STILL WAITING: THE ELUSIVE QUEST TO ENSURE JUVENILES A CONSTITUTIONAL RIGHT TO COUNSEL AT ALL STAGES OF THE JUVENILE COURT PROCESS

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> 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.[1]

Forty years after the United States Supreme Court first established that juveniles[2] have a right to counsel in delinquency proceedings, juveniles' access to timely, zealous, and effective legal representation remains a patchwork of disparate state and local laws, policies and practices that fail to assure that all youth receive skilled representation throughout their involvement with the juvenile justice system. The failure of states to adequately fund juvenile indigent defender systems, or to even provide counsel at certain critical stages of juvenile court proceedings, leaves many youth vulnerable to the consequences of false confessions and uncounseled guilty pleas, the perils of unnecessary detention while awaiting trial, or prolonged periods of confinement in inappropriate facilities following adjudication.

Indeed, the need for the assistance of counsel in juvenile court is even more essential today, as greater numbers of youth face the possibility of adult prosecution,[3] dispositions have become longer and

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

2. The use of the term "juveniles" in this article refers to children under the age of eighteen; in most states, individuals who commit crimes at age eighteen or older are charged and prosecuted as adults in the criminal justice system. Two states—New York and North Carolina—treat juveniles sixteen years of age or older as adults; ten states—Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, South Carolina, Texas, and Wisconsin—treat individuals seventeen years of age and older as adults. National Center for Juvenile Justice, State Juvenile Justice Profiles, www.ncjj.org/stateprofiles (last visited Nov. 16, 2007).

3. *See* LA. CHILD. CODE ANN. art. 305 (2004); N.Y. PENAL LAW § 60.10 (McKinney 2004); *see also* BARRY FELD, JUVENILE JUSTICE ADMINISTRATION 494 (2d ed. 2004). ("Traditionally, discretionary judicial waiver was the transfer mechanism on which

more punitive,[4] and delinquency adjudications now carry collateral consequences that follow the youth into adulthood or, in some cases, for the rest of their lives.[5] Equally important, as the stakes in

most States relied . . . State transfer provisions changed extensively in the 1990s. From 1992 through 1997, all but six States enacted or expanded transfer provision. An increasing number of State legislatures have enacted transfer provisions.") For example, under article 305 of the Louisiana Children's Code, a child who is fifteen years of age or older must be tried as an adult if the juvenile court finds that there is probable cause to believe that the child committed first or second degree murder, aggravated rape, or aggravated kidnapping. FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 139 (2005).

4. *See generally* FELD, *supra* note 3, at 30-47 ("Traditional notions of individualized dispositions based on the best interests of the juvenile are being diminished by interests in punishing criminal behavior . . . . This change in philosophy has resulted in dramatic shifts in the areas of jurisdiction, sentencing, correctional programming, confidentiality and victims of crime.").

5. For example, sex offender registration requirements now carry consequences for juvenile offenders, which may last their entire lives. *See* Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C.A. §§ 16901-16991 (West 2007). The Act requires some juvenile sex offenders to register every year of their lives with law enforcement authorities in the states in which they live, work, or attend school. *Id.* § 16913. The Act also requires states to publish their sex offender registries on the Internet, and to notify local law enforcement agencies, schools, and other community groups when juvenile sex offenders join the state's registry. *Id.* §§ 16918-16919.

Additionally, state juvenile sex offender laws often penalize juveniles well beyond the reach of juvenile court jurisdiction. For example, in Illinois, adjudicated juvenile delinquent sex offenders who are deemed sexual predators must register for their natural life; all other adjudicated juvenile sexual offenders are required to register for ten years from the date of adjudication if sentenced to probation, or, if confined, ten years from parole, discharge, or release. *See* 730 ILL. COMP. STAT. 150/7 (Supp. 2007). In Louisiana, any juvenile who has attained the age of fourteen years at the time of the commission of the offense, and who has been adjudicated delinquent based upon the perpetration, attempted perpetration, or conspiracy to commit certain crimes (aggravated rape, forcible rape, second degree sexual battery, aggravated kidnapping of a child who has not attained the age of thirteen years, second degree kidnapping of a child who has not attained the age of thirteen years, aggravated incest involving circumstances defined as an "aggravated offense," or aggravated crime against nature) shall register with the sheriff of the parish of the person's residence. LA. REV. STAT. ANN. § 15:541(14.1) (West Supp. 2007). A person who was convicted of a sexual offense against a victim who was a minor must register and maintain registration for twenty-five years from date of initial registration. A person who was convicted of an aggravated sexual offense must register for the duration of his or her life. *Id.* § 15:542.1(H)(3) (West Supp. 2007).

