interests absent a constitutional or statutory right to counsel. *Id.* The author of this Article was Vice Chair of the Working Group that issued *America’s Children At Risk* and was the principal author of that report.

example, in any delinquency proceeding that may lead to incarceration, minors have a constitutional right to appointed counsel.¹⁴

Certain statutes also create children's entitlements to counsel. Federal law, for example, requires representation for children in some judicial proceedings arising out of allegations of abuse, neglect, or dependency, such as petitions to terminate parental rights.¹⁵ In addition, some states have created statutory rights to counsel for children in certain substantive categories of civil litigation, such as custody proceedings¹⁶ and petitions for a court order to bypass parental consent requirements for abortions.¹⁷ In Massachusetts, for example, separate statutes impose piecemeal requirements that counsel be appointed for children in need of services, including those charged with truancy, running away, or chronic disobedience.¹⁸ These statutes also apply in

14. *In re Gault*, 387 U.S. 1, 36-37 (1967) (finding a right to representation by counsel in juvenile adjudications that can result in confinement); *Kent v. United States*, 383 U.S. 541, 557-62 (1966) (finding right to representation by counsel in proceedings to waive juvenile court jurisdiction and be tried as an adult in criminal court). Recognition of an affirmative right to appointed counsel should not be confused with attainment of that right. Many children who have a right to appointed counsel remain unrepresented, even when the source of the right lies in the Constitution, as in proceedings to adjudicate delinquency. See Report of the American Bar Association Juvenile Justice Center, Juvenile Law Center, & Youth Law Center, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 7-8, 21 (1996).

15. See, e.g., 45 C.F.R. § 1340.14(g) (1994) (requiring appointment of a guardian *ad litem* for abused or neglected children in judicial proceedings, pursuant to the Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (codified at 42 U.S.C. §§ 5101-5118)); see also Robert E. Shepherd, Jr. & Sharon S. England, "I Know the Child Is My Client, But Who Am I?," 64 *Fordham L. Rev.* 1917, 1921-22 (1996) (discussing the "persistent disregard" for appointment of guardian *ad litem* required by 45 C.F.R. § 1340.14(g)).

16. Howard A. Davidson, *The Child's Right to Be Heard and Represented in Judicial Proceedings*, 18 *Pepp. L. Rev.* 255, 269-70, 270 n.58 (1991) (noting that some states require appointment of a guardian *ad litem* for the child in all contested custody cases (citing Wis. Stat. Ann. § 767.045; N.H. Rev. Stat. Ann. § 458:17-a (1983))). But see Katherine H. Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 *Cardozo L. Rev.* 1523, 1552-53, 1552 nn.171-74, 1553 nn.175-76 (1994) (noting that only nine states mandate appointment of a representative—whether attorney or guardian *ad litem*—for the child in divorce custody proceedings, and that even those states require the appointment only if certain conditions precedent exist).

17. See, e.g., Mass. Ann. Laws ch. 112, § 12S (Law. Co-op. 1991); see also Marvin R. Ventrell, *Rights and Duties: An Overview of the Attorney-Child Client Relationship*, 26 *Loy. U. Chi. L.J.* 259, 268 (1995) (finding that it is increasingly common for children to be represented in cases involving health care as well as private custody disputes and proceedings concerning adoption, guardianship, welfare benefits, and school law).

18. See Mass. Ann. Laws ch. 119, § 39F (Law Co-op. 1994) (providing right to counsel for children in need of services); ch. 119, § 29 (requiring court to appoint counsel for children unable to retain counsel in hearings involving petition by the state for guardianship of the child or commitment to the custody of a state agency); ch. 210, § 3(b) (stating that the court shall appoint counsel for child in care of state or licensed child care agency to represent child in adoption proceedings); ch. 112, § 12S (providing right to counsel for minors in abortion proceedings); ch. 201, § 34 (stating

cases where the state seeks to remove a child from a parent's custody or to place the child for adoption without the parent's consent, and in cases where the minor seeks judicial authorization to obtain an abortion without parental consent.¹⁹

There is, however, little consensus among the states. Many states remain silent even where other states have enacted statutes providing a right to counsel. Thus, it can be said that existing state statutes providing children with a right to appointed counsel provide a skeletal road map of the situations where children need lawyers but may not have them. The framework proposed by this Article can be used to obtain counsel for children in states that do not currently create a statutory right.

Moreover, the situations identified in the legislation described above do not exhaust the universe of events in which one might plausibly claim that children need counsel to represent their unique viewpoints. This Article proposes to expand children's representation in civil matters affecting their crucial interests.²⁰ Examples of circumstances in which minors have an important or essential stake may include, but are not limited to, the following: abuse and neglect proceedings, including proceedings to terminate parental rights; proceedings contesting custody, visitation, or adoption; hearings regarding status offenses; circumstances involving medical decision making, including situations such as psychiatric commitment at the request of parents, judicial proceedings regarding medical procedures such as petitions for abortion without parental consent, and decisions to forgo painful treatments with uncertain chances of success; and litigation over conditions of state guardianship, including conditions of confinement in the juvenile justice system, or efforts to be placed in the same foster home with siblings.²¹

that court may appoint guardian *ad litem* to represent the legal interests of incompetents); ch. 203, § 31 (providing for appointment of guardian *ad litem* for minor in proceeding for the sale or settlement of trust estate); ch. 206, § 30 (requiring court to appoint guardian *ad litem* for minor beneficiaries of trust funds prior to making an order of decree); ch. 210, § 5 (stating that court may appoint guardian *ad litem* with power to give or withhold consent in adoption proceedings); ch. 215, § 56B (providing that court may appoint guardian *ad litem* in contempt proceedings).

19. See Jinanne S.J. Elder, *The Role of Counsel for Children: A Proposal for Addressing a Troubling Question*, Boston B.J., Jan.-Feb. 1991, at 6, 6-7 (discussing conflicting guidance for counsel's proper role and citing Model Code of Professional Responsibility EC 7-11, 7-12 (1981), Juvenile Justice Standards, Standards Relating to Counsel for Private Parties § 3.1(b)(ii)[b], [c] (1980), and Model Rules of Professional Conduct Rule 1.14 (1983)).

20. The following discussion is intended to illustrate the variety of situations in which children's problems are the subject of civil litigation. Any comprehensive catalogue of issues that might arise, or of their relative frequency, is beyond the scope of this Article.

21. The invited experts who participated in the Conference on Ethical Issues in the Representation of Children held December 1-3, 1995 at the Fordham University School of Law (the "Fordham Conference") recognized the importance of counsel in

Parameters of the argument. A few qualifications are in order before this Article embarks on its analysis. First, this Article does not argue for creating a new "right." The argument here extends the boundaries of what courts and legislators have traditionally viewed as a significant legal privilege in the civil context, a privilege expressed in the wide discretion accorded to state and federal judges to appoint counsel for the needy.²² The author's analysis provides a coherent basis for expanding the claim of children to the privilege of appointed counsel by placing this claim within the existing jurisprudence governing how judges should exercise their discretion to appoint counsel for adults.

Second, the author argues for extending access to counsel only when the justice system is already implicated—where a child and his or her family can be expected to appear before a court in relation to an identified problem. The author does not propose that counsel be available to children who wish to transfer disagreements with their parents from a private, domestic forum to a public forum. Examples of such disagreements include nonabusive discipline, parental curfews, conflicts over religious observance, or the classic bedtime dispute. Disputes that bear a resemblance to arguments over family governance sometimes do spill over into the public sphere, coming before a court when family members are unable to resolve or handle their differences. In the intrafamily situations discussed in this Article, the fact that the family's problems are presented in court provides prima facie evidence that the family's ability to resolve conflict without some form of litigation has broken down. The author does not advocate the appointment of counsel, for either minors or adults, in order to promote or inflame discord within a family that is able to resolve its disagreements internally. Where the state fails to provide a safety valve for pronounced family discord, however, it seems to verge on the delusional to assume that allowing the resulting tensions to boil over will strengthen or preserve the embattled family unit. Courts provide a regulated framework for resolving disputes that have already transcended the ability of the parties to resume more temperate discussion.

these controversies. *See Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *Fordham L. Rev.* 1301, 1320, 1323 (1996) [hereinafter *Recommendations of the Conference*] (part VIII.A.1. & D.1.-2.) (recommending that state law provide lawyers to represent children in abuse and neglect proceedings, proceedings to terminate parental rights and other foster care proceedings, delinquency cases, status offenses, and mental health commitment cases, and that further study be given to whether there should be mandatory appointment of counsel in other categories of cases, including proceedings disputing custody, visitation, or adoption).

22. *See, e.g.*, 28 U.S.C. § 1915(d) (1988) (accord[ing] federal judges the discretion to "request an attorney to represent any . . . person unable to employ counsel"); N.Y. *Jud. Law* § 35 (McKinney Supp. 1996) (provid[ing] judges the discretion to appoint counsel for indigent persons in certain circumstances).

Finally, while the author accepts the premise that children differ from adults in fundamental respects, she takes seriously children's autonomy. The author seeks a means to allow children to participate meaningfully in the process society has selected as the means of last resort for resolving disputes.²³ In this sense, the author aligns herself with those thinkers who argue that children are entitled to have their views and experiences given weight by adult decision makers, even in the face of capacities that differ from those of adults.²⁴ After all, it is the child's world view we are being asked to acknowledge.²⁵

I. CHILDREN NEED COUNSEL IN THE CIVIL CONTEXT

In our adversarial system of justice, the right to be heard is normally equated with the right to be heard through counsel who can navigate a complex judicial process. The importance of counsel to children cannot be overestimated. The Danish novelist Peter Høeg captures how difficult it is for children to give voice to their own views, unaccustomed as they are to doing so:

Speaking is not easy. All your life you have listened, or looked as if you were listening. The living word came down to you, it was not something you, personally, gave voice to. You spoke only after having put up your hand, and when you had been asked a question, and you said what was certain and correct²⁶

The hurdles to communication by children on their own behalf are ameliorated by the classic functions of the advocate's craft—listening, eliciting information, tracking down facts, and using all of those tools to advance a position.

23. See Convention on the Rights of the Child, *adopted* Nov. 20, 1989, arts. 5, 12, 28 I.L.M. 1448, 1459-60, 1461 (entered into force Sept. 2, 1990) (stating that children should be heard through "a representative" and their views weighed in proportion to their capacity); Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *Cardozo L. Rev.* 1747, 1829 (1993) (noting that children's difference has been distorted to justify adult unwillingness to credit children's experiences, views, and emerging capacity); Hillary Rodham, *Children Under the Law*, 43 *Harv. Educ. Rev.* 487, 507-09 (1973) (finding that the evolving capacity of individual children should be recognized in legal proceedings).

24. See, e.g., Woodhouse, *supra* note 23, at 1829 n.363 (challenging "the tacit assumption that children must reason like adults, any more than women must reason like men, in order to have their views and experiences taken seriously and given weight in decisions deeply affecting their lives"); Katherine H. Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 *DePaul L. Rev.* 983, 985 (1993) (noting that the protective notion of children's rights fails to acknowledge powerlessness and is flawed by conceding that differing capacities may justify differentials in rights because "capacity is part of the language of hierarchy and status, of exclusion and inequality").

25. "Acknowledging" views and experiences is not to be equated with unquestioned deference to those views. The issue is initially one of process, and one hopes that a more sensitive and responsive outcome will follow.

26. Peter Høeg, *Borderliners* 218 (1994).

A. *Can Parents Speak for Their Children?*

The Supreme Court has expressly stated that the right to representation is "the essence of justice" for minors as well as for adults.²⁷ In *Kent v. United States*²⁸ the Court held that "[t]he right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice."²⁹ Although the Supreme Court's pronouncements on children's rights to counsel are limited to matters involving delinquent behavior—characterized as neither criminal nor civil—they inform our discussion of justice in the civil arena.³⁰ For children, even more than for adults, representation is always "the essence of justice," precisely because of the unique vulnerabilities of children that so often are deemed to strip them of a need for or right to an independent claim for civil justice.

Although a few states provide a statutory right to counsel in particular circumstances, many states do not provide such a right. Statutes authorizing appointment of counsel for children define the categories of controversies in which children are recognized as needing counsel, but in which they may nonetheless find themselves without a lawyer. Legislative silence implies that in many states minors have no statutory right to counsel in hearings in which the state has already intervened, or for which the state has already altered the norm of family self-governance. Examples of such hearings include: hearings regarding status offenses (activities which violate laws only because engaged in by children—including failure to attend school or breaking a curfew imposed on minors), contested adoptions, or judicial bypass proceedings for abortions.³¹ In other instances, the state has reinforced parental authority with its own, more powerful, brand of authority by actively intervening in family life to enforce parental decisions. For example, certain statutes allow the state to detain children in response to status offenses reported by the parent (including imprecise offenses such as "incorrigibility")³² or to provide the machinery to accomplish

27. *Kent v. United States*, 383 U.S. 541, 561 (1966) (holding that children may not be transferred from juvenile to criminal court without a hearing in which they are represented by counsel). Soon after deciding *Kent*, the Supreme Court held that children have a right to counsel in all proceedings in which an adverse finding may result in incarceration. *In re Gault*, 387 U.S. 1, 41 (1967).

28. 383 U.S. 541 (1966).

29. *Id.* at 561.

30. For a discussion of the juvenile justice system inaugurated by *Kent* and *Gault*, see Catherine J. Ross, *Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. Rev. (forthcoming 1996).

31. Minors may also need counsel if they appear before a court in order to resist medical procedures—including abortions—that their parents or others seek to impose. See *In re Smith*, 16 Md. App. 209, 213-15 (Ct. Spec. App. 1972) (concerning a 16-year-old girl resisting her mother's efforts to obtain an abortion for her).

32. See, e.g., *In re Andrew R.*, 454 N.Y.S.2d 820, 826 (Fam. Ct. 1982) (holding that 13-year-old Andrew was not a person in need of supervision ("PINS") when he cut

what may turn out to be an inappropriate "voluntary" commitment of a minor to a psychiatric facility at his or her parents' request.³³

The nonrepresentation of children in such matters is based on a variety of rationales. At the most general level, courts have been loathe to intrude into the private domain of family life in ways that might be deemed to challenge parental sovereignty.³⁴ More specifically, courts often adhere to a model of family relations that presumes the interests of parents and children coincide. Courts also frequently assume that parents seek to maximize the fulfillment of their children's needs and interests. Furthermore, courts presume that parents are able to identify their children's needs and interests and, having done so, to articulate them effectively on their children's behalf.³⁵ Justice Stewart summarized this doctrine in his statement in *Parham v. J.R.*³⁶ that "[f]or centuries it has been a canon of the common law that parents speak for their minor children."³⁷

Psychiatric hospitalization provides a dramatic example of these rationales in practice, as well as illustrating their insufficiencies. In *Parham*, the Supreme Court assessed the liberty interest of a minor whose parents committed him to a state mental hospital.³⁸ In an opinion written by Chief Justice Burger, the majority recognized that psychiatric commitments intrude upon constitutionally protected liberty interests, but went on to hold that when parents commit a minor child to a psychiatric hospital, the child is not entitled to a pre admission hearing.³⁹ Instead, the Court held that such a child is entitled only to post admission review by a "neutral and detached" party (a category the Court deemed to include hospital employees) within thirty days after admission—a hearing at which the child might lack representation.⁴⁰

In his concurrence, Justice Stewart clarified the Court's reasoning. Justice Stewart stated that because parents speak for their children, the children are in the position of patients who commit themselves

classes and then ran away from a residential treatment center to which his parents "voluntarily" committed him as a foster placement).

