

A Child's Right to Counsel in Removal Proceedings

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INTRODUCTION

The last eighty years have seen the right to court-appointed counsel grow from a statutory creation into a constitutional guarantee—one that now applies

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in a variety of contexts, criminal and civil. This growth was catalyzed by two factors: the threat of particularly severe forms of deprivation, and the vulnerability of defendants who are especially incapable of representing themselves. The Supreme Court has repeatedly been willing to recognize the right in cases presenting one or both of these factors—sometimes holding that it applies to broad categories of cases in which the factors are usually present; other times requiring a case-by-case assessment of the equities in a given controversy.

Despite expansion of the right in various contexts over the past decades, the right to appointed counsel in immigration proceedings is still nothing more than an unrealized possibility expressed in occasional dicta of the federal circuit courts. Though it is not uncommon for the due process rights of immigrants to lag many decades behind the status quo, the total absence of a right to appointed counsel in removal proceedings is striking because the factors that tend to catalyze development of the right are often present in immigration cases—indeed, often to an even greater extent than in contexts where the right has already been recognized. A large percentage of immigrants in removal proceedings are, because of age or unfamiliarity with the law, completely unable to represent themselves. And they face severe liberty deprivations: possible prolonged incarceration during proceedings, and deportation when proceedings are over. This remarkable failure to recognize the right may be due to the fact that deportation is in many ways *sui generis*—for more than a century, the Court has been caught in the paradoxical position of insisting that deportation is not punishment, while nevertheless acknowledging that deportation is often worse than any punishment the courts can impose. As a result, lower courts have had trouble conceptualizing and characterizing the scope of the liberty deprivation that occurs upon deportation—which, in turn, has obfuscated the urgency of the need for counsel. It may also stem from the fact that immigrants are uniquely unprotected in the political process, and therefore unable to effectively advocate for enhanced rights through legislation. Whatever the causes, the implications are clear. A recent study showed that detained respondents in immigration proceedings in New York were five times as likely to lose their cases when they were not represented by counsel.¹ Given that roughly fifty percent of all respondents in removal proceedings are *pro se*, that makes for a tremendous amount of erroneous deprivations.²

1. STUDY GRP. ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 1 (2012), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf; see also Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 376 (2007) (finding that represented asylum applicants “win their cases at a rate that is about three times higher than the rate for unrepresented [applicants]”).

2. See EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2011 STATISTICAL YEAR BOOK G1 (2012) [hereinafter EOIR Year Book], available at

The focus of this Note is the inner core of this glaring gap in the right to appointed counsel—a group of particularly vulnerable respondents who are almost categorically unable to represent themselves adequately in removal proceedings, and who often have a right to appointed counsel when faced with other sorts of proceedings under the law: children. Due to their special vulnerabilities, children have been a crucial catalyst in the development of the right to counsel in civil proceedings: they now have a right to appointed counsel in myriad contexts, including, through the Due Process Clause, in all civil delinquency proceedings, and, under the authority of state law, in child welfare matters, child support matters, paternity matters, adoptions, judicial bypass proceedings in connection with abortions, and mental health commitment proceedings.³ But when faced with deportation, children have no right to representation by counsel, even when they are unaccompanied, and even though they face deprivations that are at least as severe as those that have supported recognition of the right in other contexts.

The occasion for renewed focus on this gap in representation is twofold. First, the fiftieth anniversary of *Gideon v. Wainwright*⁴ has ushered in a wave of commentary criticizing the criminal system for its failure to realize *Gideon*'s promise.⁵ Though a broad categorical right to counsel attaches to most criminal prosecutions, in practice this right is compromised by a severe overburdening of public defender offices, and by other aspects of criminal justice that stack the system heavily against indigent defendants.⁶ While these criticisms are justified, they would be incomplete without an assessment of how selectively and seemingly arbitrarily the principles of *Gideon* have been applied across practice areas; indigent children in removal proceedings are the most glaring instance of that arbitrariness.

Second, recent developments in (1) procedural due process, (2) ineffective-assistance-of-counsel doctrine, and (3) the statutory rights of immigrant children in removal proceedings have tipped the already skewed *Mathews v. Eldridge*⁷ scales even more clearly in favor of recognizing a child's right to representation in removal proceedings. Within the last five years, a noncitizen's interest in remaining in the United States has assumed enhanced constitutional

<http://www.justice.gov/eoir/statspub/fy11syb.pdf>. In 2011, there were just shy of 150,000 immigration court proceedings completed in which the respondent did not have counsel. *See id.*

3. *See infra* Subpart II.C.

4. 372 U.S. 335 (1963).

5. *See, e.g.,* Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After Gideon*, ATLANTIC (Mar. 13, 2013), <http://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433>.

6. *See id.*

7. 424 U.S. 319 (1976). Since it was decided, *Mathews* has come to govern the applicability of procedural due process rights in the civil context, including right-to-counsel cases. *See infra* Subpart III.

significance; the *Mathews v. Eldridge* test as it applies in right-to-counsel cases has been refined in a way that favors immigrants in removal proceedings; Congress has enacted a statute that creates a system of heightened protections for children in removal proceedings, including a mandate that the government “ensure, to the greatest extent practicable,” that unaccompanied children receive appointed counsel;⁸ and studies have been conducted on the value of counsel in enhancing the accuracy of immigration proceedings. Together, these developments urge a reconsideration of the complete lack of guaranteed counsel in immigration proceedings involving children. Indeed, in a sign that the tides may in fact be turning, a lower federal court recently held for the first time ever that certain respondents in removal proceedings were entitled to representation at the government’s expense.⁹

Part I of this Note provides brief background on the current state of the appointment doctrine, with a focus on immigration proceedings, on the one hand, and civil proceedings involving children, on the other. Part II is a historical analysis of the development of the appointment doctrine in non-immigration contexts. Situating the lack of appointed counsel for immigrant children in its proper historical context highlights how arbitrary and egregious this gap in representation is. Part III then focuses on the doctrinal basis for appointing counsel for immigrant children, with emphasis on the recent developments mentioned above. Finally, Part IV answers a question that must inevitably be addressed in any challenge to a child’s lack of representation: is it necessary to appoint counsel, rather than, or in addition to, some other sort of representative, such as a guardian ad litem or a parent or relative?

I. BACKGROUND

Immigrants in removal proceedings have a statutory right to be represented by counsel at no expense to the government.¹⁰ The Supreme Court has repeatedly rejected the notion that deportation is punishment, and the Sixth Amendment right to counsel is therefore not applicable in removal proceedings.¹¹ Immigrants do, however, have procedural due process rights,¹²

8. 8 U.S.C. § 1232(c)(5) (2012). Indeed, the immigration reform bill passed by the Senate on June 27, 2013 contains a provision requiring appointment of counsel for unaccompanied children. See An Act to Provide for Comprehensive Immigration Reform and for Other Purposes, S. 744, 113th Cong. § 3502(c) (2013). At the time this Note went to press, the status of comprehensive immigration reform was still uncertain. However, even if this provision never becomes law, the existence of a legislative proposal recognizing the need for counsel for at least some children demonstrates the urgency of the issue and the fact that it is entering into our contemporary conscience, which is a crucial factor in the due process inquiry.

9. See *Franco-Gonzales v. Holder*, 828 F. Supp. 2d 1133, 1149-50 (C.D. Cal. 2011).

10. 8 U.S.C. § 1362 (2012).

11. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

12. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (discussing due process

and four circuits have noted in various dicta that the failure to appoint counsel could, under the right circumstances, amount to a due process violation. The Sixth Circuit was the first to do so. In *Aguilera-Enriquez v. INS* it ruled that “[w]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government’s expense. Otherwise, ‘fundamental fairness’ would be violated.”¹³ By the time *Aguilera-Enriquez* was decided, the Supreme Court had already prescribed similar case-by-case approaches to the right in other contexts—and, indeed, found that this approach called for appointing counsel in a multitude of cases involving private parties who were especially incapable of representing themselves.¹⁴ It was by no means inevitable, then, that the *Aguilera-Enriquez* dictum would receive no traction whatsoever in the Sixth Circuit or any of the immigration courts below it—though that is in fact its unfortunate legacy. The same fate later befell the pronouncements in three other circuits to the same effect.¹⁵ Though there is in these circuits a conceivable basis for appointing counsel to indigent immigration defendants under the Due Process Clause, the case-by-case approach is therefore a hollow one in immigration proceedings, and removal respondents have effectively no constitutional right to appointed counsel under any circumstances.

By contrast, in non-immigration cases involving children, the appointment doctrine is comparatively well developed. Though delinquency proceedings are decidedly civil,¹⁶ and have as their primary purpose rehabilitation rather than

rights in the exclusion context); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 (1953) (discussing due process rights in the detention context); *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) (discussing due process rights in the exclusion and removal contexts).

13. 516 F.2d 565, 569 n.3 (6th Cir. 1975).

14. See, e.g., *Wade v. Mayo*, 334 U.S. 672, 683-84 (1948) (“There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. . . . Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.”). But see, e.g., *Betts v. Brady*, 316 U.S. 455, 473 (1942) (holding that the denial of appointed counsel could, but on the facts of this case did not, deprive the defendant of his due process rights).

15. See *Michelson v. INS*, 897 F.2d 465, 468 (10th Cir. 1990) (“While a petitioner is entitled to due process in a deportation proceeding, due process is not equated automatically with a right to counsel. The fifth amendment guarantee of due process speaks to fundamental fairness; before we may intervene based upon a lack of representation, petitioner must demonstrate prejudice which implicates the fundamental fairness of the proceeding.”) (internal citations omitted); *Ruiz v. INS*, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986) (“The fifth amendment guarantee of due process applies to immigration proceedings, and in specific proceedings, due process could be held to require that an indigent alien be provided with counsel. . . .”), *withdrawn*, 838 F.2d 1020 (9th Cir. 1988) (en banc); *Barthold v. INS*, 517 F.2d 689, 690-91 (5th Cir. 1975) (“It is clear that any right an alien may have [to court-appointed counsel] is grounded in the fifth amendment guarantee of due process rather than the sixth amendment right to counsel. Deportation proceedings are civil, not criminal, in nature. Therefore, we analyze the proceedings in terms of their fundamental fairness on a case-by-case basis.” (internal citations omitted)).

16. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971) (“[T]he juvenile court

punishment, children have for more than four decades had a categorical due process right to counsel when facing delinquency charges.¹⁷ Some lower courts have also found that children have a right under the state and/or federal constitutions to appointed counsel in dependency proceedings,¹⁸ as have the majority of state legislatures.¹⁹ And children may have a statutory right to counsel when facing commitment proceedings,²⁰ or when they are involved in divorce custody proceedings.²¹ Indeed, fifteen years before *Gideon*, the Supreme Court recognized that particularly young criminal defendants may have a constitutional right to appointed counsel on the basis of the specific hurdles to self-representation posed by youth or lack of experience.²² From a system-wide perspective, then, being a child clearly enhances the likelihood of receiving appointed counsel.

The recognition of a child's right to counsel in different contexts is usually based in a realization that 1) children are especially incapable of representing themselves, and 2) the consequences of erroneous deprivations are often "more tragic when children are involved," because "childhood is a particularly vulnerable time of life."²³ Though these factors put children on decidedly different footing than adults in the right-to-counsel calculus across various civil

proceeding has not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment . . .").

17. See *In re Gault*, 387 U.S. 1, 16, 41 (1967) (discussing the rehabilitative purpose of delinquency proceedings, and holding that children in delinquency proceedings have a right to appointed counsel).

18. See, e.g., *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005) (holding that the due process clause requires a right to counsel in deprivation and termination-of-parental-rights proceedings); *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976) (holding that the due process clause requires appointment of independent counsel in neglect proceedings); *In re Jamie T.T.*, 599 N.Y.S.2d 892, 894-95 (App. Div. 1993) (finding a child has a due process right to counsel in a custody proceeding following allegations of sexual abuse). For the purposes of this Note, "dependency proceedings" refers to proceedings to adjudicate allegations of abuse, neglect, or improper care by parents or guardians.

19. A 2009 study found that thirty-seven state legislatures have required that counsel be appointed for children in at least some dependency proceedings. See FIRST STAR & CHILDREN'S ADVOCACY INST., A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN 22-23 (2d ed. 2009), available at http://www.cachildlaw.org/misc/final_rtc_2nd_edition_lr.pdf.

20. See, e.g., ARIZ. REV. STAT. ANN. § 36-529(B) (2012) (requiring that counsel be appointed for all persons facing civil commitment proceedings for mental disorders); ARK. CODE ANN. § 20-47-212(a) (West 2012) (requiring appointment of counsel for persons facing involuntary commitment if it appears necessary to the court).

21. See, e.g., OR. REV. STAT. ANN. § 107.425(6) (West 2013) (creating a right to counsel for children involved in divorce proceedings); VT. STAT. ANN. tit. 15, § 594 (West 2013) (permitting courts to appoint counsel for children involved in divorce proceedings, and requiring that they appoint counsel when children are called as witnesses in such proceedings).

22. See *Wade v. Mayo*, 334 U.S. 672, 684 (1948); *Uveges v. Pennsylvania*, 335 U.S. 437, 441 (1948).

23. *Parham v. J.R.*, 442 U.S. 584, 627-28 (1979) (Brennan, J., dissenting).

contexts, their recognition has not been extended in any meaningful way into the realm of deportation proceedings, where children are on the same constitutional footing as adults, and are also without any statutory guarantee of representation. The result, of course, is that many children facing removal are unrepresented.²⁴ Some of these children are also unaccompanied²⁵—and therefore without the assistance of family or legal guardians. Pro bono organizations have managed to provide counsel for such children in many cases, but this private sector solution is far from comprehensive.²⁶ The rest of this Note serves to demonstrate that this gap in the law's otherwise broad willingness to recognize that children have a greater need for counsel is inexplicable as a matter of history, policy, or doctrine, and therefore in urgent need of reconsideration.

II. HISTORY

The historical context of the modern appointment doctrine highlights the principles that have guided—and hindered—development of the right to counsel in different areas of the law. History is of particular relevance in assessing the scope of the modern right to counsel because of the special nature of the constitutional guarantee upon which the right is based. Procedural due process is one of the least fixed and most flexibly evolving constitutional concepts. It tends to “absorb[] . . . [the] social standards of a progressive society,” and it therefore reflects and builds upon historical trends outside of the Constitution.²⁷ For this reason, historical and contemporary practices are

24. See VERA INST. OF JUST., *THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM* 24 (2012) [hereinafter VERA REPORT] available at <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf> (noting considerable gaps in the legal representation of unaccompanied children in removal proceedings).