In Minnesota, an adjudicated delinquent must continue to register for life if the person is convicted for any offense that requires registration, including, but not limited to, criminal sexual conduct, possessing pornographic work involving a minor, and patterned sex offenses. MINN. STAT. § 243.166(6)(d)(1) (Supp. 2007). Life registration is also required for any offense from another state, or any federal offense similar to the offenses described in subdivision 1b of the section. *Id.* § 243.166(6)(d)(2).

Moreover, adjudication may have significant ramifications in subsequent judicial matters, as courts have upheld the use of juvenile adjudications for adult sentence enhancement. *See* State v. Weber, 149 P.3d 646, 649-53 (Wash. 2006) (finding that

juvenile court have risen, social science research has confirmed that many youth lack the capacity, on their own, to understand the nature of those stakes and to make intelligent decisions about how to manage them.[6] And while the scope and importance of the representation of counsel has been repeatedly recognized and codified in national standards for juvenile court practice since *Gault*,[7] lack of

juvenile adjudications fall under the "prior conviction" exception of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and that the later use of that adjudication to enhance adult sentencing was appropriate); People v. Tu, 64 Cal. Rptr. 3d 878, 886-88 (Cal. Ct. App. 2007) (concluding that juvenile adjudications can constitutionally be regarded as prior convictions for purposes of increasing adult sentences).

Other collateral consequences of juvenile adjudications include potential disqualification from public housing. *See* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities be Notified?*, 79 N.Y.U. L. REV. 520, 573 (2004) [hereinafter Henning, *Eroding Confidentiality*]. Housing authorities routinely conduct background checks for adult applicants, and may "investigate whether any member of the family unit, including a juvenile member, has been convicted of specific disqualifying offenses." Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1114 (2006). Adjudication may hinder a juvenile's chance of admission to an institution of higher learning as well. *See* Robert E. Shepard, Jr., *Collateral Consequences of Juvenile Proceedings: Part II*, CRIM. JUST., Fall 2000, at 41, 42. A juvenile's employment opportunities may also be limited by adjudication. While historically juvenile adjudications have not been characterized as criminal convictions for purposes of employment applications, increasingly applications "include specific references to juvenile adjudications." *See id.*

6. *See generally* Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents' Judgment and Culpability, in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 325 (Thomas Grisso & Robert G. Schwartz eds., 2000). *See also* Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD RTS. J. 16, 17 (1999); David Elkind, *Egocentrism in Adolescence,* 38 CHILD. DEV. 1025, 1029-30 (1967); AM. BAR ASS'N, JUV. JUST. CTR., KIDS ARE DIFFERENT: HOW KNOWLEDGE OF ADOLESCENT DEVELOPMENT THEORY CAN AID DECISION-MAKING IN COURT (2000); Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, CRIM. JUST., Summer 2000, at 26, 27; LAWRENCE KOHLBERG, THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES 172-73 (1984).

7. *See* AM. COUNCIL OF CHIEF DEFENDERS & NAT'L JUV. DEFENDER CTR., TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH INDIGENT DEFENSE DELIVERY SYSTEMS (2005), *available at* http://www.njdc.info/pdf/10_Principles.pdf [hereinafter TEN CORE PRINCIPLES]; JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO 62 (Kim Brooks & Darlene Kamine eds., 2003), *available at* http://www.juvenilecoalition.org/legal_representation/ohio_report_2003/ohio_report_2003.pdf (recommending that the governor and the legislature "enact and implement an unwaivable right to counsel for all children and youth for every stage of delinquency and unruly proceedings, including probation revocation hearings where loss of liberty is a possible outcome"); IJA-ABA JOINT COMM'N ON JUV. JUST. STANDARDS: STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS 89 (1980) (calling for the juvenile to have a mandatory and unwaivable right to "effective assistance of counsel at all stages of the proceeding" and advising that "the right to counsel should attach as soon as" possible); PATRICIA PURITZ ET AL., AM. BAR ASS'N,

uniformity about the scope of counsel's role, variable appointment practices, and wide variations in resources remain.[8]