33. *America's Children At Risk*, *supra* note 13, at 67 (noting that children under 18 comprised 41% of the population of private psychiatric hospitals in 1992 and that 50% of them did not receive appropriate treatment).

34. *See Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (noting in dicta that the "primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition").

35. Courts often accept similar arguments where the state performs the guardianship function instead of parents, even though it is patently clear that the impersonal machinery of state bureaucracy cannot demonstrate the personal concern of a loving parent. *See infra* notes 73-75 and accompanying text.

36. 442 U.S. 584 (1979).

37. *Id.* at 621 (Stewart, J., concurring) (citing, *inter alia*, 1 W. Blackstone, *Commentaries* *452-53).

38. *Id.* at 587.

39. *Id.* at 607.

40. *See id.*

voluntarily, and that "voluntary" patients do not need procedural protections.⁴¹ In one quick stroke, Justice Stewart transformed the parent into a ventriloquist, and the child into Charlie McCarthy; no matter how the voices sound, they all come from the same place.

Both the majority opinion and Justice Stewart's concurrence in *Parham* underestimated the "massive curtailment of liberty" inherent in institutionalization.⁴² The opinions also overlooked evidence in the record that parents tend to institutionalize their children for reasons unrelated to the child's mental condition.⁴³ The dangers inherent in "voluntary" psychiatric commitment of adolescents are well illustrated by *R.J.D. v. Vaughan Clinic, P.C.*⁴⁴ In this case, seventeen-year-old R.J.D.'s mother committed her to a private psychiatric hospital because the mother disapproved of R.J.D.'s relationship with a man seven years her senior.⁴⁵ R.J.D.'s objections to her hospitalization landed her in a secure ward where she was denied access to telephones.⁴⁶ This situation occurred despite an earlier evaluation at a different facility conducted during the same week which resulted in a recommendation of "no medication and no follow-up," a finding endorsed by a family court referee following yet another evaluation.⁴⁷ A guard informed the girl that she would stay in the hospital "as long as someone was footing the bill."⁴⁸

Perhaps the case of fifteen-year-old Sheila (a pseudonym) is more typical if less theatrical. Sheila's divorced mother despaired of disciplining her after Sheila began experimenting with drugs, became sexu-

41. *Id.* at 622-23.

42. *Id.* at 626 (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)).

43. *See id.* at 627-32 (Brennan, J., dissenting) (noting the profound consequences of erroneous commitment, the long periods of juvenile confinement, and the well documented inadequacies of children's psychiatric facilities).

44. 572 So. 2d 1225 (Ala. 1990). In this case, the Supreme Court of Alabama found that a mother had full authority to commit her daughter to a psychiatric facility and affirmed the lower court's dismissal of the daughter's action for false imprisonment and violation of her civil rights. *Id.* at 1229.

45. *Id.* at 1230 (Adams, J., concurring in part and dissenting in part).

46. *Id.*

47. *Id.* Although the family court in *R.J.D.* appointed a guardian *ad litem* for the girl, she had no independent counsel, and the Vaughan clinic refused to allow her guardian *ad litem* to communicate with her. *Id.* R.J.D. ultimately escaped from the institution, aided by her father who had lost custody upon his divorce from R.J.D.'s mother some years earlier. *Id.* at 1226, 1230. If R.J.D.'s parents had functioned as one unit and agreed about her treatment, independent counsel surely would have offered her the only means of contesting her confinement. *See id.* at 1231.

State laws regarding procedural protections for minors admitted to public psychiatric facilities vary widely. David Lambert, *Growing Numbers of Youth Committed to Psychiatric Hospitals*, Youth L. News, Mar.-Apr. 1990, at 12, 14. Admissions to private hospitals covered by private insurance payments are not even governed by *Parham*'s requirement of minimal review procedures within 30 days after admission. *See Parham v. J.R.*, 442 U.S. 584, 617 (1979) (limiting holding to admissions to state mental hospitals).

48. *R.J.D.*, 572 So. 2d at 1230 (Adams, J., concurring in part and dissenting in part).

ally active, and dropped out of school.⁴⁹ The mother sent Sheila to live with her father.⁵⁰ When Sheila arrived at the airport in the city where her father lived, he refused to pick her up because he thought her presence would upset his new family.⁵¹ Sheila spent five weeks in state detention and shelter facilities, after which her father committed her to an adolescent treatment facility for a "conduct disorder."⁵² After exhausting Sheila's insurance coverage, the father agreed to pay \$50,000 a year to keep Sheila institutionalized until she turned eighteen.⁵³ The institution did not develop any rehabilitation plan for Sheila. Its treatment of its residents, including the use of tiny isolation cells, was virtually unregulated by the state.⁵⁴

Unfortunately, these stories are not anomalies. Although no precise statistics are available concerning adolescent psychiatric hospitalization, experts estimate recent admissions of adolescents to private psychiatric hospitals—free of even the token procedural precautions imposed on public facilities under *Parham*—to be as high as between 150,000 and 250,000 each year.⁵⁵ Indeed, children under the age of eighteen comprise over forty percent of the patients in private psychiatric facilities.⁵⁶ Many of these children, admitted as "voluntary" patients at their parents' request, exhibit behaviors that would not normally lead to hospitalization of an adult, including "conduct disorders" manifested by behavior such as "chronic violation of a variety of important rules . . . at home . . . or at school . . . [and] persistent lying."⁵⁷ A substantial percentage of youngsters doubtless exhibit these behaviors at some point during adolescence.

The above narratives suggest that the three key premises used to negate children's claims to an independent voice require crucial qualifications.⁵⁸ First, it is clear that the interests of parents and children

49. Lambert, *supra* note 47, at 13.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* Sheila's mother eventually gained her release.

55. *Id.* at 12 (citing Seattle, Washington Family Court Judge Terrence Carroll, Presentation to the 17th Annual National Conference on Juvenile Justice (Mar. 24-26, 1990)); see also Lois A. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 *Stan. L. Rev.* 773, 783 (1988) (noting that "[b]etween the 1920's and the 1970's admission rates of minors to mental hospitals increased more than eight-fold").

56. *America's Children At Risk*, *supra* note 13, at 67 (citing Annie E. Casey Foundation, *A Mental Health Initiative for Urban Children* (1992)). To be sure, many young people, like numerous adults, require psychiatric hospitalization for treatment of properly diagnosed disorders.

57. Lambert, *supra* note 47, at 12 n.3.

58. See *supra* notes 34-37 and accompanying text; see also Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 *U. Chi. L. Rev.* 1317, 1320, 1373 (1994) (arguing for a "separation of powers" approach with more than one parental figure or mediating institution making decisions about children in order to address the

do not necessarily coincide. In the cases of Sheila and R.J.D., for example, parents sought relief from the arduous job of raising and disciplining unruly adolescents. In abortion cases, parents may have many reasons—including their own moral beliefs, position in the community, and financial concerns—to urge a pregnant teenage girl either to carry an infant to term or to abort.

A clear example of a situation in which parents cannot represent their children's interests occurs when the parents are at odds with each other. In bitterly contested custody disputes, for example, each parent has an interest in the outcome of litigation that does not neatly line up with the child's independent interest.⁵⁹ Of course, the majority of divorcing parents make their own joint choices about custody and visitation, which are then entered in a judicial decree.⁶⁰ Relatively few allow a stranger to make such a critical decision for them and their children, but when they do defer to the court, many other factors may be in play, including tradeoffs for financial consideration.

Although the child may in fact be the person with the greatest interest at stake in a custody or visitation decision,⁶¹ the child's wishes may not receive due consideration unless the child is represented by counsel.⁶² The lawyers for the parents have no obligation to act in the child's best interests; indeed, their duty to the parent may require quite the opposite behavior. More is at stake than simply communicating the child's preference. The child may require an attorney when the court decides whether the child should testify or whether the confidentiality of the child's communications with psychological counselors should be waived.⁶³ As the highest court in Wisconsin urged in

reality that adult caretakers are "all fallible, imperfect, and self-regarding in their interaction with children").

59. Joseph Goldstein, Albert J. Solnit, and Anna Freud oppose routine appointment of independent counsel for children in the custody context because such appointments undermine the relationship between parent and child by threatening the normative assumption that parents speak for their children. They agree, however, that the normative assumption is negated when, as in the circumstances discussed here, the parents themselves cannot agree on a placement for the child, or the state has intervened alleging abuse or neglect. Joseph Goldstein et al., *Before the Best Interests of the Child* 111-12 (1979).

60. See Sanford N. Katz, *The Judge and Child Custody Decision-making in the United States*, in *Frontiers of Family Law* 187, 188 (David Pearl & Res Pickford eds., 1995).

61. *Veazey v. Veazey*, 560 P.2d 382, 386 (Alaska 1977) ("[T]he child is the person most interested in litigation over his custody.").

62. *G.S. v. T.S.*, 23 Conn. App. 509, 518 (Ct. App. 1990) (noting that in custody proceedings neither parent can be relied on to communicate the child's interests where those interests differ from his or her own (citing *Ford v. Ford*, 371 U.S. 187, 193 (1962))).

63. See, e.g., *G.S.*, 23 Conn. App. at 517-18 (reversing custody decision in divorce case for lower court's failure to appoint counsel for children where parents waived child's privilege with sex abuse counselor and failed to call child as witness). The *G.S.* court expressly noted that under state law, a parent who has an interest in the outcome of a hearing cannot waive the confidential communication privilege on behalf of

the divorce context, the child ought to be a player, not a football, in the game of life.⁶⁴

Furthermore, even where the court believes that it recognizes divisions between parents and child, the court may be misled regarding the nature of those divisions if the child lacks counsel. Emancipation proceedings initiated at the insistence of parents, rather than at the child's initiative, provide an apt illustration. In such proceedings, there is no adult to help the child define what is going on or to help tell the judge the real story from the child's point of view.⁶⁵

Second, parents may not be motivated by their children's needs and interests. Most courts properly "assum[e] that the great majority of parents are well motivated and act in what they reasonably perceive to be the best interest of their children."⁶⁶ Ideally, custodial parents would always have their children's best interests at heart, would hear and respond to their children's wishes and needs, and would work together with their children to make wise choices satisfying all concerned. But parents, like state agencies and schools, do not always live up to society's ideals—or to their own.⁶⁷ In divorce custody situations, for example, children may be at the heart of parental conflict, so that children become weapons used by feuding parents. Sheila and R.J.D. each had at least one parent who wanted to abandon them in a manner that would not attract social opprobrium. Some parents are simply too emotionally deprived themselves to love their children generously. Justice Brennan's analysis of the facts in *Parham* led him to conclude that it "ignores reality to assume blindly that [all] parents act in their children's best interests when making commitment decisions and when waiving their children's due process rights."⁶⁸ An unvarnished view of reality, Justice Brennan reasoned, suggests that "a child

a minor. *Id.* at 517-18 & n.7 (citing Conn. Gen. Stat. § 52-146k(d)); see also Brief of Appellee Minor Children Carisa, Nicholas and Dylan Miller at 19-23, *Miller v. Miller*, No. PEN-95-97 (Sup. Ct. Me. May 14, 1995) (arguing that children in divorce custody litigation are entitled to a lawyer to represent their views when the court-appointed guardian *ad litem* takes a position in conflict with theirs).

64. *Weichman v. Weichman*, 184 N.W.2d 882, 885 (Wis. 1971).

65. See Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. Mich. J.L. Ref. 239, 277-283 (1992) (reporting data that parents commonly initiate the idea of emancipation, urge the minor to seek it, and even initiate and dominate filing of the petition).

66. *In re Roger S.*, 569 P.2d 1286, 1295 (Cal. 1977). In this case, the court held that children are entitled to due process protections to prevent erroneous psychiatric hospitalizations. *Id.* at 1289.

67. *Id.* at 1295 (reasoning that fact of normative parental concern "cannot, however, detract in any way from the child's right to procedures that will protect him from arbitrary curtailment of his liberty interest . . . no matter how well motivated").

68. *Parham v. J.R.*, 442 U.S. 584, 632 (1979) (Brennan, J., concurring in part and dissenting in part). Although Justice Brennan acknowledged that a pre commitment hearing is generally required, he conceded that because of the special circumstances governing assumptions about familial relations, a post commitment hearing would suffice in cases of involuntary commitment of children by their parents. *Id.* at 632-33.

who has been ousted from his family has even greater need for an independent advocate."⁶⁹

Third, parents and state guardians do not and cannot always speak for their children, even if they are well-motivated and believe that their interests coincide with the child's. For example, parents themselves may not hear or understand their children. Families may believe they communicate well, but fail to do so, or may be aware that communication has broken down. As Justice Marshall observed in the context of abortion, controversies between children and parents only reach the court "where the minor and the . . . parent[s] are . . . fundamentally in conflict and the very existence of the [dispute] already has fractured the family structure."⁷⁰

Even where parents agree with each other and the united parental interest aligns with the child's independent interest, parents may not speak adequately enough to protect a child's interests. For this reason, federal courts have uniformly held that non lawyer parents appearing pro se may not represent their children in court.⁷¹ Parents cannot waive their children's right to counsel in civil litigation because "[t]he right to counsel belongs to the children"⁷²

In still other instances, parents cannot represent a child's interests because the legal issue before a court involves a dispute directly between the child and the state, and the state is the child's custodian. Examples of this situation include the following: treatment of unaccompanied, undocumented immigrant children;⁷³ children who wish to

69. *Id.* at 631 (summarizing such circumstances as "break[s] in family autonomy").

70. *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) (discussing judicial bypass proceedings to authorize abortion over the objections of teenager's parents); *see also Parham*, 442 U.S. at 635 (Brennan, J., dissenting) (concluding that prompt postadmission commitment hearings would not disrupt the family because "the interest in avoiding family discord would be less significant at this stage since the family autonomy already will have been fractured by the [psychiatric] institutionalization of the child").

71. *See, e.g., Brown v. Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168, 171-72 (E.D. Va. 1994) (appointing counsel for child whose nonlawyer father appeared on her behalf and noting that three circuit courts had expressly held that a parent cannot proceed without a licensed attorney when representing a minor child's interests); *infra* notes 160-69 and accompanying text (noting that courts do not permit nonlawyer parents to represent their children).

72. *Brown*, 868 F. Supp. at 171 (quoting *Osei-Afriyie v. Medical College of Pa.*, 937 F.2d 876, 883 (3d Cir. 1991)). Ironically, parents may waive their children's right to counsel and even appear for their children in delinquency proceedings, in which children have a constitutional right to representation. *See Huff v. K.P.*, 302 N.W.2d 779, 783 (N.D. 1981) (finding that father of 11-year-old may waive child's right to counsel and appear for her "albeit rather ineffectively").

73. *See Perez-Funez v. District Director, INS*, 619 F. Supp. 656, 659, 670 (C.D. Cal. 1985) (holding that unaccompanied minors detained by the INS and facing deportation have no right to appointed counsel, but should be able to contact an adult before waiving their right to seek relief from deportation); *see also Reno v. Flores*, 113 S. Ct. 1439, 1448 (1993) (finding that state has right to retain custody of unaccompanied minor where no parent or legal guardian can be found).

contest conditions of confinement in a facility run by a governmental entity,⁷⁴ and children in foster care.⁷⁵

Intriguingly, courts themselves, in the cases cited most frequently in support of the principle of coincidence of interests between parents and children, go on to invalidate that very principle by upholding state-imposed restrictions on the parents' unbridled control of their children. After bowing to the principle of parental autonomy, the Supreme Court has held, for example, that states may require parents to have their children vaccinated,⁷⁶ forbid parents to allow children under a certain age to work,⁷⁷ and terminate parental rights altogether if parents fail to meet the state's minimal standards of adequacy.⁷⁸ Courts have constrained parental rights to control their children in order to impose the state's vision of the child's best interests, but rarely to assure realization of the minor's autonomous vision.⁷⁹ Notwithstanding clear holdings to the contrary, courts routinely continue to articulate the canon that parents always represent their children. The foundation cases reveal that the ideal of parental control does not erect an impermeable shield against competing claims.