25. For the precise legal meaning of the term “unaccompanied,” see *infra* note 87 and accompanying text.

26. See Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 258 (2010) (“The availability of nongovernment organizations that provide legal services [to unaccompanied children] is no substitute. Although other legal service providers can assist, their resources are often insufficient. Immigration detainees are often located in rural areas where pro bono services are not readily available, such as along the Texas border where legal resources are scarce. In addition, some children’s cases are not accepted by pro bono counsel either because their cases require swift and immediate action or because their cases involve considerable complexities. Thus, the government will have to directly fund provision of counsel if these gaps are to be addressed.” (footnote omitted)).

27. *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring). Though the “fundamental fairness” approach of *Griffin* and other pre-*Mathews* cases has in a sense been superseded by the more rigorous *Mathews* balancing approach to procedural due process, see *infra* Part III, there remains, even in post-*Mathews* cases, an emphasis on flexibility and historical and contemporary notions of fairness. See, e.g., *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24-25 (1981) (applying *Mathews* balancing to determine the scope

unusually important predictors of where and when the right to counsel will attach.²⁸ And history's clearest lesson is that society harbors a fundamental aversion to proceedings that pit a competent repeat player against an untrained layperson. It is this characteristic of enforcement proceedings in a given area of law—viz., the extent to which they possess a binary adversarial quality—that predicts more than any other whether the right to appointed counsel will attach. And proceedings are viewed as especially lopsided when the defendant or respondent in enforcement proceedings possesses special characteristics that make her particularly incapable of self-representation.

A. The Source of the Right in the Criminal Context

Early English common law provided for virtually no assistance of counsel to criminal defendants until the late seventeenth century, when the Treason Act of 1695 granted a series of protections to defendants accused of treason, including the right to be represented by counsel.²⁹ From this point until 1836, counsel was permitted to criminal defendants only in misdemeanor and treason cases.³⁰ Some have suggested that the right to counsel was limited to these sorts of cases because defendants accused of misdemeanors or treason were prosecuted in an adversarial setting,³¹ whereas in felony cases “the court itself was counsel for the prisoner.”³²

A key difference between the English and colonial systems was that the colonies generally employed public prosecutors, who, as repeat players in the criminal system, had a significant advantage over criminal defendants.³³ For this reason, as one commentator put it, the colonies came to “emphasize[] the right to counsel as a guarantee against prosecutorial privilege and government overreaching.”³⁴ When the Bill of Rights was adopted, Virginia, Delaware, Massachusetts, Pennsylvania, North Carolina, and New Hampshire all had statutes that provided for some right to counsel for criminal defendants;³⁵ the Maryland, Massachusetts, New Hampshire, New York, and Pennsylvania state

of the right to appointed counsel in child welfare matters, but noting that “‘due process’ has never been, and perhaps can never be, precisely defined,” and that “[u]nlike some legal rules . . . due process is not a technical conception with a fixed content unrelated to time, place and circumstances.” (internal quotation marks omitted).

28. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (looking to history and contemporary practice to determine what due process requires).

29. Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 40 (1991).

30. Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1638 n.6 (2003).

31. See *id.*

32. See *Powell*, 287 U.S. at 61.

33. Metzger, *supra* note 30, at 1638-39.

34. *Id.* at 1639.

35. *Id.* at 1640.

constitutions provided all criminal defendants with a right to counsel,³⁶ and Congress had enacted a statute that provided for *court-appointed* counsel for defendants charged with capital crimes.³⁷

The first major development in modern American right-to-counsel jurisprudence was *Powell v. Alabama*, a 1932 case in which the Supreme Court held that representation by counsel is “so vital and imperative that the failure of [a] court to make an effective appointment of counsel [i]s . . . a denial of due process within the meaning of the Fourteenth Amendment” when a defendant is faced with capital charges.³⁸ The crux of *Powell*'s rationale was that a criminal proceeding that pits an experienced prosecutor against a lay defendant with “no skill in the science of the law” is lopsided, and has the potential to severely prejudice the defendant, who “lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one.”³⁹ Thus:

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law⁴⁰

Powell found its limited but categorical right in the Fourteenth Amendment. The Court's next major decision after *Powell* was *Johnson v. Zerbst*, which recognized a right under the Sixth Amendment to court-appointed counsel in all federal criminal prosecutions.⁴¹ Its rationale was much like the rationale in *Powell*: lay defendants are generally incapable of mounting their own defense, and cases are unfairly lopsided if “the prosecution is presented by experienced and learned counsel,” while the defense is presented by an “untrained layman.”⁴²

Though after *Zerbst* and *Powell* the right to counsel in criminal proceedings appeared to be on a trajectory toward expanded categories of coverage, the Court diverged from this path in 1942 in *Betts v. Brady*, when it declined to overturn the conviction of a Maryland man for robbery in the face of his objection that denial of court-appointed counsel rendered proceedings against him fundamentally unfair.⁴³ Since the conviction had occurred in state court, the *Betts* Court was interpreting the Fourteenth Amendment's Due Process Clause, which, it held, does not “embod[y] an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice

36. *Powell*, 287 U.S. at 61.

37. Bruce R. Jacob, *Memories of and Reflections About Gideon v. Wainwright*, 33 STETSON L. REV. 181, 187 (2003).

38. 287 U.S. at 71.

39. *Id.* at 69.

40. *Id.* at 71.

41. 304 U.S. 458, 463 (1938).

42. *Id.* at 463.

43. 316 U.S. 455, 472-73 (1942).

accorded a defendant who is not represented by counsel.”⁴⁴ The Court found enough variation in the practices of the Framers and in contemporaneous law governing the right to counsel for it to conclude that “appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy.”⁴⁵ It supplemented this separation-of-powers rationale with federalism concerns: “[t]o deduce from the due process clause a rule binding upon the States in this matter would be to impose upon them . . . a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction.”⁴⁶ Thus, “while want of counsel in a particular case may result in a conviction lacking in . . . fundamental fairness,” the case at bar involved “no question” of the commission of the crime, and therefore did not implicate the Due Process Clause.⁴⁷

The *Betts* “special circumstances” approach, as it would come to be known,⁴⁸ governed the right to counsel for indigent defendants in non-capital state prosecutions for roughly two decades. During this period, states were able to resist federal imposition of a right to appointed counsel by finding the sorts of special circumstances requiring the appointment of counsel to be lacking in a given case.⁴⁹ At the same time, the Supreme Court overturned convictions under the *Betts* standard in the vast majority of non-capital right-to-counsel cases it heard during the *Betts* era. Thus, for example, in *Wade v. Mayo*, the Court acknowledged:

There are some individuals who, by reason of age, ignorance or mental capacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.⁵⁰

On multiple occasions a defendant’s youth or mental disability led the court to overturn state-court convictions for failure to appoint counsel.⁵¹ And even when the defendant possessed normal capacities, the presence of complicated legal issues in a given case could tip the scales in favor of the

44. *Id.* at 473.

45. *Id.* at 471.

46. *Id.* at 473.

47. *Id.* at 472-73.

48. *See, e.g.*, *Palmer v. Ashe*, 342 U.S. 134, 135 (1951).

49. *See* Kim Taylor-Thompson, *Tuning Up Gideon’s Trumpet*, 71 *FORDHAM L. REV.* 1461, 1472 (2003).

50. 334 U.S. 672, 684 (1948); *see also* *Uveges v. Pennsylvania*, 335 U.S. 437, 442 (1948) (finding that a seventeen-year-old sentenced to eighty years in prison should have been provided counsel before pleading guilty).

51. *See* *Massey v. Moore*, 348 U.S. 105, 108-09 (1954) (mental disability); *Palmer v. Ashe*, 342 U.S. 134, 136-38 (1951) (mental disability); *Wade*, 334 U.S. at 684 (youth); *Uveges*, 335 U.S. at 442 (youth).

right.⁵²

Though *Betts* is no longer good law, its legacy was to create a lasting rift in appointment doctrine between the categorical approach of *Powell*, according to which the Court assigns a per se right to appointed counsel in a given context based on the severity of the deprivation at stake, and the case-by-case approach, which calls for a totality-of-the-circumstances evaluation of the defendant's ability to represent himself. *Gideon* marked the Court's acceptance of the deprivation-focused categorical approach in the criminal context, but in civil cases the special circumstances approach is more common⁵³—especially now that the *Mathews v. Eldridge* balancing test governs the availability of procedural due process rights.

The transition from *Betts* to *Gideon* indicates also that the rights of particularly vulnerable defendants sometimes constitute the seeds from which a more robust categorical right to counsel later sprouts. In 1963, *Gideon* overruled *Betts* and replaced the special circumstances approach with a categorical right that was to attach in all felony prosecutions.⁵⁴ A significant reason for doing so was the Court's disagreement with the *Betts* majority's assessment of contemporaneous standards of fundamental fairness.⁵⁵ Twenty-two state attorneys general had filed a joint amicus brief in the case urging the Court to overturn *Betts* and adopt a categorical right to counsel in state criminal prosecutions—arguing mainly that contemporary state and federal practices indicated that a right to court-appointed counsel had become a widely accepted requisite of fundamental fairness.⁵⁶ The majority appears to have been particularly swayed by this brief.⁵⁷ Its significance lay not only in its content, but also in who its authors were: by advocating for a categorical right under the federal constitution, the attorneys general demonstrated a significant state-level acquiescence in the imposition of a federal right. This knocked the federalism-based objection to the right—which had carried the day in *Betts*—out of play. And for Justice Harlan in particular, who concurred in the judgment, it was precisely the *Betts* special circumstances test that facilitated entry of the right

52. See, e.g., *Chewning v. Cunningham*, 368 U.S. 443, 447 (1962) (finding that the charge of being a habitual criminal requires a right to counsel); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) (finding that a defendant has a right to counsel before pleading guilty to a capital offense); *Herman v. Claudy*, 350 U.S. 116, 122 (1956) (finding that the number, complexity, and seriousness of charges gave rise to a right to counsel); *De Meerleer v. Michigan*, 329 U.S. 663, 665 (1947) (finding that a fair hearing required a right to counsel because of the “serious and complicated” charge).

53. See, e.g., *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981). But see *In re Gault*, 387 U.S. 1, 41 (1966) (finding a categorical right to counsel in civil delinquency proceedings).

54. *Gideon v. Wainwright*, 372 U.S. 335, 342, 345 (1963).

55. See *id.* at 345.

56. See Brief for the State Government as Amici Curiae Supporting Petitioner, *Gideon v. Wainwright*, 372 U.S. 335 (1962), (No. 155), 1962 WL 115122.

57. See 372 U.S. at 345 (“Twenty-two States, as friends of the Court, argue that *Betts* was ‘an anachronism when handed down’ and that it should now be overruled. We agree.”)

into the contemporary conception of fundamental fairness:

[T]here have been not a few cases in which special circumstances were found in little or nothing more than the “complexity” of the legal questions presented, although those questions were often of only routine difficulty. The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts v. Brady* rule is no longer a reality.⁵⁸

In other words, special circumstances had become so pervasive that the doctrine already effectively recognized a categorical right.

The next decade saw *Gideon*'s categorical right expand. The high-water mark was *Argersinger v. Hamlin*, where the Court held “that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”⁵⁹ The Court reined in this holding somewhat in *Scott v. Illinois*, which held that the right to court-appointed counsel does not attach to prosecutions in which incarceration is *authorized by statute*, but not *imposed*.⁶⁰ But in the end, the categorical approach has carried the day in criminal law: a criminal defendant's right to counsel arises under the Sixth Amendment—either directly (in federal prosecutions) or through the Fourteenth Amendment Due Process Clause (in state prosecutions)—and attaches at the threat of loss of physical liberty, regardless of a defendant's circumstances.

The history of the right in criminal proceedings is also the history of a growing sense of the fundamental unfairness of adversarial proceedings in which a government attorney opposes a lay defendant—an awareness that is heightened when proceedings involve particularly incapable or vulnerable defendants. History also shows that faithfulness to the case-by-case approach over time can cause special circumstances to harden into fixed categories in which the right applies per se. There are, after all, few lay defendants capable of mounting an effective legal defense, regardless of natural ability; the case-by-case approach facilitates this realization.

B. The Development of the Right in the Civil Context: Delinquency

The history of the right to appointed counsel as it applies to children indicates similar trends: recognition of special disadvantages and vulnerabilities; gradual acceptance of the legislative status quo into the constitutional standard; and a strong presumption that counsel should be appointed in binary adversarial proceedings against a child, coupled with a burgeoning presumption running in the opposite direction when proceedings are not adversarial, or when they present not merely a binary opposition but a

58. *Id.* at 351 (Harlan, J., concurring) (footnote omitted).

59. 407 U.S. 25, 37 (1972).

60. 440 U.S. 367, 373-74 (1979).

multitude of competing interests.

In effect, youth is a special circumstance unto itself. The Court has recognized this fact in the criminal right-to-counsel context since at least 1948, when it decided *Wade v. Mayo*—a *Betts* era special circumstances case finding that a defendant had a right to appointed counsel by virtue of his age (he was not a minor, but he was still too young to effectively represent himself in a criminal prosecution).⁶¹ And it has implicitly affirmed this fact in the civil context, where children generally have a significantly broader constitutional right to counsel than adults.

Children were in fact the conduit through which the right to counsel first expanded into the civil context. Four years after *Gideon*, the Court held in *In re Gault* that children in delinquency proceedings have a categorical due process right to appointed counsel.⁶² Delinquency proceedings are an obvious and close counterpart to criminal proceedings, and in one sense *Gault* thus flowed quite directly from *Gideon*. But delinquency proceedings are distinct in that they are definitively civil—the Sixth Amendment right to counsel therefore does not apply.⁶³ One of *Gault*'s crucial legacies was thus to break down the distinction in right-to-counsel jurisprudence between criminal and civil proceedings.

To surmount this formal hurdle, the *Gault* majority emphasized the similarity in severity between incarceration for delinquency and imprisonment for committing a felony: “[a] proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.”⁶⁴ In this way, *Gault*'s right to counsel was precisely the sort of categorical, deprivation-focused right that had been recognized in *Gideon*. But even if *Gault*'s right was categorical, it proceeded also from the special circumstances of children—i.e., their unique inability to represent themselves:

The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every step in the proceedings against him.⁶⁵

Gault was therefore also an extension of the reasoning that carried the day in *Wade* and other cases in the *Betts* lineage—viz., that the right has heightened urgency where special disadvantages are involved.⁶⁶

61. 334 U.S. 672, 684 (1948).

62. 387 U.S. 1, 41 (1966).

63. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971) (“[T]he juvenile court proceeding has not yet been held to be a ‘criminal prosecution,’ within the meaning and reach of the Sixth Amendment . . .”).