We argue that juveniles charged as delinquents must be provided with legal representation throughout the course of their involvement with the juvenile justice system. This comprehensive view of juveniles' right to counsel includes proceedings or hearings[9] that precede or follow the adjudicatory hearing itself, the primary focus of the *Gault* decision. While variations may be found from one state to the next, these additional stages of juvenile court generally address intake, detention, transfer to the adult system, adjudication, disposition, postdisposition parole or probation, and final release from the court's jurisdiction.[10] A brief discussion of each follows.

The "intake" decision looks at whether the juvenile should be formally referred to juvenile court or diverted from juvenile court.[11]

JUV. JUST. CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 5-10 (1995) [hereinafter A CALL FOR JUSTICE] (arguing that standards of representation should guarantee that every juvenile has counsel, that the right to counsel is not waived, and that the juvenile is represented from the earliest stages of the proceeding through postdisposition stages); NAT'L ASS'N OF COUNSEL FOR CHILD., NACC POLICY AGENDA: JUVENILE JUSTICE POLICY (1997), www.naccchildlaw.org/policy/policy_agenda.html (recommending that juveniles accused of offenses should be represented by competent counsel in all court proceedings, including postdisposition proceedings); NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS, JUVENILE JUSTICE STANDARDS RELATING TO INTERIM STATUS 7.6C (1980) (right to counsel at each stage of formal juvenile justice process); NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 25 (2005), *available at* www.ncjfcj.org/content/view/411/411/ (last visited Dec. 4, 2007) [hereinafter JUVENILE DELINQUENCY GUIDELINES] (holding delinquency judges responsible for providing children with access to counsel at every stage of the proceedings, from before the initial hearing through postdisposition and reentry).

8. The complete listing of National Juvenile Defender Center's state-based assessments of access to and quality of juvenile defense counsel can accessed at http://www.njdc.info/assessments.php.

9. The term "proceedings" is not to be confused with "hearings." If we accepted the argument that youth are only entitled to representation at court hearings, that would mean youth are not guaranteed the right to counsel to conduct pretrial investigation and discovery or file pretrial motions, because those actions are technically not hearings. For the purposes of a youth's right to counsel, juvenile court must be viewed as a process that requires the assistance of counsel throughout, and continues until the youth satisfies the conditions of his or her disposition and the case is discharged from the court's jurisdiction.

10. *See* YOUTH ON TRIAL, *supra* note 6, at 14-19 (listing the "critical decision points" in the juvenile justice process).

11. After a child is arrested, he is interviewed by a probation officer at the preliminary intake. At this stage, the probation officer will review the child's record, obtain his social history, and consider the seriousness of the alleged charge. Based upon this review, the probation officer makes a recommendation to the police whether to file a delinquency petition, divert the case out of the delinquency system, process the case through an informal adjustment, or dismiss the case entirely. *See* Gary S.

The decision to proceed with charges may include a recommendation for a period of community supervision before proceeding with formal charges. Diversion may include diversion entirely from juvenile court, diversion to another system such as the dependency or mental health system, or diversion to a specialty court such as a drug court.[12] If the juvenile is formally referred to juvenile court, a "detention" decision must be made—whether to release the child (with or without some type of court-ordered supervision) or detain the child (in a secure or nonsecure out-of-home placement) pending the adjudicatory hearing.[13] If the intake officer decides to detain the child, most jurisdictions require a "detention hearing within twenty-four to seventy-two hours" before a judge, referee, or master to determine whether the detention status of the child shall continue.[14] This hearing often involves an initial probable cause determination as well, in order to justify continued detention of the child.[15] In many states, this will be the juvenile's first appearance in court and her first opportunity to meet with counsel.[16]