74. See, e.g., *Alexander S. v. Boyd*, 876 F. Supp. 773, 789-90 (D.S.C. 1995) (finding that state-run juvenile facility did not have to provide resident children with law library or legal assistance).

75. The facts in *Parham* capture the problem. Several of the plaintiffs in *Parham* were committed to the state hospital by the state's child welfare agency, including the lead plaintiff, J.R. *Parham v. J.R.*, 442 U.S. 584, 587 & n.2 (1979). A court declared J.R. a neglected child when he was three months old and J.R. had moved in to and out of seven different foster homes by age seven when he entered the state hospital. *Id.* at 590. The authorities believed that J.R., whom they diagnosed as "borderline retarded, . . . would 'benefit from [a] structured environment' . . . and would 'enjoy living and playing with boys of the same age'" at the hospital. *Id.* Although it is difficult to imagine a parent seeking to institutionalize a child as a way of structuring a play group, the majority denied that the state would "act[] so differently from a natural parent in seeking medical assistance for the child." *Id.* at 618. The court conceded, however, that a child in the state's custody might ultimately be "lost in the shuffle" and overstay his need for hospitalization. *Id.* at 619.

Mishandling and neglect of children in the custody of a state agency is not unusual. Indeed, the child welfare systems in 21 states are currently under court order or consent decrees for failure to protect children or to provide needed services to their families. *Abusing the Nation's Children*, N.Y. Times, Jan. 1, 1996, at A30.

76. *Jacobson v. Massachusetts*, 197 U.S. 11, 37-38 (1905).

77. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

78. *Santosky v. Kramer*, 455 U.S. 745, 748-49 (1982).

79. Cases frequently cited as establishing children's independent rights under the Constitution often involve no conflict between parents and children, but rather are examples of parents promoting their children's exercise of rights consistent with their own political or religious views. See, e.g., *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 504, 514 (1969) (upholding children's right to nondisruptive speech in school that coincided with their parents' religious views and political activism).

B. *Children Remain Voiceless*

The children at the heart of some of the foundation cases defining the relationships among parents, children, and the state were voiceless. The trial court in *Prince v. Massachusetts*⁸⁰ heard testimony that nine-year-old Betty Simmons believed herself to be an ordained minister in the Jehovah's Witness faith and that her failure to distribute religious literature "would bring condemnation 'to everlasting destruction at Armageddon.'"⁸¹ Yet, the Supreme Court belittled Betty's own convictions and instead considered her a martyr to the beliefs of her guardian.⁸² No one even asked Amish youngsters Vernon Yutzy and Barbara Miller—whose parents were named parties in *Wisconsin v. Yoder*⁸³—whether they wished to receive a secular education. Justice Douglas emphasized in his dissent from the majority's holding in *Yoder* that Amish parents could justify withdrawing their children from public school after the eighth grade in order to preserve their religious community without running afoul of compulsory education laws.⁸⁴ Justice Douglas emphasized that courts should not "assume an identity of interest between parent and child," but instead "children should be entitled to be heard" regarding their own beliefs and desires.⁸⁵ Justice Douglas admonished that:

While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition.⁸⁶

Justice Douglas emphasized that "[i]t is the future of the student, not the future of the parents" that is at stake in deciding whether or not to enforce compulsory education laws.⁸⁷

80. 321 U.S. 158 (1944).

81. *Id.* at 163.

82. *See id.* at 170. Justice Jackson's dissent in *Prince* gave Betty's personal religious freedoms greater weight. *Id.* at 178 (Jackson, J., dissenting) ("[T]he Court now draws a line based on age that cuts across both true exercise of religion and auxiliary secular activities.").

83. 406 U.S. 205 (1972).

84. *Id.* at 241 (Douglas, J., concurring in part and dissenting in part). Justice Douglas joined in the majority opinion—which exempted Amish children from compulsory attendance in high school on religious grounds—insofar as it concerned Frieda Yoder who testified concerning her own religious beliefs. *Id.* at 243. Frieda Yoder, Justice Douglas emphasized, did not speak for the other children whose futures were at issue because "[r]eligion is an individual experience." *Id.*

85. *Id.* at 242, 244.

86. *Id.* at 244-45. The majority strenuously insisted that the case did not present any issue involving a tension between the religious interests asserted by the parents and differing views asserted by children. *Id.* at 230-31 (concluding that only the parents are subject to penalty under the statute at issue and it is "their right of free exercise, not that of their children, that must determine" the outcome).

87. *Id.* at 245.

Judicial deference to parents, and what is viewed as the proper response to children's vulnerabilities promoted by such deference, unjustifiably deprives children of their own voice in the courtroom. When judges fail to recognize that children may be vulnerable with respect to their parents as well as to adult third parties, they adopt an unrealistically truncated view of children's need and right to be heard.

The situations in which children may need independent counsel in civil litigation share a number of characteristics: (1) the state is already involved in the dispute, either as a primary party or because a genuine disagreement is before a court;⁸⁸ (2) a potential conflict of interest between the parents and the child exists or an actual conflict has been found, or the state has legal or physical custody of the child, all resulting in destruction of the presumption that an adult participant represents the child's interest; and (3) the child's interests in the outcome of the litigation are substantial, perhaps even implicating essential liberty interests.⁸⁹

II. "VICTIM[S] FIRST OF FEAR, THEN OF PANIC":⁹⁰ CHILDREN'S VULNERABILITIES AS SEEN THROUGH THE EYES OF THE COURTS

The developmental distinctions between the average adult and the average child are generally taken for granted—with or without justification.⁹¹ These distinctions—including differences in cognition, emotion, and judgment—as well as changing perceptions of them raise threshold questions concerning the relationship between the compe-

88. The author omits uncontested family matters that require judicial decrees such as uncontested divorce, visitation or custody arrangements, uncontested paternity or child support issues, and uncontested adoptions or surrogacy proceedings. Nonetheless, if, for example, the parents both agree to a visitation order to which the child objects, and the parents ask the court to enforce the order, the child should be represented. See Brian Cummings, *Appeals Court Blocks Judge's Sanctions Against 12-year-old Who Won't Visit Dad*, Chi. Daily L. Bull., Aug. 3, 1995, at 3 (holding in contempt and incarcerating 12-year-old girl because she and her younger sister refused to comply with visitation order).

89. The legal definition of liberty is of course narrower than Henry Ward Beecher's definition of the concept as encompassing "the soul's right to breathe." Henry Ward Beecher, *Life Thoughts, Gathered From the Extemporaneous Discourses of Henry Ward Beecher* 70 (1858). On the other hand, its contours in law "have not been defined precisely." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). Liberty has been deemed to include, among other things, the right to enjoy the privileges "essential to the orderly pursuit of happiness by free men," encompassing freedom from unjustified intrusions on "personal security." *Id.* (citations omitted).

90. *Haley v. Ohio*, 332 U.S. 596, 600 (1947).

91. Melton argues that courts have largely ignored the developmental literature on children's competency. Gary B. Melton, *Children's Competence to Consent: A Problem in Law and Social Science, in Children's Competence to Consent* 1, 14 (Gary B. Melton et al. eds., 1983); see also Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 *Fordham L. Rev.* 1873, 1905 (1996) (arguing that judges hearing cases involving children should "be aware of scientific research concerning children's development, and rely on [it] appropriately").

tency of the child, including various capabilities or capacities, and the appointment of counsel.⁹² Other authors in this Conference address some of the thorny issues surrounding how to determine whether children are competent to direct the course of litigation, and how differing levels of competence affect the weight that courts should give to children's preferences concerning the outcome of litigation.⁹³ The argument in this Article is confined to children of a certain age (i.e., at least possessing verbal means of communication and the ability to formulate and communicate a preference to an attorney) who are deemed to possess the requisite capacity.⁹⁴

92. Capacity may not be the best term due to its legal connotation. Perhaps the better formulation is whether the child can arrive at a position and communicate it to counsel.

93. For a discussion of how attorneys should go about determining whether the child has the requisite capacity to direct the representation, and for standards on representing the child who lacks such capacity, see generally Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 Fordham L. Rev. 1399 (1996) (proposing a paradigm for ascertaining counsel's role for young children and applying the paradigm to criminal and delinquency proceedings, custody and visitation proceedings, and child protective proceedings); Peter Margulies, *Children's Competence in Context: Confronting Lawyers' Ethical Dilemmas*, 64 Fordham L. Rev. 1473 (1996) (addressing how lawyers representing children should define competence and what a lawyer's role should be in representing a child who appears incompetent); Mlyniec, *supra* note 91 (exploring how judge's hearing cases involving children can benefit from child development research); *Recommendations of the Conference, supra* note 21, parts IV, V (discussing the representation of pre verbal and impaired children). Although this Article does not attempt to define the capacity required to direct counsel in any or all of the situations discussed here, it is worth noting that at least one Supreme Court Justice concluded after reviewing the developmental literature that the "moral and intellectual maturity of the 14-year-old approaches that of the adult," echoing submissions by the American Psychological Association. Wisconsin v. Yoder, 406 U.S. 205, 245 n.3 (1972) (Douglas, J., dissenting) (citing Piaget, Elkind, Kohlberg, Gesell and other experts in child development, psychology, and sociology). Justice Douglas apparently would have placed the burden on the party opposing the child's preference to demonstrate that the child lacked capacity. See *id.* ("[T]here is nothing in this record to indicate that the moral and intellectual judgment demanded of the student by the question in this case is beyond his capacity."); see also Brief for *Amicus Curiae* American Psychological Association in Support of Appellees at 15, *Hartigan v. Zbaraz*, 484 U.S. 171 (1988) (No. 85-673) ("[I]t is now generally accepted that by mid-adolescence (14-15) the great majority of [children] do not differ from adults in their capacities to understand and [make decisions] about medical and psychological treatment alternatives . . ."); Brief for *Amicus Curiae* American Psychological Association in Support of Appellees at 25, *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (No. 84-495) (arguing that a substantial and growing body of literature supports the view that children between 11 and 14 years of age have the capacity to weigh risks and benefits in decision making and that by age 14 most minors do not differ from adults in their ability to understand alternatives and make decisions of the same quality as those made by adults). For a comprehensive analysis of the debate in the current literature regarding law and child development, see Mlyniec, *supra* note 91, at 1875-85.

94. Of course, questions concerning the relationship between capacity and the ability to understand the counsel offered by an attorney and in turn to instruct an attorney are not limited to minors. See generally Paul R. Tremblay, *Impromptu Lawyering and De Facto Guardians*, 62 Fordham L. Rev. 1429 (1994) (addressing the relationship between old age and the ability to direct representation).

A. *Vulnerabilities Inherent in the Status of Childhood*

The Supreme Court has repeatedly noted the peculiar vulnerabilities of children and has held these vulnerabilities to have legal significance affecting both children's liberty interests and their need for counsel. This part explores the portrait of minors as a group that emerges from Supreme Court decisions in order to ascertain the legal vision of the essential characteristics of childhood within the legal system. The status of childhood is—at least in part—socially constructed by law. Such legal construction, in turn, is to some extent grounded in and reflects contemporary perceptions of the characteristics common to many members of the group whose status is being defined.⁹⁵ As depicted by the Supreme Court, children's vulnerabilities may take two forms—vulnerabilities intrinsic to the state of being a child, and those that result from the child's contextual powerlessness. The portrait that emerges is dominated by the almost tautological attribute of "immaturity." The child is seen as an unwary "victim," lacking in experience, intelligence, and education, and having limited capacity to understand rights and the consequences of waiving rights.

The Supreme Court has differentiated between the rights of "mature" and "immature" minors, but has not provided guidance on how lower courts should measure or ascertain maturity.⁹⁶ Moreover, the Court has never unbundled the vulnerabilities that characterize "immaturity." The very concept of measurement may be misleading because children's vulnerability should not be conceptualized as a single point on a spectrum. Rather, vulnerability is a bundle of presumed, perceived, or measurable ways in which children differ from adults in dimensions such as factual understanding, inferential understanding (appreciation), reasoning (both intellectual and moral), and ability to exercise choice, including understanding the repercussions of choice.⁹⁷

Martha Minow warns that while it may be attractive to propose an analytical framework for assessing when children develop different kinds of competencies requiring different sorts of protection or privilege, "the contemporary legal universe" rests on no such rational

95. It is not the goal of this Article to compare the view of children's vulnerabilities within the law to any external reality of childhood as captured by social science or other data.

96. *Bellotti v. Baird*, 443 U.S. 622, 640-43 (1979) (distinguishing abortion rights of mature and immature minors); *see also* *Thompson v. Oklahoma*, 487 U.S. 815, 859 (1988) (Scalia, J., dissenting) (questioning bright line between 15- and 16-year-olds for purposes of establishing a level of maturity sufficient to establish the culpability necessary to meet death penalty requirements). This important question also lies beyond the scope of this Article. For a discussion of the failure of judges to take account of social science literature in assessing children's capacity, *see* Mlyniec, *supra* note 91, at 13-33.

97. Unbundling these assorted distinctions between adults and children, referred to collectively as "vulnerabilities," or analyzing how each one relates to the exercise of legal rights or decision making, is beyond the scope of this Article.

scheme.⁹⁸ The same minor who is potentially subject to the death penalty, she points out, may not be able to marry without a parent's consent.⁹⁹ "It is bizarre," Minow summarizes:

to justify the variable treatment of young people currently manifested in the patchwork of legal regulations as though it expressed careful judgments about their competencies for various tasks and responsibilities. Why would a sixteen-year-old be competent to consent to her own abortion but not to miss school for her doctor's appointment without her parents permission?¹⁰⁰

The Supreme Court has struggled for over fifty years with the issue of the relationship between children's presumed level of competency and their relative need for counsel. One of the earliest examples of the Supreme Court weighing youth as a special factor occurred in the appeal of the "Scottsboro boys" whom the Court held needed counsel in their 1932 capital trial (predating recognition of the right to counsel in all criminal cases).¹⁰¹ The opinion emphasized "the ignorance and illiteracy of the defendants, their *youth*," and the fact that communication with their families was "necessarily difficult" because of geographical distance.¹⁰²

As early as 1947, the Court concluded that adolescents, even more than adults, need counsel in order to negotiate the criminal justice system.¹⁰³ The observations and analysis that gave rise to this conclusion apply equally to many aspects of the civil justice system.

In *Haley v. Ohio*,¹⁰⁴ Justice Douglas, writing for the majority, stated that a fifteen-year-old boy, "a mere child—an easy victim of the law," could not withstand intense police interrogation as well as "a mature man."¹⁰⁵ Reaching beyond the narrow facts, Justice Douglas explained that "[a]ge 15 is a tender and difficult age for a boy. . . . He cannot be judged by the more exacting standards of maturity. That

98. Minow, *supra* note 7, at 285.

99. *Id.* at 284.

100. *Id.* at 285.

101. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

102. *Id.* at 71 (emphasis added). In the case of the children whose rights are considered here, communication with their families may be "necessarily difficult" because of emotional, rather than geographic, distance.

103. See *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962); *Haley v. Ohio*, 332 U.S. 596, 599-600 (1947); see also *Argersinger v. Hamlin*, 407 U.S. 25, 33-34 (1972) (including delinquency proceedings in instances requiring appointment of counsel even in the absence of a felony accusation). *Haley* and *Gallegos* preceded the Court's decisions in both *In re Gault*, 387 U.S. 1, 36 (1967) (holding that children in juvenile court facing possible incarceration have a right to counsel) and *Miranda v. Arizona*, 384 U.S. 436, 473 (1966) (holding that adults have the right to remain silent or request an attorney during custodial interrogation). It is unclear to what extent *Miranda* rights extend to minors in juvenile proceedings. *Fare v. Michael C.*, 442 U.S. 707, 717 n.4 (1979).