64. *Gault*, 387 U.S. at 36.

65. *Id.* (citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932)) (footnotes omitted) (internal quotation marks omitted).

66. See cases cited *supra* note 51.

Another hurdle that the *Gault* majority faced in arriving at its conclusion was the special informal nature of delinquency proceedings, which for decades had prevented due process rights applicable to adults in similar contexts from attaching. In the delinquency context, a *parens patriae* conception of the court prevails: the goal of proceedings is to rehabilitate rather than to punish, hearings are informal and involve a great deal of discretion on the part of the judge, and the judge's role is to act in the best interests of the minor.⁶⁷ The best interests standard is a crucial feature of delinquency proceedings; it means that proceedings are not adversarial, and that the procedural safeguards provided to adults in adversarial hearings are therefore not always necessary.⁶⁸ In fact, requiring that counsel be appointed was seen by *Gault*'s detractors to introduce an adversarial element into a system that benefits children by virtue of its non-adversarial character, and thereby to compromise the *parens patriae* relationship between child and state.⁶⁹ The view that prevailed in *Gault* was that "the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication" under a right of appointed counsel.⁷⁰ But this was not always the winning view in subsequent due process cases arising from delinquency proceedings: the Court later found the proof-beyond-a-reasonable-doubt standard and double jeopardy protection to apply,⁷¹ but it stopped short of requiring jury trials, on the theory that "the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."⁷²

Gault thus ushered in an era of wavering on the Court between two competing conceptions of the state-child relationship: on the one hand, it sometimes viewed the state as *parens patriae* and the child as a relatively rights-less being in need of protection and rehabilitation, but not punishment;⁷³ by this view, the court is protector, not neutral arbiter. On the other hand, it sometimes saw the child as autonomous, and therefore possessing both rights and responsibilities; by this latter view, the state is the child's opponent in proceedings where responsibilities have been violated, but it owes the child enhanced procedural protections by virtue of the adversarial relationship. *Gault* ultimately concluded that the various actors involved in the delinquency system

67. David Lorentz, *Reforming Legal Representation for Minors: The Attorney Ad Litem Firm*, 30 REV. LITIG. 379, 381-82 (2011).

68. *See id.*

69. *See* 387 U.S. at 75-76 (Harlan, J., concurring in part and dissenting in part).

70. *See id.* at 22 (majority opinion).

71. *See* *Breed v. Jones*, 421 U.S. 519, 541 (1975) (double jeopardy); *In re Winship*, 397 U.S. 358, 368 (1970) (proof beyond a reasonable doubt).

72. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

73. *See generally* Robyn-Marie Lyon, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CALIF. L. REV. 681, 683-87 (1987).

cannot fully account for the interests of the child, despite the government's special role as *parens patriae* and the court's mandate to protect the child's best interests.⁷⁴ It permitted a partial break from the full-blown *parens patriae* model because that model served its purposes incompletely. The upshot of *Gault* and its progeny is that children are protected by due process from erroneous deprivations of liberty, but only in a manner that preserves the non-adversarial *parens patriae* relationship between court and child. Indeed, due process and *parens patriae* protections stand in an inverse relationship: the latter compromises the former, and where the former is reduced, the latter should compensate.⁷⁵ And though representation by counsel is distinctly a feature of adversarial systems, the deprivation at stake in delinquency proceedings coupled with the special incapacities of children to represent themselves mitigated in favor of its application, even where the court was required to protect the child's best-interests.

C. The Status Quo

As we have seen, due process is a flexible concept that is predicated on contemporary notions of fundamental fairness. The constitutional standard therefore tends to reflect and absorb the status quo as it has been established elsewhere in the law. Like its predecessors in the criminal arena, *Gault* was acutely aware of the extra-constitutional status quo in which it was decided. The Court noted:

During the last decade, court decisions, experts, and legislatures have demonstrated increasing recognition of [the right to court-appointed counsel in delinquency proceedings]. In at least one-third of the States, statutes now provide for the right of representation by retained counsel in juvenile delinquency proceedings, notice of the right, or assignment of counsel, or a combination of these. In other States, court rules have similar provisions.⁷⁶

This state of affairs indicated that a right to appointed counsel had ascended into contemporary notions of fundamental fairness. Of course, delinquency proceedings constitute a small subset of the legal proceedings that implicate the interests of children. Though recognition of a constitutional right to appointed counsel has slowed since *Gault*, the legislative, common law, and constitutional status quo indicates an admittedly inconsistent, but nevertheless pervasive recognition of a child's right to appointed counsel across jurisdictions and subject matter areas.

Child welfare matters—such as child-protection or termination-of-parental-rights (TPR) hearings—are perhaps the clearest instance of proceedings implicating children's interests. As of 2009, thirty-seven states mandated legal

74. See 387 U.S. at 36.

75. See generally Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1449-51 (2009).

76. 387 U.S. at 37-38 (footnotes omitted).

representation for children in such proceedings.⁷⁷ Some courts have also recognized a child's constitutional right to appointed counsel in child welfare proceedings. Thus, in *Kenny A. ex rel. Winn v. Perdue*, the U.S. District Court for the Northern District of Georgia held that children have a state constitutional right to appointed counsel in termination-of-parental-rights proceedings to protect a liberty interest in "safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with . . . biological parents."⁷⁸ Though *Kenny A.* was interpreting the due process clause of the Georgia Constitution, the language of that provision precisely tracks the language of the Fourteenth Amendment,⁷⁹ and the court used the same *Mathews v. Eldridge* balancing test employed in assessing procedural due process under the Federal Constitution.⁸⁰ Similarly, in *In re T.T.*, a New York state appellate court found a child's interests in a termination proceeding to have been inadequately represented, and on this basis concluded that she had a right under the Federal Fourteenth Amendment to court-appointed counsel using the familiar *Mathews* test.⁸¹ The Supreme Court has not yet ruled on a minor's right to counsel in child welfare proceedings, but there is a wealth of academic commentary urging that it recognize this right.⁸²

In other contexts, too, counsel has been mandated or provided for children in proceedings. Lawyers have been appointed to represent children in custody and visitation rights matters, child support matters, paternity matters, adoptions, mental health commitment proceedings, judicial bypass proceedings in connection with abortions, probate proceedings, and even personal injury and wrongful death cases.⁸³ A comprehensive assessment of the exact scope of a child's right to counsel across these contexts is beyond the scope of this Note, and an actual assessment of the *Mathews* factors in proceedings implicating constitutional due process interests is presented *infra* in Part III. The point for present purposes is that there exists a pervasive contemporary recognition of the importance of counsel in proceedings involving children—one that would

77. See FIRST STAR & CHILDREN'S ADVOCACY INST., A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN, 22-23 (2d ed. 2009), available at http://www.caichildlaw.org/misc/final_rtc_2nd_edition_lr.pdf.

78. 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005).

79. Compare U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."), with GA. CONST. art. 1, § 1 ("No person shall be deprived of life, liberty, or property except by due process of law.").

80. See 356 F. Supp. 2d at 1360-61.

81. 599 N.Y.S.2d 892, 894 (App. Div. 1993).

82. See, e.g., Jennifer K. Pokempner et al., *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 HARV. C.R.-C.L. REV. 529 (2012).

83. See Robert E. Shepherd, Jr. & Sharon S. England, "I Know the Child Is My Client, But Who Am I?," 64 FORDHAM L. REV. 1917, 1932-33 (1995-96).

support expansion of *Gault*'s rule into a wide range of contexts.⁸⁴

D. History's Implications for the Immigration Context

In light of history and contemporary practices, the lack of appointed counsel for children in removal proceedings is a glaring omission—one that contradicts the thrust of history and undermines contemporary notions of fundamental fairness.

Consider first, and most obviously, that removal proceedings are adversarial in the same way that criminal proceedings are adversarial—they pit a government attorney against a lay respondent with no training in the law. This is relevant not only as a doctrinal matter (discussed *infra* in Subpart III.C), but as a historical matter: since the colonial period, legislatures and courts have harbored a special aversion to proceedings that are lopsided in this way. They create a strong potential for government overreaching, and they are at the very core of what appointment doctrine seeks to correct.

Second, and more specifically, children facing cognizable liberty deprivations are especially vulnerable because they are particularly incapable of representing themselves; childhood is, in other words, a special circumstance. The Supreme Court has recognized this fact since the *Betts* era in criminal proceedings, and *Gault* can be seen as crystallizing this special circumstance into a categorical right. The current state of appointment doctrine also affirms this fact through its generally more liberal approach to children. With very limited exceptions,⁸⁵ immigration courts put children on the same constitutional footing as adults; they therefore represent a glaring hole in the special treatment of children in right-to-counsel jurisprudence.

What is more: though there never has been a right to appointed counsel in

84. *Cf. Schall v. Martin*, 467 U.S. 253, 268 (1984) (“The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” (internal quotation marks omitted)).

85. The relevant limited exceptions for present purposes are the procedural protections that exist in the Trafficking Victims Protection Reauthorization Act of 2008, which takes some small steps toward accommodating the special characteristics of children. *See* 8 U.S.C. § 1232 (2012). For more on the relevance of these exceptions, see *infra* text accompanying notes 86-89, 155. Another attempt to soften proceedings somewhat when they involve children is a memorandum written by the Chief Immigration Judge that contains recommendations for tailoring proceedings to the needs of unaccompanied children. *See* Memorandum from David L. Neal, Chief Immigration Judge, U.S. Dep’t of Justice, to all Immigration Judges, Court Adm’rs, Judicial Law Clerks, and Immigration Court Staff 1-2 (May 22, 2007), *available at* <http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf>. This memorandum recommends, for example, that judges remove their robes when children appear to be intimidated by them. *Id.* at 6. But it does nothing significant to reduce the adversarial nature of proceedings, nor does it change the availability of substantive relief; indeed, there is no apparent indication that it has been implemented in any significant way.

removal proceedings, one specific group of immigrant children is seen in the eyes of the law (though not in the eyes of the Constitution) as especially deserving of, if not quite entitled to, appointed counsel. The Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) requires the government to “ensure, to the greatest extent practicable . . . that all unaccompanied alien children who are or have been in the custody of the [federal government] . . . have counsel to represent them in legal proceedings or matters . . .”⁸⁶ “Unaccompanied alien child” is a term of art in the Immigration and Nationality Act (INA) that refers to “a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.”⁸⁷ Though statistical evidence is lacking, early data suggest that a network of non-profit organizations and pro bono attorneys has helped effectuate the TVPRA’s admonition by providing counsel for most unaccompanied children in immigration detention, and that because of the TVPRA, detained unaccompanied children are represented at a significantly higher rate than unaccompanied children who are not detained.⁸⁸ Cases involving unaccompanied children present especially special circumstances,⁸⁹ and the current state of the law thus indicates that appointing them counsel has risen to the level of being inherent in the contemporary notion of fundamental fairness. If the right to appointed counsel is to take hold in immigration proceedings, history suggests it might first find footing at a particularly vulnerable core like this one, and expand outwards from there. And yet even though a special circumstances standard has existed nominally in some circuits for almost forty years, no special circumstance has actually been recognized.

Consider also the hurdles that hindered development of the right to appointed counsel in other contexts. Among them in the criminal context was a federalism-based concern about imposing the burden of appointing counsel on state governments. No such hurdle stands in the way of finding a right to counsel in immigration proceedings, where the only government involved is the federal one. In delinquency proceedings, the procedural due process revolution was hindered at every step by concerns about domesticating the flexible *parens patriae* system, to the detriment of children who benefit from the court’s mandate to act in their best interests. No such mandate exists in immigration court, where proceedings are adversarial, where children are generally treated as adults, and where child respondents are opposed by government attorneys.

Indeed, part of the problem that the Court sought to remedy in *Gault* was

86. 8 U.S.C. § 1232(c)(5).

87. 6 U.S.C. § 279(g).

88. See VERA REPORT, *supra* note 24, at 22-24.

89. See *infra* text accompanying notes 148-153.

that the child often “receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”⁹⁰ This, coupled with a recognition of the child’s special inability to represent himself, helped the *Gault* Court overcome the notion that appointing counsel serves first and foremost to remedy the lopsidedness of adversarial enforcement proceedings. Children in immigration proceedings are subject to a different sort of worst-of-both-worlds scenario: they have neither the due process rights nor the *parens patriae* protections afforded in delinquency proceedings,⁹¹ and yet they are subjected to lopsided adversarial proceedings of the sort that have most troubled the Court and the public conscience.

From a historical perspective, it is unexpected, then, that a child’s right to appointed counsel has not yet developed in any form in immigration proceedings: the catalysts were present, the hurdles were not. And though due process is supposed to be a flexible and evolving standard, appointment doctrine in the immigration context has also been remarkably impervious to influence by the contemporary conscience. What follows in Part III is an attempt to explain this anomaly from a doctrinal perspective. At one time, the Supreme Court’s precedents may have explained what otherwise seems to be a glaring anomaly; given recent developments, they no longer do.

III. DOCTRINE

The history of the right to appointed counsel in criminal proceedings indicates a wavering emphasis between the deprivation at stake (*Powell*, *Zerbst*, *Gideon*, and *Gault*) and the capacity of the defendant to represent himself (*Betts*, *Wade*, and progeny). Where the focus has been the severity of the deprivation, a categorical right has applied; when emphasis falls on the defendant’s circumstances, on the other hand, that has warranted a case-by-case approach. Modern appointment doctrine is governed by a special variant of the *Mathews v. Eldridge* procedural due process standard that incorporates these two strands into one unified balancing test. *Mathews* requires that three factors be evaluated in determining what due process requires: “the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.”⁹² Where the procedural protection at stake is appointed

90. *In re Gault*, 387 U.S. 1, 18 n.23 (1967) (quoting *Kent v. United States*, 383 U.S. 541, 556 (1966)).

91. An apples-to-apples comparison between two contexts like delinquency and immigration could never be perfect, but given that the deprivations at stake in both contexts are cognizable under the Fourteenth Amendment, a high-level comparison such as the one presented here is at least directionally relevant. Though differences in the type of deprivations at stake could conceivably explain this widely disparate treatment, they probably do not. See *infra* Subpart III.A.

92. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981).

counsel, the court “must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.”⁹³ The two leading applications of this test clarify that this presumption generally operates to require a case-by-case assessment of the need for counsel in the lower courts when the deprivation at stake does not entail physical incarceration, and a categorical right to counsel imposed by the High Court when the threatened deprivation is loss of physical liberty. Thus, in modern civil appointment doctrine, *Betts* and *Gideon* coexist.