104. 332 U.S. 596 (1947).

105. *Id.* at 599. *Haley* reversed a conviction based on a confession obtained during five hours of questioning in the middle of the night conducted without presence of the boy's lawyer or mother. The reversal was based in part on the boy's age. See *id.*

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."¹⁰⁶ A child without counsel or friend is likely, Justice Douglas stated, "to become the victim first of fear, then of panic."¹⁰⁷ Therefore, a fifteen-year-old child needs counsel in order to "have a full appreciation" of his rights.¹⁰⁸

In *Gallegos v. Colorado*,¹⁰⁹ the Court clarified that "[t]he youth of the suspect was the crucial factor in *Haley*."¹¹⁰ Reversing a conviction based on the confession of a fourteen-year-old boy who was not allowed to see either an attorney or his mother during police interrogation, the Court explained that even a "sophisticated" fourteen-year-old

is unable to know how to protect his own interests or how to get the benefits of his constitutional rights

. . . He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. . . . Without some adult protection . . . a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.¹¹¹

The Supreme Court has expressly identified "the peculiar vulnerability of children" and "their inability to make critical decisions in an informed, mature manner" as two of three reasons that justify distinguishing the constitutional rights of children from those of adults.¹¹² According to this analysis, children's vulnerability, which creates special "needs for 'concern, . . . sympathy, and . . . paternal attention'" may justify diminished constitutional guarantees, such as denying children the right to a jury trial in delinquency adjudications.¹¹³ Similarly, the Supreme Court has concluded that children lack the attributes necessary for making sound decisions because "[i]nexperience, less education, and less intelligence make the [child] less able to evaluate the consequences of his or her conduct."¹¹⁴ The Court has described

106. *Id.* at 599.

107. *Id.* at 600.

108. *Id.* at 601.

109. 370 U.S. 49 (1962).

110. *Id.* at 53 (emphasis added).

111. *Id.* at 54. To be sure, in both *Haley* and *Gallegos*, Justice Douglas collapsed several categories of adult advisors and did not clearly distinguish between parent, friend, and attorney. The failure to focus specifically on the right to an attorney is attributable, at least in large part, to the date of the opinions, which precede establishment of the right to counsel for adults in similar circumstances. See *Miranda v. Arizona*, 384 U.S. 436, 473 (1966); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

112. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979). The third reason is the importance attributed to the "parental role in child rearing." *Id.*

113. *Id.* at 635 (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (plurality opinion)).

114. *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988); see also *Stanford v. Kentucky*, 492 U.S. 361, 395 (1989) (Brennan, J., dissenting) ("[T]he simple truth derived

minors as lacking "the experience, perspective, and judgment to recognize and avoid choices" that could prove detrimental.¹¹⁵

Similarly, when the Supreme Court in *Fare v. Michael C.*¹¹⁶ provided guidance to lower courts on applying the "totality-of-the-circumstances" approach to waivers by juveniles in delinquency proceedings, it mandated "evaluation of the juvenile's age, experience, education, . . . and intelligence, and into whether he has the capacity to understand" the law and the consequences of waiving legal rights.¹¹⁷ Of course, such factors leave much room for disagreement. For example, in *Fare* the Court held that a murder confession made in the course of a robbery by a sixteen-year-old boy who had been on probation since age twelve was admissible even though the police had denied the boy's request to see his probation officer.¹¹⁸ Dissenters emphasized the boy's vulnerability; a tape revealed that he was crying during interrogation, had the "limited understanding of the average 16-year-old," and experienced "'extensive' family problems."¹¹⁹ The dissenters agreed with the testimony of the boy's probation officer that "many times the kids don't understand what is going on."¹²⁰

Criminal charges are hardly the only contact with mechanisms of the state and the courts that are likely to seem menacing to a young person.¹²¹ Involvement with courts for any purpose may intimidate the experienced as well as the novice, thereby discouraging or complicating effective communication with state actors such as child protection workers, foster care agency personnel, and school officials, as well as with the judge.

from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults. . . .").

115. *Bellotti*, 443 U.S. at 635. State courts have relied on the *Bellotti* factors in upholding abridgements of liberty for minors, such as nocturnal curfews. *See, e.g.,* *People in Interest of J.M.*, 768 P.2d 219, 223 (Colo. 1989) (using *Bellotti* factors to determine that juvenile curfew did not infringe on minor's liberty interest in freedom of movement); *City of Panora v. Simmons*, 445 N.W.2d 363, 368 (Iowa 1989) (applying *Bellotti* factors to determine that minors' liberty interests in nocturnal movement are not co-extensive with the rights of adults).

116. 442 U.S. 707 (1979).

117. *Id.* at 725 (holding that there was no violation of rights where minor asked to see a probation officer rather than an attorney, but recognizing that the fact of youth and its attendant attributes should be weighed).

118. *Id.* at 728.

119. *Id.* at 733 & n.2 (Powell, J., dissenting).

120. *Id.* (Powell, J., dissenting); *see also id.* at 729 (Marshall, J., dissenting) (noting that "heightened concern" is appropriate where juveniles are under investigation). Melton points out that the Supreme Court decided *Fare* and *Parham* on the same day and yet took irreconcilable views of children's competency in the two cases. Melton, *supra* note 91, at 5-6.

121. Officials representing institutions such as schools, foster care, welfare, or housing authorities all wield enormous authority over children and their families.

B. *Contextual Vulnerabilities that Inhibit Children's Voice*

The efforts of minors to stand up for their rights expose their contextual vulnerability as well as the vulnerabilities deemed inherent to the young psyche. Although the courts have expressed concern about peer influence over the young, minors are at least as vulnerable to parental pressure. Parents may place onerous burdens on children who try to assert independent rights in a litigation context.

Parents have impressive means of imposing their views on adolescents, as disagreements over abortion illustrate.¹²² Justice Blackmun, for example, astutely pointed out that a "minor's emotional vulnerability and financial dependency on her parents" make a parental notice statute "tantamount to a parental-consent statute."¹²³ The reported cases establish that "[m]any minor women will encounter interference from their parents after the state-imposed notification. In addition to parental disappointment and disapproval, the minor may confront physical or emotional abuse, withdrawal of financial support, or actual obstruction of the abortion decision."¹²⁴ Statutes that impose virtually insurmountable barriers to a teenager's ability to make her own decision about abortion are particularly inappropriate when imposed on those girls who are most likely to rely on judicial bypass procedures, that is, girls unfortunate enough not to be part of compassionate, supportive, communicating families.¹²⁵ As Justice Marshall noted:

[C]ompelled notification is unlikely to result in productive consultation in families in which a daughter does not feel comfortable consulting her parents about intimate or sexual matters. . . . Forced notification in such situations would amount to punishing the daughter for the lack of a stable and communicative family environment, when the blame for that situation lies principally, if not entirely, with the parents.¹²⁶

122. This Article relies heavily on the cases involving minors' abortion rights because this issue has been so thoroughly litigated, the interests are so stark, and the doctrines have been so thoroughly aired by the courts; this reliance is not intended to indicate the frequency with which the issue arises or the importance of such cases in the author's own hierarchy of the rights of minors.

123. *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 526 (1990) (Blackmun, J., dissenting).

124. *H.L. v. Matheson*, 450 U.S. 398, 438-39, 438 & n.24 (1981) (Marshall, J., dissenting) (citing records that demonstrate parental interference).

125. See *Akron Center*, 497 U.S. at 536-37 (Blackmun, J., dissenting).

126. *Hodgson v. Minnesota*, 497 U.S. 417, 469-70 (1990) (Marshall, J., dissenting) (citation omitted); see also *Matheson*, 450 U.S. at 437-40 (Marshall, J., dissenting) (discussing the burden that compelled notification places on minors living in "non-ideal" situations); *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) (discussing the effects of forced notification on the family unit); *American Academy of Pediatrics v. Lungren*, 32 Cal. Rptr. 2d 546, 560, 561-62 app. (Ct. App. 1994) (reasoning that a girl's decision not to involve her parents in her decision to seek an abortion "does not lead to a poor familial relationship, but is the result of a poor familial relation-

A girl from this "less-than-ideal family"¹²⁷ needs a counselor to guide her through state procedures in which she must justify her desire to make her own decision without the influence of her parents.

The vulnerabilities of children have long been used to justify depriving them of liberty.¹²⁸ And yet, the Court has never unbundled the specific vulnerabilities of children or addressed the precise legal importance of each of those vulnerabilities. Taken as a whole, however, the bundle of vulnerabilities bears directly and affirmatively on children's need for appointed counsel.

III. APPLYING THE FACTORS GOVERNING JUDICIAL DISCRETION TO APPOINT COUNSEL FOR PRO SE INDIGENTS

The federal courts have largely agreed upon guidelines governing the exercise of the judicial discretion to appoint counsel for unrepresented, indigent persons in pending litigation.¹²⁹ Cases interpreting the parameters of the leeway accorded federal judges to appoint counsel for indigents are equally useful to, though not binding on, courts hearing civil matters involving minors.

A. *The Factors that Guide the Discretion of Federal Courts Support Appointing Counsel for the Especially Vulnerable*

The federal statute governing special procedures for indigent plaintiffs, 28 U.S.C. § 1915(d), provides that an indigent party may proceed *in forma pauperis*, and that "the court may request an attorney to represent any . . . person unable to employ counsel."¹³⁰ Congress enacted § 1915 in 1892, apparently to "codify existing rights or powers."¹³¹ Congress was aware when it enacted the precursor to the current statute that at least twelve states had adopted statutes expressly "permit-

ship" and that the delay which results from imposing a statutory consent requirement is detrimental to the girl's health (emphasis omitted)).

127. *Hodgson*, 497 U.S. at 470 (Marshall, J., dissenting).

128. See Melton, *supra* note 91, at 5-6 (observing the ironic results in *Parham v. J.R.*, 442 U.S. 584 (1979), and *Fare v. Michael C.*, 442 U.S. 707 (1979), decided on the same day, and noting that in *Parham* incompetence meant no pre commitment hearing was necessary, but in *Fare* the child was deemed competent to waive rights in a criminal setting).

129. The origin of judicial discretion to appoint counsel for the indigent lies both in the common law and in statutes. See *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 312-13 (1989) (Stevens, J., dissenting) (stating that "[t]he lawyer's duty to provide professional assistance to the poor is part of the ancient traditions of the bar long recognized," and that a court's power to order such service "is firmly rooted in the authority to define the terms and conditions upon which members are admitted to the bar"); see also Esther L. Brown, *Lawyers and the Promotion of Justice* 253-54 (1938) ("[I]t has long been customary for the court to assign counsel to those who cannot furnish their own attorney."); Reginald H. Smith, *Justice and the Poor* 100 (reprint 1971) (1967) (noting that courts possess "inherent power . . . to assign attorneys").

130. 28 U.S.C. § 1915(d) (1988).

131. *Mallard*, 490 U.S. at 307.

ting courts to assign counsel to represent indigent litigants" in civil matters.¹³²

There is substantial agreement among the federal circuits regarding a nonexhaustive list of factors for trial courts to consider in exercising their discretion to appoint counsel under § 1915.¹³³ As a threshold matter, a judge must determine that the applicant lacks the financial resources to retain counsel.¹³⁴ We may assume that, except for the rare child who not only possesses a trust fund but controls access to its resources, virtually all children will cross this first hurdle.¹³⁵

Assuming indigence, many jurisdictions instruct judges to turn next to the probability that a plaintiff's case is "likely to be of substance."¹³⁶ The rationale for this factor is, of course, that free lawyers are a scarce commodity.¹³⁷ Notwithstanding the homily that courts should be as readily available to the poor as to the rich, this lofty principle has never actualized.¹³⁸ In certain types of litigation, contingency fees provide a means for the merits of certain claims to determine availability of counsel.¹³⁹ But where "only" rights are involved (in contrast to a potentially large monetary award), some form of triage is necessary before attorneys dedicate their energies to a case.¹⁴⁰ Where no hope of compensation is held out, "[a] claim that

132. *Id.* at 302. Justice Brennan noted that few appointments appear to have been made under those statutes or under the state court's common law powers, as such powers were exercised in Great Britain from the 15th through late 19th centuries. *Id.* at 303-04.

133. *See, e.g.,* *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995) (citing cases interpreting § 1915(d) from the Third and Seventh Circuits); *Tabron v. Grace*, 6 F.3d 147, 155-57 (3d Cir. 1993) (citing cases from the Second, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits), *cert. denied*, 114 S. Ct. 1306 (1994); *Lavado v. Keohane*, 992 F.2d 601, 605-06 (6th Cir. 1993) (citing cases from the First, Fifth, Seventh, and D.C. Circuits); *Holt v. Ford*, 862 F.2d 850, 853 (11th Cir. 1989) (citing cases from the Second, Fifth, Seventh, and Ninth Circuits); *cf. Castner v. Colorado Springs Cablevision*, 979 F.2d 1417, 1420-23 (10th Cir. 1992) (discussing appointment of counsel in Title VII employment discrimination cases under the similar provisions of 42 U.S.C. § 2000-e-5(f)(1) (1988) and citing cases from the First, Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits).

134. *See Tabron*, 6 F.3d at 157 n.5; *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1341 (2d Cir. 1994).

135. A minor who has access to a trust fund might be in a position to request the court to order the trustees to pay reasonable attorney's fees. The average child litigant would presumably be indigent in the sense of lacking funds to retain counsel even if his or her parents had significant resources. Nothing would prevent a judge from ordering such parents to pay the counsel appointed by the court.

136. *See, e.g.,* *Cooper v. Sargenti Co.*, 877 F.2d 170, 172 (2d Cir. 1989) (rejecting request for appointment of appellate counsel following jury trial at which petitioner was represented because the underlying employment discrimination claim lacked merit, and clarifying the criteria that courts should use in determining whether to appoint counsel).

137. *See id.* at 172-73. This proposition has been cited with approval in other Circuits. *See Tabron*, 6 F.3d at 157; *Castner*, 979 F.2d at 1421.

138. *Cooper*, 877 F.2d at 173.

139. *Id.*

140. *Id.* at 172.

could not command a lawyer's acceptance if possessed by an employed middle-class property owner should not command a pro bono lawyer."¹⁴¹

To be sure, it may be difficult for a pro se litigant of any age to present even the initial outlines of a legal claim without counsel in order to survive these preliminary inquiries, but judges are regularly called upon to make such determinations.¹⁴² Appellate courts have clearly stated that in this context, the trial court is not to guess at the ultimate result, but should eliminate claims that are frivolous, even if they could survive a motion to dismiss.¹⁴³ Because the same disabilities that may warrant appointment of counsel—particularly the difficulty of translating a perceived injustice into a legal claim and marshaling facts and legal arguments to support that claim—afflict the applicant at this preliminary stage, the standard that courts use to assess the claim must be generous and tend toward leniency and inclusiveness.¹⁴⁴

As an additional threshold matter, applicants must establish that they have diligently attempted to secure counsel.¹⁴⁵ Adults may satisfy this criterion by contacting lawyers.¹⁴⁶ Minors could certainly be asked to do the same, but such a requirement is likely to result in mere formalities. The diligence required to overcome the obstacles to initiating a claim in the case of a child petitioner should suffice to establish the requisite good faith and the equivalent of a zealous quest for assistance in pursuing the matter. As the Supreme Court of Cali-

141. *Id.* at 173.

142. See *Sawma v. Perales*, 895 F.2d 91, 94-95 (2d Cir. 1990) (Motley, J., dissenting) (finding that trial court should have appointed counsel for appellant who submitted prolix, incomprehensible, unartful brief).

143. *Maclin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981) ("Even where the claim is not frivolous, counsel is often unwarranted where the indigent's chances of success are extremely slim." (citation omitted)).

144. *Cooper v. Sargenti*, 877 F.2d 170, 174 (2d Cir. 1989) ("[T]he preliminary assessment of likely merit must be undertaken somewhat more generously since the unrepresented litigant might have difficulty articulating the circumstances that will indicate the merit that might be developed by competent counsel.").

145. See *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1986) (noting that § 1915 dictates that litigant be unable to obtain counsel); *Jackson v. County of McLean*, 53 F.2d 1070, 1072 (7th Cir. 1992) (finding that § 1915 requires that indigent make an unsuccessful attempt to obtain counsel before court appoints counsel).

146. See *Jenkins v. Chemical Bank*, 721 F.2d 876, 880 (2d Cir. 1983) (noting that in the analytically related area of employment discrimination suits, see *supra* note 133, a "reasonably diligent effort" to obtain counsel is measured by such considerations as the availability of counsel in the locality, plaintiff's skill in seeking help, and the number of actual contacts with potential counsel (citing *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1319 (9th Cir. 1981))); see also *Poindexter v. FBI*, 737 F.2d 1173, 1182 n.18 (D.C. Cir. 1984) (noting that plaintiffs seeking appointment of counsel in discrimination suits have a lesser burden than those seeking such appointment in § 1915 cases).

fornia has observed, "it is fatuous to assume that a minor in custody will be in a position to call an attorney for assistance."¹⁴⁷

The next and most critical step of the courts' inquiry is analysis of a cluster of factors designed to assess the applicant's ability to present his or her case pro se. These factors include "the indigent's ability to investigate the crucial facts, whether the conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder, the indigent's ability to present the case, [and] the complexity of the legal issues."¹⁴⁸ A court should also consider any special factors suggesting that appointment of counsel would "more likely lead to a just determination."¹⁴⁹

In *Tabron v. Grace*,¹⁵⁰ for example, the Third Circuit remanded for reconsideration the denial of counsel for a prisoner because the case involved complex discovery and issues of credibility.¹⁵¹ The decision in *Tabron* supported appointment of counsel even though the legal issues of the case were not complex, the applicable law was clear, and the plaintiff appeared literate and reasonably capable.¹⁵² The court

147. *People v. Burton*, 491 P.2d 793, 797 (Cal. 1971) (holding that when a minor in police custody asks to see his parents, he triggers his rights under *Miranda* to terminate the interrogation).

All of the circuits that have addressed the question agree that the plaintiff's ability to afford counsel, the merits of the case, and the complexity of the case are important factors. See *Rucks v. Boergermann*, 57 F.3d 978, 978-79 (10th Cir. 1995); *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995); *Edgington v. Missouri Dep't of Corrections*, 52 F.3d 777, 780 (8th Cir. 1995); *Tabron v. Grace*, 6 F.3d 147, 153, 155-56 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1306 (1994); *Lavado v. Keohane*, 992 F.2d 601, 604, 606 (6th Cir. 1993); *DesRosiers v. Moran*, 949 F.2d 15, 23-24 (1st Cir. 1991); *Holt v. Ford*, 862 F.2d 850, 853 (11th Cir. 1989); *Hodge*, 802 F.2d at 60-62; *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984); *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982); *Maclin*, 650 F.2d at 887-89; cf. *Poindexter*, 737 F.2d at 1182 n.18, 1185, 1189 (comparing appointment of counsel under 42 U.S.C. § 2000e-5(f)(1) to appointment under § 1915(d)).

148. *Hodge*, 802 F.2d at 61-62.

149. *Id.* at 62; see also *Terminatè Control Corp. v. Horowitz*, 28 F.3d 1335, 1341 (2d Cir. 1994) (finding that litigant was not prejudiced by proceeding pro se at trial after district court refused to appoint counsel for him because codefendant was represented by counsel throughout proceedings). At least ten circuits agree that the plaintiff's ability to proceed pro se should also be examined. See *Rucks*, 57 F.3d at 979; *\$292,888.04 in U.S. Currency*, 54 F.3d at 569; *Edgington*, 52 F.3d at 780; *Tabron*, 6 F.3d at 156; *Lavado*, 992 F.2d at 606; *DeRosiers*, 949 F.2d at 24; *Hodge*, 802 F.2d at 61-62; *Whisenant*, 739 F.2d at 163; *Ulmer*, 691 F.2d at 213; *Maclin*, 650 F.2d at 888. Only the Eleventh Circuit and the D.C. Circuit have not expressly held that a plaintiff's ability to represent himself or herself should be considered in deciding whether or not to appoint counsel. In *Holt*, however, the Eleventh Circuit implied that its list of factors was not exhaustive, citing cases that included the plaintiff's ability to proceed pro se. 862 F.2d at 853 (stating that "the district court typically considers, among other factors," the merits of the case (emphasis added)). The D.C. Circuit has considered the plaintiff's ability to proceed pro se in Title VII cases, and has held that Title VII imposes a lower standard on the plaintiff and does not require indigency. See *Poindexter*, 737 F.2d at 1182 n.18, 1184-85.

150. 6 F.3d 147 (3d Cir. 1993).

151. *Id.* at 156.

152. *Id.* at 158.

explained that assessments of the plaintiff's ability to present the case should also involve consideration of the plaintiff's educational level, literacy, work experience, and prior experience with litigation.¹⁵³ Even gifted children whose educational level exceeds their age would be unlikely to have experience in the workplace or in civil litigation that would prepare them to present their own cases.¹⁵⁴ For instance, a child is not likely to achieve the same level of competence demonstrated by a former law professor, whom the courts held capable of representing himself.¹⁵⁵

All of the presumed vulnerabilities of youth—the inexperience, lack of education, mature intelligence and judgment, and easy victimization portrayed in the analysis of Supreme Court cases analyzed in part II—support appointment of counsel for minors. The very characteristics that are frequently held to diminish children's legal rights indicate that children cannot present their own court cases and therefore ought to have a special claim to appointed counsel. These characteristics establish that, in most instances, minors lack the ability to gather facts and deal with issues, handle their cases, understand legal issues, or conduct cross-examination without guidance from an attorney. Youth itself may be regarded as "a special factor" suggesting that appointment of a lawyer will make a just determination more likely. Youth is frequently a form of judicial shorthand for characteristics that interfere with the ability to prosecute a claim. Indeed, the highest court of California has expressly found that "a minor may be presumed to lack the ability to marshal the facts and evidence, to effectively speak for himself and to call and examine witnesses, or to discover and propose alternative" solutions to the problem before the court.¹⁵⁶

153. *Id.* at 156; see also *Maclin*, 650 F.2d at 889 (remanding for appointment of counsel because, among other things, plaintiff had no workable knowledge of the legal process).

154. The flexibility inherent in these standards would permit a finding that an exceptionally gifted child did not require counsel. See, e.g., *Brown v. Enzyme Dev. Div. of Biddle Sawyer Corp.*, 780 F. Supp. 1025, 1026 (S.D.N.Y. 1992) (declining to appoint counsel for a woman in light of her "particularly able representation of herself").

155. *Hudak v. Curators of Univ. of Mo.*, 586 F.2d 105, 106-07 (8th Cir. 1978), cert. denied, 440 U.S. 985 (1979), cited in *Castner v. Colorado Springs Cablevision*, 979 F.2d 1417, 1422 (10th Cir. 1992); see also *In re Fitzgerald*, 167 B.R. 689, 690, 692-93 (N.D. Ga. 1994) (denying bankruptcy counsel to incarcerated debtor with law degree).

156. *In re Antoine C.*, 230 Cal. Rptr. 738, 739 (Ct. App. 1986) (quoting *In re Roger S.*, 569 P.2d 1286, 1296 (Cal. 1977) (holding that counsel must be appointed to represent minors in hearings prior to psychiatric commitment under state law)). The court in *Antoine* rejected the state's claim that appointed "counsel" may be a nonlawyer. *Id.* at 740.

B. *Legal Interests Too Important to be Left to the Advocacy of Lay Adults are Too Important to be Left to the Advocacy of Children Themselves*

The reasoning that leads courts to discourage pro se litigation is closely related to the rationales adduced in favor of prohibiting unlicensed lay persons from appearing for others in legal proceedings. The underlying assessment of the relationship of lay adults to the legal system common to discouraging pro se litigation and forbidding unlicensed representation lends further support to appointing counsel for minors.

Above all, the practice of law may be nearly unfathomable to the uninitiated. As the Supreme Court noted in *Argersinger v. Hamlin*,¹⁵⁷ “[t]hat which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.”¹⁵⁸ If this observation is true for adults, it must be even more so for children. When the uninitiated appear in court, the results are potentially dangerous. One federal court compared the ban on lay persons appearing for others to the reasoning behind regulation of boating safety: “[L]itigation is akin to navigating hazardous waters; federal courts are willing to allow individuals to steer their own boats, and perhaps founder or run aground; but federal courts are not willing to permit individuals to risk the safety of others’ boats.”¹⁵⁹ The government requires licenses to captain certain crafts and denies those licenses to minors based on their age. To carry the analogy further, if a minor embarks on a treacherous boat trip to a destination that he or she has chosen, a qualified adult will be needed to captain the boat.

Federal courts that have considered the question have uniformly held that non lawyer parents appearing pro se may not represent their children in court even where the interests of both parents coincide perfectly with those of their children.¹⁶⁰ Several courts have held that parents cannot waive their children’s right to counsel in civil litigation because “ [t]he right to counsel belongs to the children.”¹⁶¹ Furthermore, the courts can appoint attorneys to protect the children’s right

157. 407 U.S. 25 (1972).

158. *Id.* at 32 n.3 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938)).

159. *Brown v. Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168, 172 (E.D. Va. 1994) (appointing counsel for a severely disabled infant under § 1915).

160. *See id.* at 172; *Osei-Afriyie v. Medical College*, 937 F.2d 876, 882-83 (3d Cir.), *motion to proceed in forma pauperis denied*, 502 U.S. 979-80 (1991); *Cheung v. Youth Orchestra Found.*, 906 F.2d 59, 61 (2d Cir. 1990) (holding that parent may not proceed pro se on child’s behalf, but that no counsel should be appointed where the claim appears meritless); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) (citing *Fed. R. Civ. P. 17(c)*; 28 U.S.C. § 1654).

161. *Brown*, 868 F. Supp. at 171 (quoting *Osei-Afriyie*, 937 F.2d at 883). *Brown* is distinguishable in several respects from the norm examined by this Article. First, the child in *Brown* was an infant who could not articulate her views, and who suffered “permanent brain injuries” which made it unlikely that she would ever become competent to direct litigation on her own behalf. *Id.* at 169. Second, nothing in the record

to counsel.¹⁶² Indeed, courts consider children's independent right to representation to be so important that in some instances they have also appointed a guardian *ad litem* to direct the course of the litigation where the attorney and the parent disagree.¹⁶³

Parents who demonstrate high levels of competency and capacity in their general life skills and attainments are not exempt.¹⁶⁴ The Third Circuit made this principle clear in a case involving a tort claim on behalf of the children of a "well-educated economist" appearing pro se.¹⁶⁵ The court of appeals vacated the judgment below against the children on the ground that the nonlawyer father was not entitled to represent his children.¹⁶⁶ The father lost a jury trial and then missed the deadline for preserving his right to request reconsideration.¹⁶⁷ The fact that even this highly competent father allowed a deadline to pass underscores why children need licensed attorneys.¹⁶⁸ It also helps to explain why appellate courts have found reversible error where trial courts allowed parents to proceed pro se on behalf of their children. If the interests of children are too important to be left to the advocacy of unlicensed adults, it stands to reason that they are too important to be left to the advocacy of children themselves.¹⁶⁹

IV. THE ANALOGY BETWEEN CHILDREN AND PRISONERS: THE RIGHTS OF PETITION AND ACCESS IMPOSE AFFIRMATIVE OBLIGATIONS ON THE STATE TO ASSIST PETITIONERS IN CUSTODY

The young African American poet Sapphire likens childhood under the constant scrutiny of adults to time spent in prison: "If you've ever been in prison or in your parents' house, you know what it's like."¹⁷⁰ She is not the only one to take this view. The majority of the current Supreme Court agrees. In the Court's hands, the comparison is used to denigrate the liberty interests of children.

suggested that the interests of the child diverged in any respect from those of her father.

162. *Cheung*, 906 F.2d at 61.

163. *Meeker*, 782 F.2d at 155 (appointing guardian *ad litem* to form independent assessment of children's claims in action against protective services agency).

164. *Osei-Afriyie*, 937 F.2d at 882-83.

165. *Id.* at 882.

166. *Id.* at 883.

167. *Id.* at 880.

168. *See id.* at 882-83.

169. This argument does not reach the question of whether minors have a lesser right to represent themselves than adults, should they choose to do so. *See* 28 U.S.C. § 1654 (1988) (creating a statutory right for litigant to represent himself). Adult defendants in criminal actions also have a right under the Sixth Amendment to represent themselves. *Faretta v. California*, 422 U.S. 806, 821 (1975).

170. *Polished Sapphire*, *The New Yorker*, Dec. 25, 1995 & Jan. 1, 1996, at 6, 6 (quoting Sapphire, *There's a Window*, in *American Dreams* (1994)).

In *Schall v. Martin*¹⁷¹ the Supreme Court proclaimed that children's liberty interests are "qualified by the recognition that juveniles, unlike adults, are always in some form of custody."¹⁷² According to Justice Rehnquist's opinion for the majority in *Schall*, this observation justifies preventive detention of juveniles accused of delinquent acts under circumstances that would violate the Due Process Clause if applied to adults.¹⁷³ The *Schall* majority denied that such cavalier detentions amounted to punishment, even for juveniles ultimately discharged or released on probation.¹⁷⁴ Although Justice Marshall's dissent derides the majority's comparison of detention and parental custody as "difficult to take seriously,"¹⁷⁵ the Court continues to equate children with prisoners in other contexts, an analogy that normally diminishes children's rights.¹⁷⁶

For example, in *Vernonia School District 47J v. Acton*,¹⁷⁷ a recent case, the Supreme Court upheld random (i.e., suspicionless) urinalysis for drug testing of student athletes.¹⁷⁸ The majority opinion, written by Justice Scalia, minimized the liberty interests of children on the grounds that the children had been "committed to the temporary cus-

171. 467 U.S. 253 (1984).

172. *Id.* at 265 (finding that preventive detention of juveniles under circumstances that would be impermissible if applied to adults does not violate the Due Process Clause); see also *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2391 (1995) ("[M]inors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, i.e., the right to come and go at will."); *Reno v. Flores*, 113 S. Ct. 1439, 1447 (1993) (upholding detention of undocumented immigrant children on the grounds that children "are always in some form of custody" (quoting *Schall v. Martin*, 467 U.S. 253, 265 (1984))). *Contra Flores*, 113 S. Ct. at 1455 (O'Connor, J., dissenting) (noting that Court has "rejected" the assertion that a child has a right "not to liberty but to custody" (quoting *In re Gault*, 387 U.S. 1, 17 (1967))).

173. 467 U.S. at 288-89 (Marshall, J., dissenting); cf. *United States v. Salerno*, 481 U.S. 739, 750-52 (1987) (finding that pretrial detention of adults requires a full hearing at which the government must show by clear and convincing evidence, among other things, probable cause that defendant committed a serious crime, that defendant has a serious criminal history, and that no conditions of release can adequately protect the public).