Around every major anniversary of *Gideon*, there is a wave of renewed focus on civil applications of *Gideon* that the Supreme Court has not yet considered.⁹⁴ Thus, this Note is not the first to argue that application of the *Mathews* test in the immigration context calls for a less chimerical appointment doctrine.⁹⁵ But recent years have seen a spate of new developments that skew the scales in ways that have not yet been explored: the standard for assessing the right to counsel in civil cases has been clarified by the Supreme Court; a new regime governing unaccompanied children in removal proceedings has been created; the noncitizen’s interest in remaining in the United States has been elevated in constitutional significance; and studies have been conducted on the value of counsel to the accuracy of immigration proceedings. Together, these developments indicate that the immigration courts have been embarrassingly remiss in their failure to give meaning to the case-by-case approach in proceedings involving children, and that the federal courts have neglected their duty to supervise this regime effectively. What follows describes the contours and extent of these failures and the reasons for a different path forward—with emphasis on child immigrants in general, and unaccompanied child immigrants in particular.

A. Private Interests

Removal proceedings implicate a slew of cognizable individual interests that weigh heavily on the *Mathews* scales. Chief among them, of course, is deportation, which in many ways is *sui generis*: its potentially wretched

93. *Id.*

94. See, e.g., Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL’Y 1 (2003); Stephen J. Cullen & Kelly A. Powers, *The Last Huzzah for Civil Gideon*, 41 MD. B.J. 24 (2008); Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417 (1993); Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL’Y REV. 503 (1998).

95. Though a handful of commentators have written about applications of *Gideon* in the immigration context, only one appears to have written about the right to counsel for immigrant children. See Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41 (2011).

consequences have long been acknowledged by the Supreme Court,⁹⁶ and yet it has repeatedly been characterized as non-punitive,⁹⁷ and, by implication, less severe than the incarceration that often flows from criminal conviction. Second, incarceration, too, is a common consequence of being in removal proceedings: immigrants facing removal charges, including children, are often detained for months or even years in prisons or prison-like conditions while they await resolution of their cases.⁹⁸ Third, when children are in proceedings, they have an interest in family integrity that also factors into the *Mathews* analysis. And finally—indeed, perhaps counterintuitively—even the government has interests that enhance the significance of the private interests at stake in removal proceedings involving children.⁹⁹

1. Physical Liberty and the *Lassiter* Presumption

Deprivation of physical liberty serves two functions in procedural due process cases: it is (1) a private interest that weighs in the *Mathews* scales in favor of enhanced procedural rights, and (2) a presumption-establishing factor in right-to-counsel cases. In *Lassiter*, the Supreme Court created a presumption against a right to appointed counsel in civil proceedings that do not yield “at least a potential deprivation of physical liberty.”¹⁰⁰ Some language in *Lassiter* suggests that this presumption favors the right to counsel only when liberty deprivation occurs *as a result of proceedings*—that is, “only where the indigent, *if he is unsuccessful*, may lose his personal freedom.”¹⁰¹ In a 2009 opinion, the Attorney General seized on this language and emphasized its significance:

Although an alien may be detained during the course of a removal proceeding, he does not “lose his physical liberty” based on the outcome of the proceeding. That is, the point of the proceeding is not to determine or provide the basis for incarceration or an equivalent deprivation of physical liberty, but rather to determine whether the alien is entitled to live freely in the United States or must be released elsewhere.¹⁰²

For this reason, in the Attorney General’s view, even detained removal

96. See *infra* text accompanying notes 134-136.

97. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

98. See, e.g., Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States*, 7 SEATTLE J. FOR SOC. JUST. 693, 693-94 (2009); Whitney Chelgren, Note, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1487-89 (2011).

99. Because this interest technically belongs to the government (though it weighs in favor of recognition of the right), it is treated separately. See *infra* Subpart III.B.

100. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31 (1981).

101. *Id.* at 27 (emphasis added).

102. *In re Compean*, 24 I. & N. Dec. 710, 718 n.3 (2009) (quoting *Lassiter*, 452 U.S. at 25), *vacated on other grounds*, 25 I. & N. Dec. 1 (2009).

respondents suffer from the *Lassiter* presumption against the availability of a categorical right to counsel.¹⁰³ There has been little occasion for courts to weigh in on this view, since few civil contexts threaten incarceration incidental to resolution of proceedings, but not as a final outcome. But there is good reason to believe that a court would not make so much of the distinction.

First, as Professor Linda Hill has argued, “an alien in removal proceedings does not always confront a decision between living freely in the United States or being released elsewhere. Certain aliens with a final order of removal who cannot be physically removed or safely released in the United States may be subject to prolonged detention.”¹⁰⁴ Second, and more importantly, Professor Hill notes that a removal respondent’s need for counsel is not confined solely to her case on the merits: “[r]epresentation is also critical to assure a child’s right to release during proceedings and his or her right to minimal conditions of detention.”¹⁰⁵ The result of a determination that a child respondent is an escape risk,¹⁰⁶ for example, would cause an unrepresented child, “if he is unsuccessful, [to] lose his personal freedom.”¹⁰⁷ Third, many commentators have underscored the myriad of ways in which immigration detention is unlike other sorts of “preventive detention,” and virtually identical to the detention that results from conviction for a crime¹⁰⁸ (or, for that matter, adjudication as a delinquent¹⁰⁹). This gives good reason to believe that a court would not place much weight on the Attorney General’s arcane distinction. And finally, despite the language that the Attorney General has seized upon, *Lassiter* itself was clearly concerned with possible indirect liberty deprivations in civil cases—i.e., deprivations of liberty that could flow *incidentally* from adjudications on the merits of civil cases: “Some parents” in child welfare proceedings, the Court noted, “will have an additional interest to protect. Petitions to terminate parental rights are not uncommonly based on alleged criminal activity. Parents so accused may need legal counsel to guide them in understanding the problems such petitions may create.”¹¹⁰ In other words: when criminal punishment may flow indirectly from civil proceedings, that could elevate the significance of the private interests at stake. Given the Court’s attentiveness to these indirect consequences of

103. *See id.*

104. Hill, *supra* note 95, at 57 (footnotes omitted) (citing *Zadvydas v. Davis*, 533 U.S. 678, 699, 701 (2001)).

105. *Id.*

106. Pursuant to the *Flores v. Reno* Stipulated Settlement Agreement, being an “escape-risk” is a permissible basis for detaining a child in “staff-secure” placement. *See* Stipulated Settlement Agreement at 12-13, *Flores v. Reno* (No. CV 85-4544-RJK(Px)) (C.D. Cal. Jan. 17, 1997) [hereinafter *Flores* Settlement Agreement], available at http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf.

107. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27.

108. *See, e.g., Chelgren, supra* note 98, at 1486-89.

109. *See Flores* Settlement Agreement, *supra* note 106, at 12 (permitting certain child respondents to be detained in a “State or county juvenile detention facility”).

110. *Lassiter*, 452 U.S. at 27 n.3.

proceedings, it is hard to imagine that the Attorney General's distinction between direct and incidental results would carry the day. For these reasons, child respondents in immigration detention would therefore probably not be hindered by the *Lassiter* presumption.

And even if a court were to disagree with this analysis, the *Lassiter* presumption is by no means irrebuttable. For one thing, *Lassiter* itself clearly contemplates the development of a *Betts*-type case-by-case regime in the lower courts. *Lassiter* involved an appeal from a termination-of-parental-rights (TPR) proceeding, and the Court ultimately declined to find that parents have a categorical right to appointed counsel in such proceedings because it could not conclude that the *Mathews* factors would "always be so distributed" as to overcome the presumption against counsel where no incarceration was threatened.¹¹¹ But in doing so it also confirmed that the presumption could be overcome on a case-by-case basis:

If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.¹¹²

The presumption in *Lassiter* thus served not to categorically block application of the right, but to usher in a case-by-case approach instead of a *per se* right. And this case-by-case right to counsel has not been illusory: lower courts have indeed found a due process right to counsel in compelling TPR cases.¹¹³

Indeed, the Supreme Court's civil right-to-counsel jurisprudence both before and after *Lassiter* confirms that incarceration is "neither a necessary nor a sufficient condition for requiring counsel on behalf of an indigent defendant," as Justice Blackmun put it in a dissenting opinion in *Lassiter*.¹¹⁴ Justice Blackmun correctly noted that when *Lassiter* was decided, the Court had

111. *Id.* at 31 (emphasis added).

112. *Id.*

113. *See, e.g.,* *Garramone v. Romo*, 94 F.3d 1446, 1449-50 (10th Cir. 1996) (finding that a mother had a federal constitutional right to appointed counsel in neglect proceedings under *Lassiter*'s case-by-case approach); *Marathon Cnty. Dep't of Soc. Servs. v. I.H.*, Nos. 91-0058 & 91-0059, 1991 WL 198168, at *2-3 (Wis. Ct. App. Aug. 6, 1991) (finding that a mother had a federal constitutional right to appointed counsel in TPR proceedings under *Lassiter*'s case-by-case approach). Note also that Chief Justice Burger concurred in the result in *Lassiter* because he saw the case-by-case approach as sufficient for protecting the due process rights of those who needed counsel. *Lassiter*, 452 U.S. at 34-35 (Burger, C.J., concurring). His concurrence is a reminder that in some contexts, the case-by-case approach can be of substantive value to many who seek appointed counsel, and that the *Lassiter* presumption is a presumption against the categorical right. The cases cited in this Note affirm that principle. *See also In re A.H.L.*, 214 S.W.3d 45, 51 (Tex. Ct. App. 2006) ("There is no constitutional right to appointed counsel in every termination proceeding." (emphasis added) (citing *Lassiter*, 452 U.S. at 27-32)).

114. 452 U.S. at 40 (Blackmun, J., dissenting).

already declined to find a right to appointed counsel in parole revocation hearings, despite their potential to result in physical incarceration; and it had, in a four-Justice plurality opinion, found that prisoners facing transfer from a prison to a mental hospital—which entailed no *new* deprivation of physical liberty—were categorically entitled to appointed counsel at their transfer hearings.¹¹⁵ In this latter scenario, it was the special circumstances of mentally ill prisoners—viz., their inability to “understand or exercise [their] rights”—that called for a right to appointed counsel.¹¹⁶

The Court’s most recent application of *Lassiter* comports with Justice Blackmun’s neither-necessary-nor-sufficient take on the *Lassiter* presumption, and thereby reduces its significance. *Turner v. Rogers* presented the question of whether a father facing civil contempt charges for failure to comply with a child support order had a right to counsel at his hearing.¹¹⁷ The charges carried a potential term of imprisonment for up to twelve months.¹¹⁸ In spite of the *Lassiter* presumption, the Court declined to find “a categorical right to counsel in proceedings of the kind before [it].”¹¹⁹ This result was based on three findings. First, contempt proceedings like the one in *Lassiter* often present no complicated issues for adjudication that would require the assistance of counsel.¹²⁰ Second, given the relatively simple issues for adjudication, there were “substitute procedural safeguards” that could protect an unrepresented defendant.¹²¹ And third, in civil contempt proceedings for failure to pay child support, “the person opposing the defendant . . . is not the government represented by counsel but the custodial parent *un* represented by counsel.”¹²² Such proceedings therefore lack the sort of lopsidedness that typically calls for appointing counsel; indeed, appointing counsel “could create an asymmetry of representation” where none had existed, “mak[ing] the proceedings *less* fair

115. *Id.*, 452 U.S. at 40-41 (Blackmun, J., dissenting) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 785-89 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Vitek v. Jones*, 445 U.S. 480, 492, 494 (1980)). Indeed, a fifth vote in *Vitek v. Jones*—the case cited by Justice Blackmun finding a right to counsel at transfer hearings—agreed with the plurality’s assessment of the categorical need for representation; Justice Powell declined to join the plurality because he believed this right could be satisfied by certain non-attorney representatives. See *Vitek*, 445 U.S. at 498-99 (Powell, J., concurring) (“I therefore agree that due process requires the provision of assistance to an inmate threatened with involuntary transfer to a mental hospital. . . . [But] due process may be satisfied by the provision of a qualified and independent adviser who is not a lawyer.”).

116. See *Vitek*, 445 U.S. at 496-97 (plurality opinion).

117. 131 S. Ct. 2507, 2512 (2011).

118. *Cf. id.* at 2513 (noting that the trial judge sentenced the indigent father to up to twelve months in the county detention center).

119. *Id.* at 2520.

120. See *id.* at 2518-19. (“[I]ndigence can be a question that in many—but not all—cases is sufficiently straightforward to warrant determination *prior* to providing a defendant with counsel, even in a criminal case.”)

121. *Id.* at 2519 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335).

122. *Id.*

overall, [and] increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive.”¹²³

In its refusal to recognize a categorical right to counsel in proceedings that threaten incarceration, *Turner* thus (1) de-emphasized the *Lassiter* presumption; (2) re-emphasized the asymmetry factor that has, throughout modern history, been the cardinal determinant of whether appointed counsel is required; and (3) confirmed that the pre-*Lassiter* state of civil appointment doctrine is, in effect, the post-*Lassiter* state of the doctrine. Moreover, *Turner* was careful not to rule out a right to counsel in civil contempt proceedings. Rather, like *Lassiter*, it traded the defendant's suggested categorical regime for a case-by-case standard. It held, in other words, that “the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order,” and it made note of the fact that it was not “address[ing] civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody.”¹²⁴ In such proceedings, “[t]he government is likely to have counsel or some other competent representative,” and there may very well exist a categorical right to counsel.¹²⁵ Nor, the Court noted, was it “address[ing] what due process requires in an unusually complex case where a defendant can fairly be represented only by a trained advocate.”¹²⁶

2. Family Integrity

The legacy of *Turner* is thus to emphasize other factors in the *Mathews* test (see *infra* Subpart III.C) over the presence or absence of physical liberty deprivation. Private interests are nevertheless a discrete factor in the *Mathews* balancing test, and the private interest in being free from deprivation of personal liberty is a compelling one. Indeed, it is especially compelling when children are involved. As Justice Brennan wrote in a partial dissent in *Parham v. J.R.*—a case concerning the due process rights of children whose parents seek to have them committed to state mental hospitals—“childhood is a particularly vulnerable time of life and children erroneously institutionalized during their formative years may bear the scars for the rest of their lives.”¹²⁷ For this proposition, Justice Brennan cited several studies from the 1950s, ‘60s, and ‘70s on the importance of attachment in child development.¹²⁸ Attachment,

123. *Id.*

124. *Id.* at 2520.

125. *Id.*

126. *Id.* (internal quotation marks omitted).

127. 442 U.S. 584, 628 (1979) (Brennan, J., concurring in part and dissenting in part) (footnotes omitted).