174. 467 U.S. at 272-73. Ironically, *Schall* demonstrates that the presence of counsel, required in the cursory hearing that leads to pretrial detentions of juveniles, is not necessarily a protection against injustice. See *id.* at 279; *id.* at 305-06 (Marshall, J., dissenting) (referring to one detention hearing as a "parody of reasoned decisionmaking").

175. *Id.* at 289 (Marshall, J., dissenting).

176. See, e.g., *Flores*, 113 S. Ct. at 1447 (holding that undocumented immigrant children have no right to be held in a noncustodial setting pending hearings because under *Schall*, juveniles "are always in some form of custody" (citation omitted)). But cf. *Ingraham v. Wright*, 430 U.S. 651, 669, 682 (1977) (noting that "[t]he prisoner and the schoolchild stand in wholly different circumstances," but declining to require administrative safeguards to protect children from excessive punishment in the public school setting).

177. 115 S. Ct. 2386 (1995).

178. *Id.* at 2396.

tody of the State as schoolmaster.”¹⁷⁹ Justice Scalia emphasized repeatedly that “the most significant element in this case” is the government’s custodial relationship to students, thus “caution[ing] against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts.”¹⁸⁰ In a cogent dissent, Justice O’Connor laid bare the implications of the majority opinion. The majority, she charged, had come a long way from the Court’s statement in the 1985 case of *New Jersey v. TLO*¹⁸¹ that it was “not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.”¹⁸² Calling the Court to account for its current reasoning, she pointed out that the *only* case with a comparable holding involved prisoners.¹⁸³

For purposes of this Article, this author shall take seriously the analogy of children to prisoners. Although the author does not in fact accept the analogy between children and prisoners as developed by the current Supreme Court,¹⁸⁴ the analogy points the way toward an expansion of children’s rights in the limited context of claims to counsel. Many of the adult plaintiffs found to have a strong claim to counsel under § 1915 were prisoners;¹⁸⁵ the fact of their incarceration was

179. *Id.* at 2391; *see also id.* at 2392 (emphasizing that schools are “custodial” (citing *New Jersey v. TLO*, 469 U.S. 325, 339 (1985))).

180. *Id.* at 2396.

181. 469 U.S. 325 (1985).

182. *Vernonia*, 115 S. Ct. at 2404 (O’Connor, J., dissenting) (quoting *TLO*, 469 U.S. at 338-39). Justice Marshall played on the emerging analogy in his dissent in *Wolff v. McDonnell*, 418 U.S. 539 (1974), where he echoed Justice Fortas’s observation in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), that children do not shed their First Amendment rights at the schoolhouse gate, *id.* at 506, and stated that “a prisoner does not shed his basic constitutional rights at the prison gate.” *Wolff*, 418 U.S. at 581 (Marshall, J., dissenting).

183. *Vernonia*, 115 S. Ct. at 2401 (O’Connor, J., dissenting) (finding suspicion requirement impracticable in the context of searches of prisoners for contraband following contact visits because the observation necessary to form suspicion would disrupt “the confidentiality and intimacy that these visits are intended to afford,” and distinguishing cases relied on by the majority (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979))).

184. Even its architect, Chief Justice Rehnquist, does not always take the analogy seriously. He apparently has reserved the right to distinguish between children whose liberties can be constrained under *Schall* because they are “always in some form of custody,” and those whose interests can go unprotected because they find themselves in the “free world” outside the custody of the state. An example of the latter was toddler Joshua DeShaney. Joshua’s father beat him so severely that the resulting brain damage is expected to result in his life-long confinement to an institution for the profoundly retarded. *DeShaney v. Winnebago Co. Dep’t of Social Servs.*, 489 U.S. 189, 193 (1989). Although state child welfare authorities were aware that Joshua was at risk and could have protected him but failed to do so, Chief Justice Rehnquist wrote an opinion for the majority that held that “the State had no constitutional duty to protect Joshua.” *Id.* at 201. For a discussion of the inconsistencies between Chief Justice Rehnquist’s positions in *Schall* and *DeShaney*, see Aviam Soifer, *Moral Ambition, Formalism and the “Free World” of DeShaney*, 57 *Geo. Wash. L. Rev.* 1513, 1519-21 (1989).

185. *See supra* notes 130-55 and accompanying text.

found to pose an insurmountable barrier to their own effective fact-finding.¹⁸⁶

Prisoners have a constitutional right to affirmative assistance from the state, sometimes including appointed counsel, in order to pursue their civil claims.¹⁸⁷ If all children are prisoners, as the analogy would have it, then all children may have a constitutional right to counsel in order to pursue meritorious civil litigation.

A. *The Right of Meaningful Access to the Courts*

The right of access to the courts is derived from the First Amendment right to petition the government¹⁸⁸—an often overlooked liberty interest—as well as from the Due Process Clause. The Supreme Court has expressly held that prisoners “retain [the] right of access to the courts.”¹⁸⁹ The Court has explained that “[l]ike others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts.”¹⁹⁰ The range of civil claims that can arise during a prisoner’s

186. See, e.g., *Burgos v. Hopkins*, 14 F.3d 787, 788-89 (2d Cir. 1994) (addressing difficulties in fact-finding faced by incarcerated parties who represent themselves); *Tabron v. Grace*, 6 F.3d 147, 151, 158 (3d Cir. 1993) (noting that “[prisoner’s] incarceration may have limited his ability to engage in factual investigation”); *Maclin v. Freake*, 650 F.2d 885, 887-89 (7th Cir. 1981) (concluding that district court should have appointed counsel where prisoner was “in no position to investigate facts germane to his complaint”). Even outside the prison context, courts have noted that § 1915 must be understood to guarantee indigents “meaningful access” to the courts as understood in the cases discussed *supra* at notes 130-55 and accompanying text regarding prisoners’ rights. See *Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986).

187. See *infra* notes 188-209 and accompanying text.

188. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (citing *Johnson v. Avery*, 393 U.S. 483, 485 (1969); *Ex parte Hull*, 312 U.S. 546, 549 (1941)). The Supreme Court has also found roots for the right of access in the Equal Protection Clause. *Murray v. Giarratano*, 492 U.S. 1, 21 n.8 (1989).

The First Amendment provides, in pertinent part, “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” U.S. Const. amend. I. Few commentators have discussed the right to petition, either independently or in relation to other expressive rights guaranteed under the First Amendment. A notable exception is Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 *Hastings Const. L.Q.* 15, 17 (1993) (arguing that the right to petition has been largely forgotten, but is historically a distinct and even superior right to the other expressive rights); see also Norman B. Smith, “*Shall Make No Law Abridging . . .*”: *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 *U. Cin. L. Rev.* 1153, 1180-83 (1986) (arguing that the right to petition is a nearly absolute right upon which courts should not place limitations).

189. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (citing *Younger v. Gilmore*, 404 U.S. 15, 15 (1971); *Johnson v. Avery*, 393 U.S. 483, 485 (1969)); see *Bounds v. Smith*, 430 U.S. 817, 821 (1977) (“It is now established beyond doubt that prisoners have a constitutional right of access to the courts.”); *Ex parte Hull*, 312 U.S. 546, 549 (1941) (“[T]he state and its officers may not abridge or impair [the prisoner’s] right to apply to a federal court for a writ of habeas corpus.”).

190. *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (citing *Avery*, 393 U.S. at 485).

incarceration is by no means limited to claims related to confinement, but rather resembles in breadth the variety of claims minors may bring. A prisoner "may have grievances of a civil nature against those outside the prison. His imprisonment may give his wife grounds for divorce and be a factor in determining the custody of his children; and he may have pressing social security, workmen's compensation, or veterans' claims."¹⁹¹

Access to the courts for pursuing any of these civil claims, in addition to collateral challenges to confinement itself,¹⁹² must be "meaningful."¹⁹³ But prisoners may be hampered in pursuing legal claims because of the conditions of their confinement, and may be hampered so severely that the discretionary appointment of counsel by the courts is insufficient to insure their right of access to the courts.

In *Bounds v. Smith*,¹⁹⁴ the Supreme Court held that the right of access to the courts imposes an affirmative obligation on the state to assist prisoners who wish to prosecute civil claims, an obligation which the state does not have with regard to other citizens.¹⁹⁵ Under *Bounds*, government must insure that inmate access to the courts is "adequate, effective and meaningful."¹⁹⁶ To insure meaningful access, prisons must provide inmates with "adequate law libraries or adequate assistance from persons trained in the law."¹⁹⁷

Bounds and its progeny expressly state that the Constitution does not impose any one mechanism on the state for fulfilling its affirmative obligation to assist prisoners in pursuing their right of access to

191. *Avery*, 393 U.S. at 493 (Douglas, J., concurring). The right of access for prisoners extends to civil actions, as well as to actions challenging the underlying conviction. *Wolff*, 418 U.S. at 579-80.

192. In the case of a minor, the analogy leads to a petition for emancipation, or a claim to have the court respect a child's expressed preferences regarding custody or visitation. See *Cummings*, *supra* note 88, at 3.

193. *Bounds v. Smith*, 430 U.S. 817, 823 (1977) (noting that "'meaningful access' to the courts is the touchstone" (quoting *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974) (rejecting a constitutional right for indigent defendants to appointed counsel for discretionary appeals because pro se appellants can rely on legal documents and research prepared below))).

194. 430 U.S. 817 (1977).

195. *Id.* at 828.

196. *Id.* at 822.

197. *Id.* at 828 (reaffirming *Younger v. Gilmore*, 404 U.S. 15 (1971)). It should be noted that one of the dissents in *Bounds* was authored by then-Justice Rehnquist, and that, with the exception of Justice Stevens, none of the Justices who signed Justice Marshall's majority opinion remain on the bench today. This situation is true, of course, of many of the decisions on which this Article relies. These decisions nonetheless retain their value as precedents. Even if they did not, it would remain a legitimate intellectual approach to rely on the decisions as logical building blocks in a search for principles under the common law. See Jamie Kalven, *Introduction to Harry Kalven, Jr., A Worthy Tradition: Freedom of Speech in America* at xx (1988) (noting that in Harry Kalven's view, the tradition of insights and arguments is indelible, even if new precedents supercede the old).

the courts; flexibility is the hallmark.¹⁹⁸ States are not required to provide appointed counsel, to provide the assistance of paralegal assistants or law students, to ensure access to jail house lawyers, or even to maintain a law library in each prison.¹⁹⁹ While each of these forms of assistance promotes meaningful access to the courts, the Supreme Court has made clear that the measure of what is required varies with the facts.²⁰⁰ In the case of children, however, the instant analysis indicates that adult counsel is needed to achieve meaningful access because of the very attributes that have been associated with children since Blackstone first referred to their peculiar vulnerabilities²⁰¹—in particular, their lack of fully developed intelligence, education, and literacy.

Courts emphasize the limited capacity of prisoners to explain why prisoners need additional assistance to achieve meaningful access to the courts. In upholding a right to the help of so-called jail house lawyers, the Supreme Court observed that the prison population includes many who are “totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited.”²⁰² Children and prisoners share a low level of education which inhibits their ability to express ideas in writing or explain their cases clearly. According to the Correctional Education Association, seventy percent of adult inmates have not completed high school and more than seventy-five percent read at or below the eighth grade level, rendering them “functionally illiterate.”²⁰³ The particularly low level of education among prisoners has contributed to a determination that provision of a law library, without more, fails to ensure meaningful access to the courts.²⁰⁴ Judicial descriptions of prisoners often bear remarkable similarities to descriptions of the young.

Clearly, the characteristics of children are to some extent the characteristics of vulnerability in all its guises. Vulnerable groups—including children, persons with special needs, and those with mental disabilities—like other disadvantaged groups in our society, may require special consideration from the courts in order to realize their rights. Therefore, courts have held that certain classes of vulnerable persons require special services tailored to their differing abilities in order to level the playing field and assure that access to the courts is

198. *Bounds*, 430 U.S. at 824-25, 828.

199. *Id.* at 825.

200. *Id.* at 825, 830-32.

201. *See supra* note 1 and accompanying text.

202. *Johnson v. Avery*, 393 U.S. 483, 487 (1969).

203. Jennifer Gerarda Brown, *Posner, Prisoners, and Pragmatism*, 66 Tul. L. Rev. 1117, 1143 & nn.124 & 126 (1992) (citing *Important Information About Correctional Education in the United States Today* at 1 (Correctional Educ. Ass'n Laurel, Md.)).

204. *Canterino v. Wilson*, 562 F. Supp. 106, 110 (W.D. Ky. 1983), *motion to amend denied*, 644 F. Supp. 738 (W.D. Ky. 1986), *aff'd*, 875 F.2d 862 (6th Cir.), *cert. denied*, 493 U.S. 991 (1989).

truly meaningful.²⁰⁵ Examples of especially vulnerable adults include illiterate or non-English speaking prisoners,²⁰⁶ committed mental patients,²⁰⁷ and residents of women's prisons who lack a jail house lawyer to assist them with filing papers.²⁰⁸ In each instance, the claim to special legal services—including appointed counsel—rises to constitutional dimensions.²⁰⁹

The analogy between children and prisoners is both metaphoric and literal. The view of children as prisoners functions as a metaphor for powerlessness and lack of control. When the courts invoke this equivalence to justify limitations on liberty, children may justifiably ask the courts to adhere to the principled consistency that law normally demands. Consistency would require the courts to grant children the small advantages resulting from the analogy. But in other respects, the analogy may be taken more literally. It is the job of adult guardians to subject children to restrictions that free adults would not normally tolerate—such as restrictions on daily schedules and on where, when, and with whom the child may come and go and for what purpose. Under extreme circumstances, these restrictions may result in conditions that construct a more literal parallel between childhood and prison, as when parents interfere with communications and other activities that may be prerequisites to the pursuit of legal claims.

Consideration of the activities that courts have found to constitute an unwarranted interference with prisoners' rights of access supports this more literal parallel between children and prisoners. Courts have condemned a range of intrusions into prisoners' claims, all of which require little creativity to imagine as parental intrusions. These intru-

205. *Morgan v. Sproat*, 432 F. Supp. 1130, 1157-58 (S.D. Miss. 1977).

206. *Cruz v. Hauck*, 627 F.2d 710, 719, 721 & n.21 (5th Cir. 1980) (finding that prisoners who do not speak English or are illiterate need legal assistance, not just access to a library, to achieve the fundamental right of meaningful access to the courts); *Hadix v. Johnson*, 694 F. Supp. 259, 288 n.35 (E.D. Mich. 1988) (reaffirming need for special legal services for non-English speaking prisoners), *aff'd in part and rev'd in part sub nom.* *Knop v. Johnson*, 977 F.2d 996, 1005 (6th Cir. 1992) (holding that law libraries without further legal assistance are inadequate to assure illiterate prisoners or those who lack "the intelligence necessary to prepare coherent pleadings" meaningful access to the courts), *cert. denied*, 113 S. Ct. 1415 (1993); *United States ex rel. Para-Professional Law Clinic v. Kane*, 656 F. Supp. 1099, 1105 (E.D. Pa.), *aff'd*, 835 F.2d 285 (3d Cir. 1987), *cert. denied*, 485 U.S. 993 (1988).

207. *Ward v. Kort*, 762 F.2d 856, 858 (10th Cir. 1985), *cited in* *John L. v. Adams*, 969 F.2d 228, 234 n.6 (6th Cir. 1992), *reh'g denied*, No. 91-6241, 1992 U.S. App. LEXIS 23378, at *1 (6th Cir. Sept. 22, 1992); *Johnson v. Brelje*, 701 F.2d 1201, 1208 (7th Cir. 1983).