128. See *id.* at 628 n.7 (citing JOHN BOWLBY, CHILD CARE AND THE GROWTH OF LOVE 80 (1953); F. ELKIN, AGENTS OF SOCIALIZATION IN CHILDREN'S BEHAVIOR 357, 360 (R.

of course, is thwarted when children are separated from family during formative years. Thus, as Justice O'Connor recognized in a later case, institutional placement for children is pernicious "even where conditions are decent and humane and where the child has no less authority to make personal choices than she would have in a family setting"129

In other words, incarcerating a child is a deprivation not only of an interest in liberty, but also of a separately cognizable interest in family integrity. This interest is a weighty one in the eyes of the Due Process Clause. The Supreme Court has long recognized the right to family integrity as fundamental, and though its precedents usually describe it as a parent's right to care for and control her child,¹³⁰ it has also been framed as a child's interest in maintaining a relationship with her parents. As one lower federal court put it, "an erroneous decision that . . . parental rights should be terminated can lead to the unnecessary destruction of the child's most important family relationships," and children therefore have a fundamental liberty interest "in maintaining the integrity of the family unit and in having a relationship with . . . biological parents."¹³¹ Removal proceedings implicate this interest for two reasons: first, because of the incarceration that often occurs incidental to proceedings, and second, because removal itself can separate children from their families. For example, though the data are, for obvious reasons, not robust, there is some indication that many undocumented children who are apprehended by U.S. Immigration and Customs Enforcement (ICE) in the interior of the country are mistakenly classified as unaccompanied because they are unwilling to bring their undocumented parents to the attention of the immigration authorities.¹³² If

Bergman ed. 1968); JOHN HORROCKS, *THE PSYCHOLOGY OF ADOLESCENCE* 156 (1976)).

129. *Reno v. Flores*, 507 U.S. 292, 318 (1993) (O'Connor, J., concurring).

130. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, [the Due Process Clause] denotes not merely freedom from bodily restraint but also the right . . . to marry, establish a home and bring up children . . .").

131. *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005); *see also Roe v. Conn*, 417 F. Supp. 769, 779-80 (M.D. Ala. 1976) ("Accordingly, this Court declares Alabama Code, Title 13, §§ 350 and 352 unconstitutional, because it violates the family integrity of Margaret Wambles and all other mothers in the class represented by her and the family integrity of Richard Roe and all other children in the class represented by him." (emphasis added)).

132. *See* APPLESEED NETWORK, *CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS* 22 (2011) [hereinafter APPLESEED REPORT] ("Even if [an apprehended child] has a parent in the United States, CBP or ICE must treat the child as 'unaccompanied' when the parent is unwilling or unable to retrieve the apprehended minor."); *id.* at 22 n.38 ("Many undocumented immigrant parents reasonably fear that, if they retrieve their child at a CBP station or an ICE center, they will be apprehended as well, and the entire family deported."). Another report notes that "[u]p to 15 percent of unaccompanied children enter the system as a result of being apprehended 'internally' in the United States (as opposed to at a port of entry)"; such children, who have typically been in the country longer than children apprehended at the border, may be more likely to have family ties in the United States that would be

such children are detained, they may be deprived of an interest in family integrity for a significant period; if they are removed, this deprivation likely becomes permanent. Thus, when children in proceedings have family ties in the United States that would be threatened upon removal—a distinct risk in cases involving unaccompanied children—detention and removal can compromise not merely the cardinal interest in physical liberty, but also the integrity of families. If incarcerating an adult warrants special scrutiny because of the liberty deprivation it effectuates, incarcerating and removing a child with family ties in the United States should, a fortiori, raise extra special concern.

3. Removal

Removal itself is a considerable deprivation, above and beyond the ways in which it compromises family integrity in certain specific instances, and despite the considerable difficulty the Supreme Court has faced in classifying it. For more than a century, the Court has hewn to the formal rule that removal is not a form of punishment; thus, the threat of removal does not usher in the various procedural protections that apply in criminal trials.¹³³ At the same time, the Court has struggled to reconcile this formal rule with the recognition that removal is a uniquely severe form of deprivation. As Justice Brandeis put it more than ninety years ago, deportation “may result . . . in loss of both property and life; or of all that makes life worth living.”¹³⁴ And in the more recent case of *INS v. St. Cyr*, the Court noted that the “right to remain in the United States may be more important to the [noncitizen] than any potential jail sentence.”¹³⁵ Indeed, in a dissenting opinion in *Fong Yue Ting v. United States*—the very case in which the Court established its formal rule that deportation is not punishment—Justice Brewer wrote that “if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.”¹³⁶

In a 2010 ineffective-assistance-of-counsel case, the Supreme Court took a significant step toward reconciling Justice Brewer’s paradox. *Padilla v. Kentucky* presented a collateral challenge to a drug transportation conviction on ineffective-assistance-of-counsel grounds.¹³⁷ Padilla’s crime was a removable offense, and he argued in postconviction proceedings that he would not have

compromised by removal. VERA REPORT, *supra* note 24, at 4.

133. See *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (noting that “[t]he order of deportation is not a punishment for crime” and that therefore the petitioner was not “deprived of life, liberty or property, without due process of law, and the provisions of the Constitution . . . [had] no application”).

134. *Ng Fong Ho v. White*, 259 U.S. 276, 284 (1922); see also *Bridges v. Wixon*, 326 U.S. 135, 147 (1945).

135. See 533 U.S. 289, 322 (2001) (internal quotation marks and citation omitted).

136. 149 U.S. at 741 (Brewer, J., dissenting) (internal quotation marks and citation omitted).

137. 130 S. Ct. 1473, 1477-78 (2010).

pleaded guilty to the crime if his attorney had advised him of the immigration consequences of doing so.¹³⁸ The Kentucky Supreme Court had rejected this claim on the basis of its view that “collateral consequences are outside the scope of representation required by the Sixth Amendment.”¹³⁹ In lower courts, the line between direct and collateral consequences of criminal convictions had become a well-accepted means of distinguishing between consequences of convictions that required notice to clients, on the one hand, and consequences that attorneys did not need to mention to their clients, on the other.¹⁴⁰ The Supreme Court nevertheless found the question of whether to apply such a distinction unnecessary in *Padilla* “because of the unique nature of deportation.”¹⁴¹ Though deportation is not punishment, it is nevertheless a “particularly severe penalty”—indeed, it is “sometimes the most important part[] of the penalty that may be imposed on noncitizen defendants.”¹⁴² There could therefore

be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions. . . . [B]ecause of its close connection to the criminal process, [deportation is] uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.¹⁴³

This led the Court to “conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel[, and that] *Strickland* applies to *Padilla*’s claim.”¹⁴⁴

Though the Court had on repeated occasions over more than a century acknowledged Justice Brewer’s paradox in various ways—i.e., that deportation is not technically punishment, though it is often worse than all forms of punishment—*Padilla* was the first major instance in which the similarity between criminal punishment and deportation had functioned as a constitutional rule of decision in a Supreme Court case. In other words, what previously had appeared as dicta or in dissenting opinions made its way in *Padilla* into the very ground of the decision: *Padilla* had a Sixth Amendment claim because deportation is just as significant to a criminal defendant as the actual punishment that may flow from a guilty plea. In this way, *Padilla* elevated the constitutional significance of the severity of deportation as a deprivation of liberty. And though this did not solve Justice Brewer’s paradox

138. *Id.*

139. *Id.* at 1481 (internal quotation marks and citation omitted).

140. *See id.* at 1481 & n.9 (noting that the Kentucky court was “far from alone” in finding this distinction).

141. *Id.* at 1481.

142. *Id.* at 1480-81 (internal quotation marks and citation omitted).

143. *Id.* at 1481-82 (internal quotation marks and citation omitted).

144. *Id.* at 1482.

(deportation is still not technically punishment for Bill of Rights purposes), it has signaled a new departure from the hyperformalism of *Fong Yue Ting* and its progeny, toward a more functional approach to the modern-day merging of the criminal and removal systems.¹⁴⁵ *Padilla* thus strengthens the argument that any given noncitizen in removal proceedings might make a case for a right to appointed counsel, and it puts the lower courts on notice that their hollow application of the case-by-case approach to the right could one day in the not-so-distant future be rebuked from above.

The Court's articulations of Justice Brewer's paradox have typically focused on what a noncitizen loses access to in the United States after being deported.¹⁴⁶ From this view, deportation is very much like incarceration: it prevents an individual from living, working, and moving about freely in the country. But consequences that await a deportee on the other end of deportation—that is, upon arrival in a receiving country—are also cognizable for due process purposes; indeed, they strengthen the view that deportation can be significantly worse “than any potential jail sentence.”¹⁴⁷

Unaccompanied children face some of the most severe risks upon repatriation: a recent report noted that “the desire to escape domestic abuse and sexual violence” plays a significant role in many female minors' decisions to immigrate unaccompanied; for these children, removal can mean a return to these circumstances.¹⁴⁸ There are, moreover, only limited protections for unaccompanied minors during the repatriation process, which heightens the safety threat that removal poses for all unaccompanied children, regardless of the circumstances that led them to immigrate in the first place. The U.S. legal regime contains certain limited safeguards designed to prevent the removal of children who might face trafficking or abuse upon repatriation, but it has been largely criticized as having no teeth.¹⁴⁹ Once children have been returned, home-country authorities are ultimately responsible for safety and reintegration,¹⁵⁰ and those authorities are often not up to the task.¹⁵¹ Given that

145. As the Court recognized, “The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Id.* at 1480 (footnote omitted).

146. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (“[T]he . . . right to remain in the United States may be more important to the [noncitizen] than any potential jail sentence.” (emphasis added) (internal quotation marks and citation omitted)).

147. See *id.* (internal quotation marks and citation omitted).

148. APPELEED REPORT, *supra* note 132, at 15.

149. See *id.* at 31-51 (describing the primary statute governing the treatment of unaccompanied children during and after removal proceedings—the TVPRA—as an “unfulfilled promise”).

150. *Id.* at 53.

151. *Id.* at 59-60 (noting that at non-governmental shelters in Mexico, “[u]p to 20% of children leave . . . without a family member or guardian,” and that even governmental shelters have “limited ability” to stop the over 20% of children who escape or leave in other

the Department of State has characterized Mexico as “a large source, transit, and destination country for men, women, and children subjected to sex trafficking and forced labor,”¹⁵² such children clearly face significant risks to life and liberty.

Of course, trafficking is only one discrete form of harm that children face after repatriation. An inaccurate adjudication in an asylum proceeding, for example, can result in a deportee returning to the hands of persecutors or “the same conditions which led them [to] migrate initially.”¹⁵³

The abuse and neglect context in domestic law strongly suggests that a child’s interest in being free from these home-country consequences of removal is both cognizable and weighty in the *Mathews* analysis. Courts regularly acknowledge that children in abuse and neglect proceedings have “a strong [due process] interest in obtaining State intervention to protect [them] from further abuse”¹⁵⁴—even though domestic abuse happens at the hands of nonstate actors, and therefore creates no government liability. They should clearly also have a cognizable due process interest in not being abused or otherwise mistreated upon repatriation—which, as we have seen, can be a significant likelihood. And though the U.S. legal regime for protecting repatriated children is still in its infancy, it clearly recognizes the importance of reducing the adversarial character of immigration proceedings as a means of protecting this interest: the TVPRA now requires that defensive asylum applications by unaccompanied minors be adjudicated in a non-adversarial setting (unlike other defensive applications, which are processed in the adversarial context of removal proceedings).¹⁵⁵ This provision is an acknowledgement by the political branches of the significant risk of deprivation posed by adversarial proceedings that have the potential to send a child into harm’s way after removal—an acknowledgement that the Due Process Clause, with its emphasis on contemporary notions of fundamental fairness, should take into account. And, of course, procedural due process views appointed counsel as the cardinal remedy for lopsided adversarial proceedings; given that non-asylum-applicant children often face similar sorts of risks (e.g., being trafficked or abused) through the results of *adversarial* removal proceedings, the need for appointed counsel is clear.

Removal, then, implicates a sort of two-sided private interest for *Mathews* purposes: from the domestic perspective, it severely restricts liberty in the same way that incarceration does (by separating an individual from friends, family,

unauthorized or unspecified ways).

152. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 247 (2012), available at <http://www.state.gov/documents/organization/192596.pdf>.

153. See APPLESEED REPORT, *supra* note 132, at 60-62 (discussing governmental shelters’ failure to investigate abuse or neglect at a repatriated child’s home of origin).

154. *In re Jamie T.T.*, 599 N.Y.S.2d 892, 894 (App. Div. 1993).

155. See, e.g., 8 U.S.C. § 1158(b)(3)(C) (2012) (“An asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child.”).

work, and daily life). The Supreme Court's awareness of the severity of this deprivation recently made its way from dissents and dicta into the very core of the Sixth Amendment. In this way, *Padilla* adds weight to the private-interests side of the *Mathews* scales. It also signals to the lower courts that have disingenuously created a case-by-case right-to-counsel regime that they should soon find applications for what has thus far been an illusory protection. From the home-country perspective, removal often poses the risk of additional, and sometimes even greater, deprivations—especially when unaccompanied children are involved. Most importantly, both of these sorts of deprivations are often present together, in a single case. Thus, although deportation is notoriously hard to classify, there is good reason to believe that if pressed with these arguments, courts would come to see it as an even greater deprivation than incarceration alone.

B. Government Interests

Against these private interests—in physical liberty, family integrity, and freedom from abuse, persecution, trafficking, and other consequences “more important than any . . . jail sentence”¹⁵⁶—*Mathews* requires weighing the government interests implicated in requiring heightened procedural protections. There are two relevant interests for present purposes: the government's “fiscal and administrative interest in reducing the cost and burden of . . . proceedings,” and its “*parens patriae* interest in preserving and promoting the welfare of the child.”¹⁵⁷

1. Fiscal and Administrative Burden

Where the procedural protection at issue is appointed counsel, this first interest can be a considerable one. As the *Lassiter* Court pointed out, appointing counsel imposes both a direct burden (paying for counsel) and an indirect burden (“the cost of the lengthened proceedings [counsel's] presence may cause”).¹⁵⁸ And part of *Gideon*'s legacy has been to underscore the extent of this burden on the states and counties that administer public defender programs.¹⁵⁹ The Supreme Court has nevertheless clearly indicated that although “the State's pecuniary interest [in not appointing counsel] is legitimate, it is hardly significant enough to overcome private interests as important as,” say, “a parent's desire for and right to the companionship, care, custody, and management of his or her children.”¹⁶⁰ Thus, even though *Lassiter*

156. *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (internal quotation marks and citation omitted).

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

158. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 28 (1981).

159. See generally Cohen, *supra* note 5.

160. *Lassiter*, 452 U.S. at 27-28 (internal quotation marks and citation omitted).

declined to find a categorical right to counsel for parents in TPR proceedings, it was not the weight of the government's interests on the other side of the *Mathews* scales that prevented this from happening. Where even weightier private interests are involved, it is, a fortiori, hard to imagine the government's fiscal and administrative interests carrying the day. What is more: while *Lassiter* downplayed the significance of the cost factor, *Turner* ignored it completely—there, the Court made no mention whatsoever of the fiscal and administrative burden of supplying counsel to indigent defendants in civil contempt proceedings, even though the cost issue had been heavily briefed.¹⁶¹

Lassiter also placed particular emphasis on the comparison between the “potential costs of appointed counsel in termination proceedings” and the “costs in all criminal actions.”¹⁶² When viewed against this benchmark, the Court concluded that the fiscal and administrative burden at issue in *Lassiter* was “*de minimis*.”¹⁶³ A comparison between the immigration and criminal contexts yields the same conclusion. Since 2007, immigration courts have completed roughly 350,000 cases per year; respondents proceed pro se in about half of these cases.¹⁶⁴ In the criminal context, state- and county-level public defender offices received nearly 5.6 million cases in 2007 alone.¹⁶⁵ Thus, providing counsel for *all* respondents who currently proceed pro se in immigration court would create a case load of about 3.1% of *Gideon*'s yearly burden on state public defender offices—and this ignores that (a) many of the roughly 350,000 cases heard in immigration court are simple matters requiring limited review, and (b) some percentage of pro se respondents are not indigent and therefore would not require appointed counsel. Though precise data are lacking, it appears that around six to eight thousand unaccompanied children are placed in removal proceedings each year.¹⁶⁶ Some of these children obtain counsel through pro bono organizations, and others request voluntary departure before substantial proceedings on the merits begin.¹⁶⁷ Nevertheless, assuming this number approximately represents the need for appointed counsel for unaccompanied children, it constitutes 0.1% of *Gideon*'s annual case burden. It is important to note, also, that this *de minimis* obligation would fall exclusively on the federal government; whereas *Gideon*'s burden is enhanced by federalism concerns, no such plus factor exists in the immigration context. It is unlikely,

161. See Brief of Respondents at 60-61, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10-10), 2011 WL 481836; Brief of Senators DeMint, Graham, Johannis, and Rubio as Amici Curiae in Support of Respondents at 8-9, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10-10), 2011 WL 525740.

162. *Lassiter*, 452 U.S. at 28 (internal quotation marks omitted).

163. *Id.* (internal quotation marks omitted).

164. See EOIR YEAR BOOK, *supra* note 2, at B2, G1.

165. See Donald J. Farole, Jr., Justice Research & Statistics Ass'n Annual Meeting, A National Assessment of Public Defender Office Caseloads 5 (Oct. 28, 2010), available at http://www.jrsa.org/events/conference/presentations-10/Donald_Farole.pdf.

166. VERA REPORT, *supra* note 24, at 10.

167. See *id.* at 22, 24.

then, that the government's interest in being free from the fiscal and administrative burden of providing counsel for child respondents in immigration court would weigh heavily in the *Mathews* analysis—it is, in the end, a de minimis cost imposition that is outweighed by the cardinal life and liberty interests at stake.

2. *Parens Patriae*

In cases involving children, the Court has recognized a second government interest implicated in the *Mathews* right-to-counsel analysis: the government's *parens patriae* interest in the welfare of the child. This interest is something of a paradox—though it belongs to the government, it is vindicated by the procedural safeguards sought by the private party. It therefore weighs on the private-interests side of the scales, strengthening the case for counsel.

In *Lassiter*, for example, the Court noted that “[s]ince the State has an urgent interest in the welfare of the child, it shares the parent’s interest in an accurate and just decision [in TPR proceedings]. For this reason, the State may share the indigent parent’s interest in the availability of appointed counsel.”¹⁶⁸ Similarly, in *Santosky v. Kramer*—a case in which parents alleged a due process right to a heightened burden of proof of neglect in TPR proceedings—the Court acknowledged that one of the government interests involved was “a *parens patriae* interest in preserving and promoting the welfare of the child,” and that the heightened standard of proof requested by the private party opposing the government was “consistent with [this interest].”¹⁶⁹

Both *Lassiter* and *Santosky* arose out of the TPR context, where there is typically state legislation that requires the government to act in the child’s best interest.¹⁷⁰

It is therefore not entirely clear that this interest would be recognized for *Mathews* purposes in other contexts involving children. But given new legislation in the immigration context imposing a limited best-interests requirement on certain agencies dealing with unaccompanied children, there is a good chance it would be recognized in at least that specific context. The TPVRA requires unaccompanied children in custody to “be promptly placed in the least restrictive setting that is *in the best interest of the child*,” and it authorizes the Secretary of Health and Human Services (HHS) “to appoint

168. *Lassiter*, 452 U.S. at 27-28.

169. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); see also *Garramone v. Romo*, 94 F.3d 1446, 1450 (10th Cir. 1996) (“[T]he government’s interest in the neglect proceeding would have been better served by ensuring that Garramone was represented by counsel. The government shares Garramone’s interest in accurate and just findings affecting the custody of her children. . . . That interest is served by providing the parent with adequate representation . . .” (citing *Lassiter*, 452 U.S. at 27-28)).

170. See *Santosky*, 455 U.S. at 766-67 (citing state legislation as the source of the *parens patriae* obligation that factors into the procedural due process analysis).

independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children,” who “shall be provided access to materials necessary to effectively *advocate for the best interest of the child.*”¹⁷¹ This language mandates that best interests be taken into consideration in determining conditions of custody, and it falls just shy of mandating that an unaccompanied child’s best interests be protected by a guardian during proceedings. Though it does nothing to change the adversarial quality of removal proceedings that lies at the core of the need for counsel,¹⁷² it does attribute interests to the government that are aligned with the interests of private respondents, and would therefore be vindicated, rather than hampered, by recognition of the procedural rights they seek.

The government’s *parens patriae* role vis-à-vis the child in TPR proceedings may stem also from the fact that such proceedings by their very nature threaten to effectuate a separation from parents, and therefore require the state to take on a parental role. Though separation from parents is not the core issue to be adjudicated in removal proceedings involving unaccompanied children, it is, as we have seen, often an inevitable consequence of adjudicating removability and of detention incidental to adjudicating removability (which can be prolonged). Given the weakness of the other government interest involved and the strength of the countervailing private interests, resolution of this question one way or the other is unlikely to be dispositive—but this important similarity between TPR cases and removal cases involving unaccompanied children suggests that a court reviewing a right-to-counsel claim in such a case would go the way of *Lassiter* and *Santosky* by recognizing the intersection of the government’s interests with the child’s. This, of course, would tip the scales even further towards recognition of the right.

3. Value of Additional Procedural Safeguards

The final factor to be considered in the *Mathews* right-to-counsel analysis is the “risk that the procedures used will lead to erroneous decisions.”¹⁷³ In right-to-counsel cases, this third factor receives considerable weight. It was found to be lacking in the leading precedents of *Lassiter* and *Turner*—both of which ultimately declined to find a categorical right to counsel.¹⁷⁴ And in both opinions the Court noted that its outcome might have been otherwise if

171. 8 U.S.C. § 1232(c)(2), (c)(6) (2012) (emphasis added).

172. Except in the limited circumstance of defensive asylum applications by unaccompanied children, which the TVPRA does require to be adjudicated in a non-adversarial setting, see 8 U.S.C. § 1158(b)(3)(C), this governmental *parens patriae* interest is not imputed to the immigration court and does not govern what happens *during proceedings*—it therefore does not disturb the pressing need for counsel arising out of the adversarial nature of removal proceedings.

173. *Lassiter*, 452 U.S. at 27.

174. See *Turner v. Rogers*, 131 S. Ct. 2507, 2519-20 (2011); *Lassiter*, 452 U.S. at 28-29.

proceedings had presented a special need for the accuracy-enhancing presence of an attorney.¹⁷⁵

The unique role of attorneys in our adversarial system is well documented in Supreme Court opinions, and it has been the reason for myriad per se rules requiring their presence in various circumstances.¹⁷⁶ As the Court put it in *Fare v. Michael C.*—a case holding that a juvenile's request for his probation officer during an interrogation did not trigger the *Miranda* rule—“[w]hether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts.”¹⁷⁷ An attorney enhances the accuracy of proceedings because she is “trained in the law,”¹⁷⁸ and because she sharpens the factfinding process.¹⁷⁹ She may also enhance accuracy by making the presentations of issues less lopsided when the government is represented by an attorney. Her presence is therefore indispensable when proceedings present complex issues of law, unusual risks of factfinding error, or the binary lopsidedness that has been the cardinal concern in right-to-counsel jurisprudence for centuries. All three of these conditions are undoubtedly present in immigration proceedings.

In *Turner*, the Court emphasized that the central issue in a civil contempt proceeding for failure to comply with a child-support order is the defendant's ability to comply with the order: if the defendant can demonstrate that he is not able to make the required payments, he is not in contempt.¹⁸⁰ Resolution of this issue is unusually uncomplicated—so much so, in fact, that even in criminal cases, in which indigent defendants have a Sixth Amendment right to counsel, proving indigence occurs before counsel is appointed.¹⁸¹ This was one of three dispositive factors leading to the *Turner* Court's conclusion, and the opinion expressly distinguished and reserved the question of “what due process requires in an unusually complex case where a defendant can fairly be represented only

175. See *Turner*, 131 S. Ct. at 2520 (“Neither do we address what due process requires in an unusually complex case where a defendant can fairly be represented only by a trained advocate.” (internal quotation marks omitted)); *Lassiter*, 452 U.S. at 31 (“If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.” (emphasis added)).

176. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 469 (1966) (“[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.”).

177. 442 U.S. 707, 719 (1979).

178. *Id.*

179. See, e.g., *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005) (stating that lack of counsel may serve to “magnify the risk of erroneous factfinding” (quoting *Santosky v. Kramer*, 455 U.S. 745, 762 (1982))).

180. *Turner*, 131 S. Ct. at 2512-13.

181. *Id.* at 2518-19.

by a trained advocate.”¹⁸²

Immigration proceedings represent just such circumstances. As one court has put it, “the immigration laws [are] second only to the Internal Revenue Code in complexity.”¹⁸³ Others have painted a more colorful picture:

The Tax Laws and the Immigration and Nationality Acts [INA] are examples we have cited of Congress’s ingenuity in passing statutes certain to accelerate the aging process of judges. . . . Congress, . . . apparently confident of the aphorism that human skill, properly applied, can resolve any enigma that human inventiveness can create, has enacted a baffling skein of provisions for the I.N.S. and courts to disentangle.¹⁸⁴

Indeed, given the labyrinthine nature of the INA and the administrative and judicial precedents interpreting it, even a seemingly simple matter can spiral into an impenetrable morass. In a case involving the applicability of a superseded provision of the INA to a particular noncitizen’s case, the Eleventh Circuit candidly noted that “the pivotal issue of when removal proceedings against [the respondent] commenced . . . would seem [to] be a simple issue with a clear answer, but this is immigration law where the issues are seldom simple and the answers are far from clear.”¹⁸⁵ This complexity is compounded by the fact that noncitizens navigating it are usually unfamiliar with American law and government, and often cannot speak English.¹⁸⁶ Removal proceedings therefore fit squarely within the category of cases described in *Turner* as so “unusually complex” that a person “can fairly be represented only by a trained advocate.”¹⁸⁷

In addition to their special ability to navigate the law, lawyers are also uniquely skilled in influencing the factfinding process. Their presence is therefore indispensable not only when legal issues are complex—as they undoubtedly are in immigration proceedings—but also when legal standards give factfinders unusual amounts of discretion. The Court in *Santosky* clearly acknowledged that unusual amounts of judicial discretion create a heightened need for due process safeguards. In TPR proceedings, the Court noted, “numerous factors combine to magnify the risk of erroneous factfinding. . . . [P]roceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge.”¹⁸⁸ When combined with the “disparity between the adversaries’ litigation

182. *Id.* at 2520 (internal quotation marks omitted).

183. *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) (internal quotation marks omitted).

184. *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977).

185. *Alanis-Bustamante v. Reno*, 201 F.3d 1303, 1308 (11th Cir. 2000).

186. See Note, *A Second Chance: The Right to Ineffective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544, 1559 (2007).

187. *Turner*, 131 S. Ct. at 2520 (internal quotation marks omitted).

188. *Santosky v. Kramer*, 455 U.S. 745, 762 (1982). Such “imprecise standards” can include, for example, determining what might be “detrimental to the best interests of the child.” *Id.* at 762 n.12 (internal quotation marks omitted).

resources”—stemming from, *inter alia*, the fact that the state is represented by counsel while the parent is not—such standards create a “significant prospect of erroneous [deprivation].”¹⁸⁹ The solution sought and granted in *Santosky* was a heightened burden of proof of neglect in TPR proceedings; as at least one other court has recognized, another obvious solution is requiring the appointment of counsel to represent the private party.¹⁹⁰

The immigration laws are rife with discretionary standards that leave determinations open to the subjective values of immigration judges (IJs). For example, the equitable standard for granting cancellation of removal¹⁹¹ to a legal permanent resident (LPR) requires the IJ to rule on such amorphous factors as the strength of “family ties within the United States,” “evidence of hardship to the respondent and his family if deportation occurs,” “evidence of value and service to the community,” and “other evidence attesting to a respondent’s good character.”¹⁹² In order to grant the same relief to a non-LPR, the IJ must determine whether “removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child.”¹⁹³ These are exactly the sorts of “imprecise substantive standards that leave determinations unusually open to the subjective values of the judge,” which, in turn, “magnif[ies] the risk of erroneous factfinding.”¹⁹⁴ One recent study on outcomes in asylum proceedings demonstrates the arbitrariness that this subjectivity renders: outcomes were found to vary significantly with such irrelevant factors as the gender and past experiences of the IJ deciding the case.¹⁹⁵ Though the federal circuit courts that review IJ and Board of Immigration Appeals (BIA) decisions have virtually no ability to overturn an exercise of discretion, they too have been quick to note the sorts of abuses that

189. *Id.* at 764.

190. See *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005) (finding that the “wide room for judicial discretion and thus for subjective determinations” in TPR proceedings mitigated in favor of appointing counsel to the children involved).

191. “Cancellation” is a form of relief from removal for certain noncitizens who have been adjudicated to be removable. See 8 U.S.C. § 1229b(b)(1)(D) (2012).