208. *Glover v. Johnson*, 478 F. Supp. 1075, 1096-97 (E.D. Mich. 1979).

209. Courts have pointedly described the idea of giving vulnerable, uneducated prisoners access to law libraries without any further assistance as the moral and practical equivalent of "furnishing medical services through books like: 'Brain Surgery Self-taught' . . . along with scalpels, drills, hemostats, sponges and sutures." *Kane*, 656 F. Supp. at 1105 n.2 (quoting *Falzerano v. Collier*, 535 F. Supp. 800, 803 (D.N.J. 1982)).

sions include interference with mail,²¹⁰ confiscation or destruction of legal papers,²¹¹ and interference with telephone privileges related to legal matters.²¹² While parents do not constitute the State, parents do retain the ability to interfere with access to the courts and some undoubtedly will try to do so. The presence of assigned counsel for children may mitigate some of the barriers to being heard that parents can erect.

Similarly, factors that lower courts have considered in assessing the extent of a state's affirmative obligation to assist prisoners in obtaining access to the courts include the following: (1) the duration of confinement; (2) the nature of the legal rights at issue; and (3) the number of inmates likely to require a certain form of legal assistance during the period of confinement at issue.²¹³ Because the Supreme Court has labeled minority itself as a form of confinement, if a legal issue springs from one's status as a minor, the duration of confinement will last as long as the legal controversy, but the issue will be moot by the time it can be resolved absent interference because a child will outgrow the status of being a minor. To the extent that the number of plaintiffs in each specific instance of civil litigation is small, and depending on the number of plaintiffs who reside in private homes, provision of counsel may be the least expensive, most efficient means of assuring access to the courts, comparing favorably with, for example, creation of law libraries.²¹⁴

Acknowledgment of limited resources on the part of the State cannot change the underlying analysis. As the Supreme Court emphasized in *Bounds*, cost may be considered in crafting relief, but "the cost of protecting a constitutional right cannot justify its total denial."²¹⁵ In *Argersinger v. Hamlin*, the Court considered the related issue of when courts should appoint counsel for adults charged with misdemeanors.²¹⁶ Justice Powell recommended in his concurrence

210. See, e.g., *Nolan v. Scafati*, 430 F.2d 548, 550 (1st Cir. 1970) (addressing refusal to mail prisoners' letters).

211. See e.g., *Simmons v. Dickhaut*, 804 F.2d 182, 183 (1st Cir. 1986) (per curiam) (holding that confiscation or destruction of prisoner's legal paper violates his right of access to courts under federal law (citing *Wright v. Newsome*, 795 F.2d 964, 968 (11th Cir. 1986); *Carter v. Hutto*, 781 F.2d 1028, 1031-32 (4th Cir. 1986); *Tyler v. "Ron" Deputy Sheriff or Jailer/Custodian of Prisoners*, 574 F.2d 427, 429 (8th Cir. 1978); *Hiney v. Wilson*, 520 F.2d 589, 591 (2d Cir. 1975))).

212. *Casey v. Lewis*, 43 F.3d 1261, 1269-70 (9th Cir. 1994) (finding that restrictions on or interference with telephone calls to attorneys violates prisoners' rights of meaningful access to the courts).

213. See *Berry v. Department of Corrections*, 697 P.2d 711, 714 (Ariz. Ct. App. 1985) (citing *Cruz v. Hauck*, 515 F.2d 322, 332, 333 (5th Cir. 1975); *Bounds v. Smith*, 430 U.S. 817, 827-28 (1977)).

214. If access to computerized legal data bases were free and available in school libraries, the balancing might have a different result if some minors were deemed capable of using such systems to perform meaningful legal research.

215. *Bounds*, 430 U.S. at 825.

216. 407 U.S. 25, 26-27 (1992).

that triage in deference to limited resources be guided by three factors that bear a remarkable resemblance to those applied by lower courts under § 1915. These factors include (1) the complexity of the legal and factual questions, (2) “the likely consequences” of an adverse decision, including serious consequences other than confinement, and (3) individual factors such as “the competency of the individual . . . to present his own case.”²¹⁷ Emphasis on the third prong—the individual’s competency to present his own case—is likely to result in appointment of counsel for minors.²¹⁸

B. Minors in Custody Have a Right of Access to the Courts that is Coextensive With the Right as Applied to Adult Prisoners

Only three courts have expressly considered the right of access as applied to minors.²¹⁹ All three decisions held that the scope of the right of access for minors in custody is coextensive with the right of access as applied to incarcerated adults, and that the right imposes affirmative obligations on the state.²²⁰

In 1977, a Mississippi federal district court held in *Morgan v. Sproat*²²¹ that juveniles committed to a state training school, “no less than adult offenders, are entitled to reasonable access to the courts.”²²² The court found that mere provision of a law library would not suffice to protect the rights of the youngsters before it. The court explained that even if the juvenile facility had a law library, which it did not, “without assistance the students could not make effective use of legal materials.”²²³ Evidence that sixty-five percent of the residents were “of subnormal intellectual capacity” was merely one of the factors leading to that conclusion.²²⁴ Other factors that the court considered significant included “the students’ ages, their lack of experience with the criminal system, and their relatively short confinement [which] means that [in contrast to adult facilities] there cannot be a system of writ writers”²²⁵

The *Morgan* court did more than recognize an abstract right to counsel; it approved a consent decree designed to ensure that the right translated into reality. The consent decree required the training

217. *Id.* at 64 (Powell, J., concurring).

218. See *supra* notes 148-55 and accompanying text.

219. See *John L. v. Adams*, 969 F.2d 228, 230 (6th Cir. 1992); *Germany v. Vance*, 868 F.2d 9, 11 (1st Cir. 1989); *Morgan v. Sproat*, 432 F. Supp. 1130, 1135 (S.D. Miss. 1977). The sole commentator on access to the courts does not discuss the application of the concept to juveniles. See Spanbauer, *supra* note 188, at 43-49.

220. See *John L.*, 969 F.2d at 233, 235; *Germany*, 868 F.2d at 16; *Morgan*, 432 F. Supp. at 1158-59.

221. 432 F. Supp. 1130 (S.D. Miss. 1977).

222. *Id.* at 1158.

223. *Id.*

224. *Id.* at 1158 n.60.

225. *Id.* at 1158.

school to notify all current and future residents that they were entitled to contact specific legal services organizations for assistance by means including conspicuous posting of legal services available to residents.²²⁶ Finally, the order required the institution to facilitate access to counsel by assisting residents in writing requests for representation and delivering the requests immediately to the appropriate legal services program.²²⁷

The Sixth Circuit squarely confronted the relationship between the right of access and the right to counsel for collateral and civil claims by juveniles in the 1992 case of *John L. v. Adams*.²²⁸ The court expressly held that juveniles incarcerated in a state training institution have a constitutional right of access to the courts under *Bounds*; the fact of incarceration, the court held, is far more important to the determination of inmate rights than age.²²⁹ But when age entered the calculation, this factor reinforced the young people's claim before the court.²³⁰ The Sixth Circuit held that the youth and inexperience of the litigants in *John L.* indicated that they required more than a library to achieve meaningful access to courts.²³¹ The court further held that meaningful access meant nothing less than "access to an attorney."²³²

The Sixth Circuit in *John L.*, however, distinguished between two categories of claims: those that impose an affirmative obligation on the state to assist prisoner access, and those that the state is merely barred from impeding.²³³ The court also limited the children's right

226. *Id.* at 1159. The court also noted that in contravention of *In re Gault*, 387 U.S. 1 (1967), many of the children had not received representation at the hearings which led to their commitment, and might therefore be detained illegally. *Morgan*, 432 F. Supp. at 1158.

227. *Id.* at 1159.

228. 969 F.2d 228 (6th Cir. 1992). To the author's knowledge, only one commentator has discussed *John L.* See Karen B. Swenson, *John L. v. Betty Adams: Taking Bounds in the Right Direction for Incarcerated Juveniles*, 24 Mem. St. U. L. Rev. 429 (1994).

229. See *John L.*, 969 F.2d at 233.

230. See *id.* at 234; *Knop v. Johnson*, 977 F.2d 996, 999 (6th Cir. 1992) (holding that only especially vulnerable adult prisoners—such as the illiterate or unintelligent—require availability of legal assistance in addition to law libraries in order to achieve meaningful access to the courts, but distinguishing juveniles, who, as a class, cannot achieve meaningful access to the courts "absent access to an attorney").

231. *Id.*

232. *Id.*

233. *Id.* at 235. The district court in *John L.* enumerated appropriate issues for evaluation by attorneys compensated by the state, including: (1) the duration and conditions of confinement; (2) Eighth Amendment claims whether based on "deliberate indifference" or cruel and unusual punishment; (3) "unconstitutional conditions of confinement"; (4) due process claims; (5) equal protection claims; (6) departmental transfers giving rise to a liberty interest; (7) other claims providing the basis for an action under 42 U.S.C. § 1983; and (8) claims "involving . . . program and education issues." *Id.* at 231.

to counsel by restricting the right to federal habeas corpus and civil rights claims.²³⁴

The Sixth Circuit read *Bounds* as extending the right of access only so far as to encompass potential claims related to incarceration.²³⁵ The court held, therefore, that the state had no duty to assist prisoners in prosecuting other civil claims, such as those concerning education or treatment under state law.²³⁶ The Sixth Circuit acknowledged that it crafted this distinction in large part due to its concerns over the difficulty of drawing reasonable lines limiting the state's affirmative obligations.²³⁷ The court noted: "[W]ere we to hold that the right of access extends to state law treatment and education issues, we see no logical end to the matters on which similarly situated groups of plaintiffs could demand access to an attorney[,] . . . [including] emancipat[ion] from their parents. . . ." ²³⁸ Therefore, the court ruled that the right to affirmative assistance did not extend to civil matters involving purely issues of state law.²³⁹

The *John L.* ruling, however, is an unjustifiable narrowing of the holding in *Bounds*. The Supreme Court had no occasion in *Bounds* to consider the requirements for access to courts in diverse actions. On the contrary, the Court expressly reaffirmed that the right of access applies to a broad range of civil claims.²⁴⁰ Moreover, an inherent limitation on access to the courts is imposed by the requirements of Rule

234. *Id.* at 234.

235. *Id.*

236. *Id.* at 234-35.

237. *See id.* at 237.

238. *Id.* As the argument in this Article makes clear, the Sixth Circuit correctly perceived the difficulty of drawing boundaries so that the right of counsel would apply only to some categories of claims. The error in the court's analysis is the assumption that lack of resources may justify artificially truncating constitutionally mandated rights. *See supra* note 215 and accompanying text.

239. *Id.* Courts in other jurisdictions disagree and expressly hold that the right of access applies to state as well as federal courts, and to state as well as federal claims. *Bounds v. Smith*, 430 U.S. 817, 833 (1977); *Washington v. Meachum*, No. 534616, 1995 Conn. Super. LEXIS 849, at *87 (Conn. Super. Ct. Mar. 6, 1995) ("It is clear beyond doubt that both the state and federal constitutions guarantee prisoners a right of access to the courts.").

The sole commentator on *John L.* argues correctly that the Sixth Circuit defined the scope of the right of access more narrowly than *Bounds* requires. *See Swenson, supra* note 228, at 468-71 (arguing that counsel should be appointed for state law civil claims by juvenile inmates and that appointment of counsel should continue beyond the filing stage, but voicing justifiable skepticism that current practice will result in such appointments and that the Supreme Court as currently composed will require such a result). *Bounds* expressly did not require "any particular element"—including counsel—but mandated a package of services appropriate to the specific situation and rendering access to the courts meaningful. *See Bounds*, 430 U.S. at 832. Moreover, the facts in *Bounds* concerned "in large part . . . original actions seeking new trials, release from confinement, or vindication of fundamental civil rights." *Id.* at 827.

240. *See Bounds*, 430 U.S. at 833 (Powell, J., concurring) (referring to "prisoner[] claims in state or federal courts"); *id.* at 828-29 (citing *Younger v. Gilmore*, 404 U.S. 15 (1971); *Johnson v. Avery*, 393 U.S. 483 (1969)).

11 of the Federal Rules of Civil Procedure and, in turn, by the roots of Rule 11 in the right of petition.²⁴¹ Historically, the right to petition did not extend to "frivolous, vexatious petitions," which the government retained the power to sanction.²⁴² Courts thus retain the power to deny the right of access to petitioners pursuing frivolous claims.

The First Circuit extended the right of access to minors in the custody of noninstitutional state facilities in *Germany v. Vance*²⁴³—a case which reminds us forcefully that parents and guardians do not always speak for their children. The case involved sixteen-year-old Suzanne Germany who was committed to the custody of the Massachusetts Department of Youth Services ("DYS") following a charge that she had assaulted her father.²⁴⁴ Suzanne was never incarcerated.²⁴⁵ Although in DHS custody, Suzanne lived, at various times, with her parents, in a foster home, and with a friend.²⁴⁶ Shortly after Suzanne entered DHS custody, her mother confessed to Suzanne's DHS caseworker that the father had fabricated the assault in order to obtain DHS services for Suzanne.²⁴⁷ DHS failed to inform Suzanne of this exculpatory evidence.²⁴⁸

Some time later, a new caseworker read Suzanne's file and notified Suzanne that the agency was aware of her father's perjury.²⁴⁹ Suzanne, however, remained in custody, her letter to the court explaining her wrongful adjudication unanswered.²⁵⁰ Only after a new DHS supervisor himself informed the judge that the charges were false did the judge appoint counsel for Suzanne.²⁵¹ The attorney was able to arrange for Suzanne to enter an independent living situation.²⁵² Nonetheless, Suzanne subsequently remained in DHS custody for nearly a year and was only discharged after her eighteenth birthday.²⁵³

Applying *Bounds*, the First Circuit in *Germany* endorsed the district court's view that

[a]n individual certainly has at least as strong a need to know the key facts of his or her case [as to know the applicable law] in order to determine whether a colorable claim exists. Indeed, failure to disclose facts which are essential to an incarcerated individual's

241. See Spanbauer, *supra* note 188, at 58-60.

242. *Id.* at 17 n.6.

243. 868 F.2d 9, 16 (1st Cir. 1989).

244. *Id.* at 12. Suzanne pled delinquent and initially received probation under DHS custody. *Id.* Probation was revoked after approximately six months. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 13.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

claim for relief may be more effective in denying access to the courts than destroying court papers or limiting access to the mail.²⁵⁴

The First Circuit held that Suzanne had a right of access to the courts and that under *Bounds* such access must be “‘adequate, effective, and meaningful.’”²⁵⁵

The court rejected the state’s claim that *Bounds* was in apposite because Suzanne was not a prisoner and instead emphasized that “she was at all times in DYS custody pursuant to an adjudication of delinquency.”²⁵⁶ Custody, the *Germany* court ruled, created a “special relationship” that in turn prompted “a duty to take affirmative steps to ensure [Suzanne’s] continuing right of access to the courts.”²⁵⁷ The court stressed that, far from diminishing the right of access, Suzanne’s age reinforced her rights:

The fact that [Suzanne] was a minor could only serve to heighten this responsibility. . . .

. . . .

. . . [Her] status as a juvenile offers no excuse. . . .

Indeed, custodians of a minor may well have a *greater* obligation to take action to ensure the minor’s ‘meaningful access’ to the courts than do the custodians of an adult inmate, because of the minor’s greater reliance on the correctional system for care and protection.²⁵⁸

Although *Germany* did not directly concern availability of counsel, a reading of the case in the context of other opinions on the right of access supports a right to appointment of counsel to help pursue claims on behalf of minors who are held in a variety of custodial circumstances.