192. *In re C-V-T*, No. 3342, 1998 WL 151434, at *11 (B.I.A. 1998) (order granting cancellation of removal).

193. 8 U.S.C. § 1229b(b)(1)(D).

194. *Kenny A.*, 356 F. Supp. 2d at 1361 (internal quotation marks omitted).

195. *Ramji-Nogales*, *supra* note 1, at 376-77 (“Perhaps the most interesting result of our study is that the chance of winning an asylum case varies significantly according to the gender of the immigration judge. Female judges grant asylum at a rate that is 44% higher than that of their male colleagues. The work experience of the judge before joining the bench also matters: The grant rate of judges who once worked for the Department of Homeland Security . . . drops largely in proportion to the length of such prior service. By contrast, an asylum applicant is considerably advantaged, on a statistical basis, if his or her judge once practiced immigration law in a private firm [sic], served on the staff of a nonprofit organization, or had experience as a full-time law teacher.”).

discretionary standards can lead to.¹⁹⁶ As the *Gault* Court emphasized, attorneys are able to “make skilled inquiry into the facts, [and] to insist upon regularity of the proceedings.”¹⁹⁷ Representation by counsel is therefore essential for accurate adjudication in removal proceedings, where subjective standards drastically enhance the possibility of inaccurate factfinding.

These two error-enhancing factors—complexity and subjectivity in the law—are further exacerbated when proceedings possess that binary lopsidedness that courts have long recognized as the touchstone of fundamental unfairness. As we have seen, one of the effects of *Turner* has been to emphasize the importance of this factor over others in the right-to-counsel calculus.¹⁹⁸ The *Turner* Court was reluctant to find a right to appointed counsel in contempt proceedings for failure to comply with a child support order, despite the paramount physical liberty interest at stake, precisely because such proceedings do not possess the binary adversarial lopsidedness that appointed counsel can rectify. “[S]ometimes,” the Court noted, “the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent *un* represented by counsel.”¹⁹⁹ Thus, “[a] requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would alter significantly the nature of the proceeding.”²⁰⁰ By contrast, *Turner* expressly shielded from its operation circumstances in which “[t]he government is likely to have counsel or some other competent representative,” because such scenarios implicate the accuracy-enhancing function of counsel.²⁰¹ Removal proceedings always present just such a scenario.

Procedural due process requires that proceedings be “candidly appraised” in order to determine what procedures are due.²⁰² A final and crucial accuracy-enhancing factor of proceedings is public openness. As one commentator has put it, “[o]pen courtrooms encourage truthfulness and discourage perjury, they encourage fairness and discourage abuse, and most important, they place our system of justice before the public and thus make it accountable.”²⁰³ The

196. See, e.g., *Wang v. Attorney Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) (“The tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding.”); *Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005) (“The IJ’s opinion is riddled with inappropriate and extraneous comments”); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) (“[T]he IJ’s assessment of Petitioner’s credibility was skewed by prejudice, personal speculation, bias, and conjecture”).

197. *In re Gault*, 387 U.S. 1, 36 (1967).

198. See *supra* text accompanying notes 117-126.

199. *Turner*, 131 S. Ct. at 2519.

200. *Id.* at 2511 (internal quotation marks omitted).

201. *Id.* at 2520.

202. *In re Gault*, 387 U.S. at 21.

203. Kathleen S. Bean, *Challenging the Rules: Public Access to Dependency Court*, 79 DENV. U.L. REV. 1, 1 (2001).

Supreme Court, for its part, has on multiple occasions recognized the accuracy-enhancing value of public access to the courtroom.²⁰⁴ Though removal proceedings are technically open to the public, hearings involving “an abused alien child are closed to the public,” as are proceedings deemed by an IJ to require the protection of the parties, the witnesses, or the public interest.²⁰⁵ Such proceedings present an especially urgent case for the accuracy-enhancing presence of counsel, who has a special ability to “insist upon regularity.”²⁰⁶

The value of attorneys in navigating complexity and subjectivity in the law, leveling the playing field when representation is lopsided, and bringing accountability and regularity to the courtroom is no longer merely a theoretical assertion in the immigration context. Two recent studies show an egregious disparity in outcomes between cases in which respondents are represented and cases in which they are not. A 2011 study of adjudication in New York immigration courts showed that success rates for non-detained respondents in removal proceedings increase from 13% to 74% when respondents are represented by counsel.²⁰⁷ For detained respondents, success rates increase from 3% to 18%.²⁰⁸ Another study investigating outcomes in asylum cases found the asylum grant rate to be roughly three times higher for asylum seekers with legal counsel.²⁰⁹ These numbers underscore the accuracy-enhancing value of counsel in proceedings that are complex, governed by subjective standards, characterized by binary lopsidedness, and often closed to the public.

D. Reconciling the Strength of the Case for Counsel with Its Lack of Recognition

The foregoing analysis demonstrates that even though the doctrine implicates numerous factors and therefore a great deal of unpredictability, there is a nearly unquestionable due process right to counsel in removal proceedings involving children. How, then, can this be squared with the utter lack of recognition of the right by the courts tasked with adjudicating removal cases?²¹⁰ For one thing, though the case for counsel has always been strong, the last five

204. *See, e.g.,* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (discussing the importance of openness in giving “assurance that the proceedings were conducted fairly to all concerned” and “discourag[ing] perjury, the misconduct of participants, and decisions based on secret bias or partiality”).

205. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL 62 (2013), *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_review.pdf.

206. *In re Gault*, 387 U.S. at 36.

207. STUDY GRP. ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS 3 (2012), *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.

208. *Id.*

209. Ramji-Nogales, *supra* note 1, at 340.

210. *See supra* text accompanying notes 12-15.

years have seen it grow stronger in ways that have yet to be assessed together in one place. These developments include the now-leading appointment doctrine precedent of *Turner*, which has brought contemporary appointment doctrine back in line with its roots as a response to government overreaching; *Padilla*, a case that takes a crucial step towards reconciling Justice Brewer's paradox; recent studies proving the accuracy-enhancing value of legal representation; and the enactment of the TVPRA. The awkward place that deportation occupies in Supreme Court jurisprudence has unquestionably been a key stumbling block for the right to counsel in removal proceedings. *Padilla* lowers this stumbling block, and the strength of the doctrinal and empirical case for counsel in removal proceedings involving children should now be enough to do away with it. The only remaining piece of the puzzle is to understand why courts should require representation *by counsel*, as opposed to other non-legal representatives, such as parents (where available) or guardians ad litem.

IV. WHY LEGAL REPRESENTATION?

Children proceeding pro se at removal hearings are often not entirely without assistance: they may be represented by guardians ad litem (GALs),²¹¹ relatives, other “[r]eputable individuals of good moral character who have a personal relationship with [the child]” (such as neighbors, clergy, or friends), or even consular officials of their home countries.²¹² The TVPRA authorizes HHS to appoint “independent child advocates” to advocate for the best interests of “child trafficking victims and other vulnerable unaccompanied alien children.”²¹³ And the University of Chicago’s Young Center has built out a robust network of “child advocates” in the Chicago area who advocate on behalf of the best interests of unaccompanied children in proceedings there.²¹⁴

211. Whereas an attorney representing a child must typically pursue the child’s stated interests, a GAL’s role is to advocate for the best interests of a child, even when best interests and stated interests conflict. See AM. BAR ASS’N, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § A-2 (1996), available at

<http://www.afcnet.org/Portals/0/PublicDocuments/Guidelines/AbuseNeglectStandards.pdf> [hereinafter STANDARDS OF PRACTICE]. Thus, in circumstances where a child does not in fact know which outcome might be in her best interests, or is for any number of reasons unwilling to ask for it, GALs allow attorneys and courts to discern and pursue those options in contravention of the child’s stated interests. Sometimes GALs are also attorneys, and they can in fact serve the dual roles of GAL and attorney for a single client, see *id.*; more often, they are non-attorneys, and therefore cannot perform any legal functions on behalf of a child.

212. See EXEC. OFFICE FOR IMMIGRATION REVIEW, FACT SHEET: WHO CAN REPRESENT ALIENS IN IMMIGRATION PROCEEDINGS 4 (2009), available at <http://www.justice.gov/eoir/press/09/WhoCanRepresentAliensFactSheet10022009.pdf>.

213. 8 U.S.C. § 1232(c)(6) (2012).

214. *Our Projects*, YOUNG CENTER FOR IMMIGRANT CHILD. RTS., <http://theyoungcenter.org/about/projects> (last visited Oct. 29, 2013).

Elsewhere in legal contexts involving children's interests, courts often appoint GALs to represent children. Sometimes these advocates are attorneys, but often they are not.²¹⁵

Given this universe of non-attorney representatives that courts are accustomed to hearing from both inside and outside the removal context, a court addressing a right-to-counsel claim from a child removal respondent will likely expect to hear a principled argument as to why such non-attorney representation is inadequate, both practically speaking and in the eyes of the Due Process Clause.²¹⁶ Some such arguments flow obviously from the appointment doctrine explored *supra*, while others are based in the ethical rules governing representation by attorneys and non-attorneys, in the treatment of children throughout the law as possessing autonomy interests, and in the nature of removal proceedings. What follows addresses these arguments. It is by no means an effort to denigrate the tremendous value that non-attorney representatives such as GALs can provide in children's cases; rather, it is the case for why legal representatives should be required in addition to any other non-legal representatives who may be playing important roles in a given child's case. The primary focus is on GALs, because they are likely to be seen by courts as the most viable alternative to counsel.

A. Non-Attorney Representation Would Not Satisfy Due Process

As an initial matter, much of what was said above about why due process requires appointing counsel to children in removal proceedings does not apply to non-attorney representation. The principal due process defect in removal proceedings involving children is their binary lopsidedness (which is exacerbated by the special vulnerabilities of children, the complexity of the legal regime, and the tremendous amount of discretion vested in IJs). This defect would not be remedied by the appointment of non-law-trained representatives. As the Court noted in *Gault*, minors need "the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [they] ha[ve] a defense and to prepare and submit it."²¹⁷ While non-law-trained

215. See, e.g., MINN. STAT. ANN. § 518.165 (West 2013) (authorizing the appointment of GALs where "custody or parenting time with a minor child is in issue"); WASH. REV. CODE ANN. § 26.12.175 (West 2013) (authorizing the appointment of GALs where "necessary to protect the best interests of the child in any proceeding under [the Family Code]").

216. For example, in a pending right-to-counsel case, the government argued that the respondents' representation needs could be satisfied by, *inter alia*, a "legal guardian, near relative, or friend." *Franco-Gonzales v. Holder*, 828 F. Supp. 2d 1133, 1145 (C.D. Cal. 2011) (internal quotation marks omitted). The argument that non-legal representation suffices is bound to arise in right-to-counsel cases, but this argument has been ignored in existing commentary on the right to counsel in civil contexts. See, e.g., Hill, *supra* note 95.

217. *In re Gault*, 387 U.S. 1, 36 (1967) (footnote omitted).

representatives may be more capable than a child of insisting upon regularity and inquiring into the facts of the case, they cannot effectively assist children in “cop[ing] with problems of law” and preparing legal arguments—especially not where proceedings and legal issues are unusually complex. And even if some non-law-trained representatives are indeed as skilled in understanding the law as the average attorney, attorneys “have the ability to perform important functions in the courtroom” that others cannot, including calling and examining witnesses, representing clients in non-removal matters related to proceedings, filing motions, and preserving error.²¹⁸ For these reasons, non-attorneys cannot serve the accuracy-enhancing function in immigration court that the complexity and subjectivity of removal adjudication require. If the government has legal counsel to prepare its legal case in binary adversarial proceedings, so too, in the eyes of the Due Process Clause, must the child.

B. The Substance of Removal Proceedings Requires Legal Advocacy

The GAL role is typically a creature of common law or state legislation, and it takes a wide variety of forms across jurisdictions.²¹⁹ The overriding purpose of appointing a GAL is nevertheless to give voice to an individual’s best interests where that individual is presumed unable to do so herself.²²⁰ Thus, GALs are commonly appointed for children in abuse and neglect proceedings against parents, custody disputes, TPR proceedings, adoption proceedings, delinquency proceedings, judicial bypass proceedings for minors seeking abortions, and other suits in which parents are opposing parties.²²¹ What unifies these sorts of proceedings is that they require decisions about custody—typically, the state taking custody away from a parent and assigning it to another parent or assuming custody itself.²²² As this Note has argued, removal proceedings can often indirectly implicate parental custody²²³: HHS temporarily assumes custody when unaccompanied children are detained during proceedings, for example, and sometimes removal decisions have the effect of sending a child from the custody of one parent (in the United States)

218. Lorentz, *supra* note 67, at 394.

219. See Note, *Lawying for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1138 n.52 (1978).

220. See STANDARDS OF PRACTICE, *supra* note 211, § A-2.

221. See Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1785 n.4 (1996).

222. See *id.* at 1795 (“The appointment of a guardian ad litem represents a judgment by society that a child’s parents cannot be expected to act in the child’s best interests and that someone else should assume parental authority and responsibility to protect the interests of the child in the matter being litigated.”). The use of GALs in judicial bypass proceedings for minors seeking abortions involves the state taking away parents’ ability to exercise custody in a specific circumstance, and therefore fits approximately within the description of custody-determination proceedings used here.

223. See *supra* Part III.B.2.

into the custody of the other (in the home country). But removal proceedings are not fundamentally concerned with decisions about care for a child, and there is no substantive standard in immigration law that requires determining what might be in a respondent's best interests.²²⁴ Appointing GALs to child removal respondents may be an important first step towards introducing a degree of best-interests focus into the removal calculus, but, because the removal system doggedly eschews making best-interest determinations, it would be anomalous for a court to find a GAL sufficient to represent a child's position. In other words: where the court's substantive mandate is to make a decision based on what would be in a child's best interests,²²⁵ a GAL, whose overriding focus is the child's best interests, may effectively serve the child's needs in court; where, on the other hand, adjudication turns on arcane legal standards that have nothing to do with best interests, a GAL alone cannot suffice, no matter how helpful her presence might be—rather, *legal advocacy* is paramount.

C. The Procedures in Removal Proceedings Assume Legal Advocacy

There is a perennial debate among child welfare specialists over the proper focus of child advocacy in court. Some support a best-interests-focused model, where the individual representing the child—whether attorney or GAL—takes

224. An arguable exception is Special Immigrant Juvenile Status (SIJS), which is a form of relief from removal for noncitizen children who have been:

[D]eclared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law[, and] *for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence.*

8 U.S.C. § 1101(a)(27)(J)(i)-(ii) (2012) (emphasis added). However, the best-interests determination upon which SIJS is based “is specifically assigned to the juvenile court and thus takes advantage of the juvenile court's expertise and experience.” David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1006 (2002). SIJS adjudication thus does not require immigration courts to rule on a child's best interests, and it is therefore no exception to the broad rule that substantive law in immigration court is not best-interests focused.