All three decisions analyzing the right of access as it applies to minors—*Morgan*, *Germany*, and *John L.*—concerned children in the formal custody of the state. A limitation to the context of formal custody, however, would unnecessarily narrow the holdings of the three cases. If all children are always in some form of custody, as the Supreme Court has noted,²⁵⁹ then all children should be able to assert a claim for affirmative assistance in pursuing access to courts for meritorious civil claims. For purposes of this analysis, the fact that the child is in custody is more important than the identity of the particular custodian. Custody impairs access to the courts, and the affirmative obligation to facilitate access falls on the state, regardless of whether

254. *Germany v. Vance*, 673 F. Supp. 1143, 1149 (D. Mass. 1987), *vacated and remanded*, 868 F.2d 9 (1st Cir. 1989).

255. *Germany v. Vance*, 868 F.2d 9, 15 (1st Cir. 1989) (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1977)).

256. *Id.* at 14 n.7.

257. *Id.* at 15.

258. *Id.* at 15-16.

259. *Schall v. Martin*, 467 U.S. 253, 265 (1983).

the state or an individual adult is the custodian. As the First Circuit emphasized in *Germany*, custody and youth combine to heighten a social responsibility to promote meaningful access to the courts.²⁶⁰

Therefore, even assuming that the Sixth Circuit was correct in *John L.* regarding the limitations on the scope of the right of access,²⁶¹ all children would still have access to claims for potential litigation involving their constitutional rights, including rights stemming from protected liberty interests. Children, as a group, are inexperienced, have less education than the average adult, and usually lack access to lay writ writers when they perceive their interests as diverging from those of their parents. Furthermore, they are unlikely to be able to proceed competently on a pro se basis. Children, as a group, "are always in some form of custody."²⁶² Therefore, the precedents involving the rights of prisoners suggest that the state may be required to provide all children with affirmative assistance to pursue their meritorious civil claims, including assistance in the form of appointed counsel.

V. LAWYERS APPOINTED FOR CHILDREN SHOULD SERVE AS ATTORNEYS, NOT AS A GUARDIANS *AD LITEM*

In *Powell v. Alabama*,²⁶³ the Supreme Court emphasized that the right to counsel is critical to being heard in court—especially for the most vulnerable litigants:

The right to be heard would be, in many cases, of little avail, if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.²⁶⁴

This basic principle from criminal law extends logically to children because of their lack of both experience and advanced education.

Regardless of the mechanisms used to realize meaningful access to the courts, one unifying theme emerges from *Bounds* and its progeny—legal assistance allows the prisoner to express his or her own claims and views to the court. The role of any intermediary between the prisoner and the court is limited to assessing whether the merits of a proposed claim pass the threshold requirements to survive a challenge based on frivolity. In no instance has a court proposed that the independent judgment of an attorney, paralegal, or law student be substituted for that of a prisoner pursuing a claim. Of course, as in all

260. See *Germany*, 868 F.2d at 15.

261. See *supra* notes 233-39 and accompanying text.

262. *Schall*, 467 U.S. at 265.

263. 287 U.S. 45 (1932).

264. *Id.* at 68-69.

modes of counseling, legal advisors should offer opinions and alternatives for consideration by the counselee.²⁶⁵

Where children are concerned, however, courts and commentators too frequently collapse the roles of attorneys and guardians *ad litem*.²⁶⁶ The differences in these roles should be stark. Attorneys are bound by professional standards that require them to pursue "the wishes and objectives of the child where the child is capable of making considered decisions in his [or her] own interest."²⁶⁷ The guardian *ad litem*, in contrast, "presents an independent voice in the litigation, and is charged with protecting the child's best interest [as the guardian understands it] rather than the child's viewpoint."²⁶⁸

265. James K. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 Harv. C.R.-C.L. L. Rev. 565, 589 (1976) (suggesting and perhaps going too far in doing so, that the attorney "should be able to attempt to persuade the child that the attorney's conception of the child's best interest is correct"). Practitioners tend to believe that most children will accept the advice of an attorney who discussed the alternatives with them. See Ann M. Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases* 49 n.52 (1993) (discussing informal interviews in which 45 of 47 teenagers said they would accept advice of lawyer that conflicted with their own preferences if they believed that attorney cared about them). The same may well be true of many adult clients.

266. See Haralambie, *supra* note 265, at 2-14 (discussing the frequent role confusion in practice).

267. Mark Hardin, *Guardians Ad Litem for Child Victims in Criminal Proceedings*, 25 J. Fam. L. 687, 690 (1986-87) (citing Juvenile Justice Standards, Standards Relating to Counsel for Private Parties, Standard 3.1(b) (1980); Lawyer's Manual on Professional Conduct 31:601-08 (1986); Model Code of Professional Responsibility EC 7-12 (1980); Model Rules of Professional Conduct Rule 1.14 (1983); *In re Genusa*, 381 So. 2d 504 (La. 1980); Ariz. State Bar, Ethics Op. 86-13 (1986)); see also *Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 Fam. L.Q. 375, § I.A-1 (1995) [hereinafter *Proposed Standards*] ("[C]hild's attorney' means a lawyer . . . who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.").

Difficult questions concerning who should assess the child's capacity, how capacity should be determined, and to what extent the wishes of a child with borderline capacity should be considered are beyond the scope of this Article, but are addressed elsewhere in this issue and in other works. See, e.g., Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 Fam. L.Q. 287, 320 (1983) (recommending that lawyers should represent a "capable" child client's wishes in a protection proceeding and proposing that lawyers should presume that children age seven and older are capable); Robyn-Marie Lyon, Note, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 Cal. L. Rev. 681, 693, 700-01, 706 (1987) (arguing that attorneys should take direction from a minor client if the minor is competent to give such direction); Katherine H. Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 Cardozo L. Rev. 1523, 1562-63 (1994) (discussing the widespread confusion concerning the role of appointed counsel for children and the distinctive roles of attorney and guardian *ad litem* even among proponents of independent representation of children).

268. Hardin, *supra* note 267, at 689; see also *Proposed Standards, supra* note 267, § I.A-2 (stating that a guardian *ad litem* shall "protect the child's interests without being bound by the child's expressed preferences").

The applicable professional standards require attorneys serving as attorneys to advocate the competent client's position as defined by the client—including child clients.²⁶⁹ As summarized in one recent article, "Most recent sets of Standards seem to advance a model of representation that is substantially identical to that for an unimpaired adult when the child is able to give direction to the attorney"²⁷⁰ Even the Standards promulgated by the American Academy of Matrimonial Lawyers for proceedings involving custody and visitation, which are premised on the idea that neither counsel nor guardians *ad litem* should be routinely appointed for children in such proceedings, state that where lawyers are appointed, unimpaired clients of any age have the right to set the goals of the representation.²⁷¹ Many experts agree that:

[A] lawyer appointed or retained to serve a child in a legal proceeding should serve as the child's lawyer[,] . . . not . . . as the child's guardian ad litem. . . . The lawyer for a child who is not impaired . . . must allow the child to set the goals of the representation as would an adult client.²⁷²

Some, however, worry about allowing an attorney to advocate a child's viewpoint when the attorney perceives the viewpoint to be wrongheaded. The basis for this concern includes role identification with parents, distrust of children, a sense that children are inherently less "rational" than adults, and an implicit acknowledgment that even adults, with their additional life experience, do not always accurately identify their own best interests, much less act on them.²⁷³ Attorneys, however, may not be competent to substitute their own judgment for that of their clients. Attorneys may lack specialized training or expertise in assessing the variety of emotionally charged issues likely to come into play in litigation involving a child's life choices. These issues include choosing a preferred guardian, preferences regarding visitation, the need for medical or psychiatric care, reproductive choice;

269. See Model Rules of Professional Conduct Rules 1.2(a), 1.14(a) (1983); Model Code of Professional Responsibility EC 7-7 (1981).

270. Shepherd & England, *supra* note 15, at 1941; see also *id.* at 1934-41 (reviewing professional standards including the Institute for Judicial Administration/American Bar Association Juvenile Justice Standards (1979), the ABA Model Code of Professional Responsibility (1969), and the ABA Model Rules of Professional Conduct (1983)).

271. American Academy of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings* Standards 1.1, 2.4 (1995).

272. See *Recommendations of the Conference*, *supra* note 21, part I.

273. See generally Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents and Attorneys*, 7 Notre Dame J.L. Ethics & Pub. Pol'y 423 (1993) (arguing that parents have a right to direct the course of their child's representation and proposing that the Model Rules be amended accordingly).

and the long term practical effects and psychological implications of such choices.²⁷⁴

Perhaps even more important, the controversies that trigger this analysis of the attorney's role arise in the context of a well-established justice system characterized by a belief in the adversary system. The lawyer's role is to tell the client's story as persuasively as possible, not to make ultimate decisions. The role of decision maker is reserved for the trier of fact. The lawyer can thus rest easy in the knowledge that, at least in theory, if both sides present their best arguments to the court, the trier of fact will be better equipped to render an intelligent decision.

The presence of counsel minimizes the risk that a court would dispense "assembly-line justice."²⁷⁵ The cursory nature of proceedings for lesser offenses, which the Supreme Court has noted often are "characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court," do not diminish the need for counsel, but make it even more pressing.²⁷⁶ If, as the Supreme Court has held, dramatic improvements result when attorneys are provided for adults,²⁷⁷ it is even more important to provide children with counsel to ensure that their voices are heard before critical decisions concerning them are made.

Ideally, appointment of counsel for the child would result in the court hearing well-reasoned arguments for every viewpoint. The court would then apply the appropriate legal standard. Our justice system rests on the assumption that the adversary system encourages the best expression of each position. Based on that foundation principle, and knowing that the judge will decide the matter, a lawyer for a child may pursue the child's preferences without undue angst.²⁷⁸

274. Attorneys' general training fails to prepare them for the exigencies of representing children, including communication with child clients. Furthermore, attorneys frequently are confronted with clients who communicate indirectly or not at all regardless of their competency. Again, representation of preverbal clients raises separate issues.

275. *Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972). Of course, this premise depends on the idealistic hope that children will receive more than "assembly line" representation from properly trained lawyers with reasonable case loads.

276. *Id.* at 35-36 (quoting William E. Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 Legal Aid Brief Case 151, 152 (1970)).

277. *See id.* at 36.

278. The *Proposed Standards*, *supra* note 267, part I.B-4., recognize that circumstances may arise in which the attorney's assessment of the child's best interests differ to such an extent with the view expressed by the child that the attorney perceives a conflict. Even under such circumstances, the Standards require the attorney to continue to press the child's case, but allow the attorney to "request appointment of a guardian *ad litem* [to serve in addition to the attorney] *without revealing the basis for the request.*" *Proposed Standards*, *supra* note 267, § I.B-2 (emphasis added).

CONCLUSION

The questions of when and why counsel should be appointed for children lie at the heart of all dialogue about ethical issues in representing children.²⁷⁹ This Article has explored those questions in light of existing jurisprudence governing adults' rights to counsel in the civil context.

The presumption of vulnerability has been central to jurisprudence about children. Blackstone drew on an important—but limited—truth in observing that children's capacities differ in various respects from those of adults. Up through our own time, courts have focused on various aspects of that "difference"—children's susceptibility to victimization; their lack of experience, fully developed intelligence and education; and their limited capacity to grasp legal rights and the consequences of waiving them. Whatever role the law has played in constructing that understanding of childhood, those vulnerabilities cannot be denied, and are more than simple social constructions.

But those vulnerabilities should not be understood only as disabilities that justify outsider status and voicelessness. To the contrary, as a rich group of cases holding that counsel should be appointed for adults who are unable to pursue their own claims attests, the vulnerabilities of children support the appointment of counsel for children who are incapable of making considered decisions. Such appointments are especially vital when liberty interests are at stake. Appointing counsel is also crucial when the court suspects that the interests of parents and children may not coincide. In certain respects, the analogy of child to prisoner is more metaphoric than literal. But to the extent that the Supreme Court has held that the status of a child resembles that of a prisoner, and that children in fact lack certain personal freedoms, the child's claim to appointed counsel may rise to the level of a constitutional claim to affirmative assistance to achieve meaningful access to the courts.

Recognizing children's need for counsel in civil litigation promotes both procedural and substantive justice. This Article has focused primarily on the normative values served by appointing counsel for children. But the instrumental results of expanding the voice of the vulnerable may also be significant. Appointing counsel allows the vulnerable to present their best arguments to decision makers whose authority is backed by the coercive power of the state. It reduces the risk of an arbitrary decision. Appointment of counsel increases the likelihood of an outcome consistent with the child's expressed preferences by partially redressing the imbalance of power between children and the adults who make decisions about them. Appointing counsel thus simultaneously enhances the likelihood of a just decision and the integrity of the justice system.

279. See *Recommendations of the Conference*, *supra* note 21, part VIII.

In contrast to children who conclude that a judge made a critical decision about their lives without respecting their views and preferences, children who can express their views through counsel may take solace in the rationality of the system that determined their fate—even if the decision is not the one they sought. Children may thus resemble prisoners in a respect not yet discussed; evidence suggests that prisoners are more likely to accept undesirable regulations following a process in which they have participated.²⁸⁰ The child who has been represented by a lawyer who has heard and communicated the child's views may cooperate more fully with the court's decree, and render the decree more effective.²⁸¹ But the child who feels that the state made critical decisions about his life without respect for his views will suffer from the additional sting of arbitrariness.

When children correctly perceive that they are unnoticed and unheard, the scars run deep. The narrator of Høeg's *Borderliners*, who grew up as a ward of the state in a procession of residential facilities, vividly captures the wounds that result when children pass voiceless through the institutions that determine their fate:

Time had wrapped a membrane around [the adults]. They were . . . pressed for time and totally unaffected by our meeting. . . .

. . . Time has wrapped itself around the adults—with its haste, its dread, its ambitions, its bitterness, and its long-term goals. They no longer see us properly, and what they do see they have forgotten five minutes later.

While we, we have no skin. And we remember them forever. . . .

. . . We remember[] every facial expression, every insult and word of encouragement, every casual remark, every expression of power and weakness. To them, we were everyday, to us they were timeless, cosmic, and overwhelmingly powerful.²⁸²

As Høeg's narrator suggests, the reasons for assuring that children have ample voice transcend considerations of legitimacy and efficacy. Voice cannot offer a perfect antidote to the existential vulnerability that children experience. But voice is an essential element of the sense of autonomous self that is critical in a society that rests on human rights and mutual respect. In this sense, expanding children's right to counsel in the civil context furthers two classical dimensions of

280. *Wolff v. McDonnell*, 418 U.S. 539, 588-89 (1974) (Marshall, J., concurring in part and dissenting in part) (citing *Palmigiano v. Baxter*, 487 F.2d 1280, 1283 (1st Cir. 1973); *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972) (“[F]air treatment . . . will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.”)).

281. See *Parham v. J.R.*, 442 U.S. 584, 636 n.22 (1979) (Brennan, J., concurring in part and dissenting in part) (noting that “[c]hildren who felt that they have received a fair hearing may be more likely to accept the legitimacy of their confinement, acknowledge their illness, and cooperate with those attempting to give treatment” (quoting, *inter alia*, *O'Connor v. Donaldson*, 422 U.S. 563, 579 (1975) (Burger, C.J., concurring))).

282. Høeg, *supra* note 26, at 161.

liberty. Appointment of counsel protects all individuals (and especially the weak) against arbitrary power—whether wielded by the state or by private persons assisted by the threat of state enforcement. More positively, it affirms the personhood of all members of society. Ultimately, society's attentiveness to the vulnerable defines the boundaries of our commitment to the living democratic tradition.