225. See, e.g., OHIO REV. CODE ANN. § 2151.85 (West 2013) (“A woman who is pregnant, unmarried, under eighteen years of age, and unemancipated and who wishes to have an abortion without the notification of her parents, guardian, or custodian may file a complaint in the juvenile court of the county in which she has a residence The complaint shall . . . include . . . an allegation . . . [t]hat one or both of her parents, her guardian, or her custodian was engaged in a pattern of physical, sexual, or emotional abuse against her, or that the notification of her parents, guardian, or custodian otherwise *is not in her best interest.*” (emphasis added)); *In re A.V.D.*, 815 P.2d 277, 281 (Wash. Ct. App. 1991) (“Under RCW 13.34.180 and .190, a court may terminate parental rights if it finds that (1) the requisite allegations are supported by clear, cogent and convincing evidence; and (2) termination is in the best interests of the child.” (footnote omitted)).

into account a child's stated wishes, but considers them as one input among many in an independent determination of what is best for the child, which may very well contravene what the child purports to want.²²⁶ This view recognizes the limited cognitive capacity that some children have to make decisions autonomously;²²⁷ the conflict of choosing between parents that certain custody proceedings sometimes place them in;²²⁸ and the inability or unwillingness of some children to shoulder the responsibility that goes along with making important decisions for themselves.²²⁹ By contrast, others support a child-directed advocacy model.²³⁰ This model recognizes that pursuing a child's stated interests has the effect of empowering the child and recognizing her status as a rights-holder.²³¹ As one proponent of this approach puts it, "[w]hen the lawyer advocates for the child's express preferences, she does so in the language of rights;" on the other hand, "[l]awyer models that undermine client autonomy also undermine rights. It is not enough to suggest that because children are incompetent, or otherwise disabled, they lack rights—for it is very clear that children do have rights: constitutional, statutory, procedural, and substantive."²³² Crucial for present purposes is the fact that while the best-interests mandate can be fulfilled by a non-attorney advocate, the child-directed model presupposes representation by an attorney: "[b]ecause the American legal system is adversarial, counsel fills an indispensable role in ensuring that individual claimants are represented and that the requisites of due process are met."²³³

It is beyond the scope of this Note to determine which model might fit best in a given case or category of cases. Nor is it necessary to do so, because for better or worse the removal system has already thoroughly endorsed the rights- and autonomy-based model: rather than providing for a parent-figure judge to help the respondent along her path to adulthood, the removal system creates adversarial proceedings governed by procedural due process.²³⁴ The respondent—even the child respondent—is not a potential ward in need of protection, but an autonomous adversary of the state who possesses both rights

226. See generally Robert E. Emery, *Hearing Children's Voices: Listening—and Deciding—Is an Adult Responsibility*, 45 ARIZ. L. REV. 621 (2003).

227. See Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIMONY LAW. 183, 195 (2005).

228. See *id.* at 194 ("[M]any commentators have recognized that children may suffer loyalty conflicts if they are forced to articulate a preference in custody disputes.")

229. As Professor Robert Emery has noted, "[r]ights and responsibilities go hand-in-hand, and many of our well-intentioned efforts to increase children's rights have, unfortunately, burdened children with adult responsibilities." Emery, *supra* note 226, at 622.

230. See, e.g., Katherine Hunt Federle, *Lawyering in Juvenile Court: Lessons from a Civil Gideon Experiment*, 37 FORDHAM URB. L.J. 93 (2010).

231. See *id.* at 110.

232. *Id.*

233. *Id.*

234. See *supra* text accompanying notes 67-72; *supra* Part II.D.

and responsibilities, and who is entitled to enhanced procedural protections by virtue of her position. This is not a system in which an inquisitorial judge seeks the advice of an investigator-guardian, but, rather, a system that presupposes zealous advocacy—the cornerstone of representation by an attorney.²³⁵

It is no response to point to the bright-line between autonomy and dependence that many legal standards draw at the age of eighteen.²³⁶ Autonomy in the eyes of the Due Process Clause is much more commonly determined on a totality-of-the-circumstances basis. Thus, for example, the Supreme Court has held that “the totality of the circumstances surrounding [an] interrogation” are to be assessed in “determin[ing] whether there has been a waiver even where interrogation of juveniles is involved.”²³⁷ And instead of permitting states to require parental consent for minors to obtain abortions, it has held that a “pregnant minor is entitled . . . to show . . . that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes,” regardless of age.²³⁸ Children below a certain age are probably per se incapable of the sort of autonomous decisionmaking that is required by the child-directed representation model, but that age is most certainly not eighteen.²³⁹ Nor would such young children’s interests be served by a GAL alone; their cases present a need for both sorts of representation—best-interests-based *and* rights-based—and the latter sort can only be performed by an attorney.

D. Accurate Factfinding Requires Confidentiality

Though they are viewed first and foremost as advocates, GALs typically also function as court investigators,²⁴⁰ and unlike attorneys, they usually owe their primary duty not to the child on behalf of whom they advocate but to the

235. See MODEL RULES OF PROF'L CONDUCT, preamble cmt. 2 (2012) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”); *id.* preamble cmt. 9 (“These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests . . .”).

236. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981) (“[A] natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person’s eighteenth birthday.”).

237. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

238. *Bellotti v. Baird*, 443 U.S. 622, 643 (1979).

239. Indeed, some social science research indicates that it may be as low as seven or eight. See *Atwood*, *supra* note 227, at 195.

240. See *id.* at 196 (“While courts often refer to the guardian ad litem as ‘the arm of the court,’ the guardian’s role may encompass acting as expert witness or mediator as well as investigator and court advisor. In states where the duties of guardians ad litem are spelled out by statute or court rule, they often include investigation of the case, interviews with parties and others knowledgeable about the child, review of relevant records, participation in court proceedings and settlement discussions, and reporting of findings and recommendations to the court.” (footnotes omitted)).

court.²⁴¹ Their relationships with child-clients are therefore rarely governed by confidentiality requirements.²⁴² Indeed, most jurisdictions do not recognize a privilege between GAL and child that could prevent courts and other parties from forcing them to testify about litigation-related communications, even when doing so might not be in the child's best interests.²⁴³ For this reason, many GALs give nonconfidentiality warnings at the outset of their relationships with the children they represent, and some jurisdictions even require that such warnings be given.²⁴⁴ As one commentator indicates, this can pose a significant threat to a GAL's ability to uncover relevant facts and advocate effectively on her behalf:

Establishing trust is no small task for the GAL: parents may instruct the child to not speak about certain matters; the child may not speak easily to strangers; or the child may try to manipulate the interview to achieve a desired result. . . . [W]arnings of non-confidentiality only exacerbate this difficulty.²⁴⁵

A large percentage of removal proceedings involving children require adjudicating claims of persecution, trafficking, neglect, or abuse,²⁴⁶ and can therefore require the sort of factfinding that can only be performed within the confines of a confidential relationship. Even if uncomfortable facts must one day be disclosed to the court, children will be more comfortable relating such facts to an adult who can guarantee that they will only be disclosed on the child's terms and with the child's permission.²⁴⁷ Given the confidentiality rules governing attorneys²⁴⁸—the express purpose of which is to engender trust and thereby facilitate adequate communication and factfinding²⁴⁹—such an adult must be an attorney.²⁵⁰

241. See Marcia M. Boumil et al., *Legal and Ethical Issues Confronting Guardian Ad Litem Practice*, 13 J.L. & FAM. STUD. 43, 45-46 (2011); Stuckey, *supra* note 221, at 1792.

242. Stuckey, *supra* note 221, at 1792.

243. Boumil, *supra* note 241, at 55; Stuckey, *supra* note 221, at 1792.

244. Boumil, *supra* note 241, at 55-56.

245. *Id.* at 56.

246. See *supra* notes 148-153.

247. See Hollis R. Peterson, Case Note & Comment, *In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian Ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1109-10 & n.172 (2006).

248. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2012).

249. See *id.* R. 1.6 cmt. 2 ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." (citation omitted)).

250. It should be noted that when "child advocates" are assigned to "child trafficking victims and other vulnerable unaccompanied alien children" pursuant to the TVPRA, a statutory privilege does in fact apply: "[t]he child advocate shall not be compelled to testify or provide evidence in any proceeding concerning any information or opinion received from the child in the course of serving as a child advocate." 8 U.S.C. § 1232(c)(6) (2012). This alleviates the concern about confidentiality that compulsory testimony creates, but it stops

E. A Note About Relatives and Other Representatives

Much of what is said above applies with even more force to other non-attorneys who could conceivably find themselves in the role of a child's representative in removal proceedings. Relatives and other adults who serve as a child's "sponsor" when the child is released from government custody may find themselves forced to speak on behalf of the child in immigration court.²⁵¹ These individuals are even less likely than official GALs to be versed in the intricacies of immigration law and court proceedings, and they will do almost nothing to level the playing field in the way that due process requires.²⁵² Moreover, commentators have pointed to conflicts of interests that can arise when family members (or their attorneys) are allowed to represent the interests of children in court.²⁵³ Parents in dependency court, for example, may wish to have a child removed from the home even though the child "wishes to stay in her family and in many cases could stay there safely with the imposition of certain requirements."²⁵⁴ So too might an adult "sponsor" tasked with caring for

short of creating a duty of confidentiality, and therefore does not obviate the need for a nonconfidentiality warning, or the risk that a GAL will disclose information against a child's wishes when it supports a best-interests determination. Indeed, a robust duty of confidentiality would destroy the best-interests-serving purpose of the GAL, who "must be free to pursue the best interests of [her] charges, as would a parent, even if this means using [i.e., disclosing] statements made by their children." Stuckey, *supra* note 221, at 1801. Thus, even in the context of advocating for unaccompanied children pursuant to the TVPRA, a GAL's ability to obtain sensitive information from her child-client will be limited in a way that an attorney's ability to obtain such information is not.

251. The *Flores* Settlement Agreement requires the government to release an apprehended child to a "sponsor" once it has determined that the child is neither a flight risk nor a safety threat. *Flores* Settlement Agreement, *supra* note 106, at 9-10. A "sponsor" can be, *inter alia*, a parent, a legal guardian, "an adult relative (brother, sister, aunt, uncle, or grandparent)," "an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being," or "an adult individual or entity seeking custody." *Id.* at 10.

252. For an example of the ways in which an untrained parent is inadequate as a representative in immigration court, see *Franco-Gonzales v. Holder*, 828 F. Supp. 2d 1133, 1147 (C.D. Cal. 2011). There, the court noted the many mistakes the mentally disabled respondent's father had made in representing his son, and the various ways in which he did not suffice as a representative:

[The father] (1) failed to assert an available basis for asylum, *i.e.*, his son's mental illness, despite being advised to do so; (2) failed to discuss the asylum application with his son prior to filing it, despite the requirement that the preparer read the form aloud to the applicant for verification; (3) does not have time to represent his son because he supports his family by working full-time as a newspaper delivery-man and takes English classes; (4) has only a basic knowledge of English and requires the services of a translator; and (5) is the primary witness in support of his son's asylum application. [The father] lacks basic knowledge of his son's circumstances as demonstrated by the fact that he believes his son has no attorney in his criminal proceedings and he has minimal and incorrect knowledge of his son's criminal and medical history.

Id. (citations omitted).

253. See, *e.g.*, Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663, 679 (2006).

254. *Id.*

a child eventually wish to see the child removed from her charge, and therefore urge the child to seek voluntary departure when she otherwise might desire to remain in the United States and be entitled to do so. To avoid such conflicts and to ensure that due process is satisfied, child “sponsors” should be presumed inadequate representatives of children’s interests in removal proceedings.

CONCLUSION

The foregoing analysis is the case for a right to appointed counsel for all children in immigration court. Given the severity of the deprivations at stake in removal proceedings involving children, courts should be willing to recognize a categorical, deprivation-focused right in this context. The *Lassiter* presumption mitigates in favor of such a result, as do the important recent cases of *Padilla* and *Turner*. And, of course, there would be longstanding and closely analogous precedent for doing so.²⁵⁵ But given the Court’s more recent preference for case-by-case regimes in other civil contexts, immigrants’ rights advocates will likely need to begin their work with particularly vulnerable categories of children—the most vulnerable of which, this Note has proposed, consists of unaccompanied children—and move outwards from there. Indeed, advocates have already taken this tack, and initial results are promising: as we have seen, a district court recently ruled that certain mentally disabled respondents have a right to government-provided representation in removal proceedings.²⁵⁶ Though this decision was statutory, it has due process implications as a signal of a change in the contemporary conscience. So too does the TVPRA, with its incipient regime for softening the adversarial structure of removal proceedings involving unaccompanied children, and with its recommendations that guardians and counsel be provided. These developments do not obviate the need for change, but they do signal that change is warranted.

Of course, not all unaccompanied children would be created equal as plaintiff-respondents in a *Betts*-focused strategy to create a robust case-by-case regime. Detained children have weightier private interests, as do children with comparatively strong family ties in the United States, children who face severe consequences upon repatriation, and children whose cases present complex legal issues or unusual amounts of IJ discretion.²⁵⁷ But, again—given the Due Process Clause’s cardinal aversion to adversarial proceedings in which vulnerable individuals facing severe liberty deprivations square off against government attorneys, *all* children in removal proceedings have a due process right to counsel, regardless of whether it is ultimately recognized through a more robust case-by-case approach, or a few broadly sweeping categorical

255. See *In re Gault*, 387 U.S. 1 (1967).

256. See *Franco-Gonzales v. Holder*, 828 F. Supp. 2d 1133, 1149-50 (C.D. Cal. 2011).

257. Thus, SIJS applicants may have weaker claims than certain asylum applicants, for example.

rulings.

It should be noted as a final matter that the value of the right to counsel depends not only on its scope, but also on the quality of counsel that is provided. As others have recognized, “when the competency of counsel in immigration proceedings is taken into consideration, the differential outcomes associated with the presence of effective counsel are likely to be even more pronounced.”²⁵⁸ Efforts to improve the quality of counsel—in particular, by reducing caseloads—are therefore a crucial companion to the legal effort to achieve recognition of the right.

258. M. Margaret McKeown & Allegra McLeod, *The Counsel Conundrum: Effective Representation in Immigration Proceedings*, in REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 286, 288 (2009).