"Transfer" refers to the prosecution of juveniles under the age of eighteen—or younger in a minority of jurisdictions—as adults in the criminal justice system. All states statutorily exclude some juveniles from juvenile court jurisdiction, based on their age and the seriousness of the crime with which they are charged.[17] Presently, as a consequence of nationwide reform of juvenile court laws in the mid-1990s,[18] the vast majority of youth transferred to the adult system are there because of legislative exclusion, also referred to as "direct file." Many states deny direct file youth any hearing procedure to challenge the appropriateness of their prosecution as adults.[19] Some

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Katzmann, *Introduction: Issues and Institutions*, *in* SECURING OUR CHILDREN'S FUTURE: NEW APPROACHES TO JUVENILE JUSTICE AND YOUTH VIOLENCE 1, 10-11 (Gary S. Katzmann ed., 2002).

12. *See id.* at 10.

13. *See id.*; *see also* 42 PA. CONS. STAT. ANN. §§ 6325-6326 (West 2000); N.J. STAT. ANN. §§ 2A:4A-34-35 (West 2006); MISS. CODE ANN. § 43-21-307 (West 1999).

14. Katzmann, *supra* note 11, at 10.

15. *Id.*

16. *Id.*

17. For an overview of state policies authorizing the prosecution of juveniles as adults, see Patrick Griffin, *Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws,* TECHNICAL ASSISTANCE TO THE JUV. CT., Oct. 2003, at 1, 3, *available at* http://ncjj.servehttp.com/NCJJWebsite/pdf/transferbulletin.pdf.

18. *See* FELD, *supra* note 3.

19. *See* Manduley v. Super. Ct., 41 P.3d 3, 32-33 (Cal. 2002) (holding that the absence of a provision requiring that a judicial fitness hearing take place before a minor can be charged in criminal court does not deprive such charged minors of due process of law); *see also* Rostylav Shiller, *Fundamental Unfairness of the Discretionary Direct File Process in Florida: The Need For a Return to Juvenile Court Waiver*

states, however, allow juveniles to petition the criminal court judge to transfer their case back to juvenile court.[20] In these "reverse transfer" hearings, juveniles have a right to counsel along with other due process protections.

Despite the growing reliance on legislative transfer, all states allow judges to transfer youth into the adult system, typically at the request of the prosecutor, when the juvenile is above a certain age and has been charged with a particularly serious felony.[21] In addition to showing probable cause to believe a crime has been committed and demonstrating a prima facie case against the particular juvenile, the state must also demonstrate that the juvenile is not amenable to treatment in available juvenile facilities within the time period available for juvenile court jurisdiction.[22] In keeping with the legislative changes in the 1990s, which made it easier to transfer juveniles to the adult system, many states now allow for transfer when it is in the "public interest" or where it can be shown to promote "public safety."[23]

The "adjudicatory" phase of juvenile court is the trial phase, and it is the child's rights at this hearing that *Gault* primarily addressed. If the child is found guilty after the hearing or admits guilt to the charges, the court will proceed to "disposition," which is the equivalent of sentencing in the criminal justice system. Historically, disposition focused on placement or supervision options that promoted the treatment and rehabilitation of the juvenile.[24] These options ranged from the least restrictive (returning the child home on probation with minimal supervision), to the most restrictive (committing the child to a state-operated secure juvenile correctional

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Hearings, 6 WHITTIER J. CHILD & FAM. ADVOC. 13 (2006) (arguing that Florida's arbitrary and unreasonable direct file scheme violates, among others, fundamental due process applied to the states through the Fourteenth Amendment).

20. FELD, *supra* note 3, at 495 ("Of the 35 States with statutory exclusion or concurrent jurisdiction provisions, 20 also have provisions for transferring "excluded" or "direct filed" cases from criminal court to juvenile court under certain circumstances. This procedure is sometimes referred to as "reverse" waiver or transfer.") *See, e.g.,* 42 PA. CONS. STAT. ANN. § 6322 (West 2000).

21. *See* Griffin*, supra* note 17. In Pennsylvania, for example, when a child who is at least fourteen is charged with a felony, the juvenile court may transfer the case to a criminal court if it finds: (1) "there is a prima face case that the child committed" the felony; (2) the alleged act would be categorized as "a felony if committed by an adult;" and (3) "there are reasonable grounds to believe that" transferring the case would serve the public interest. 42 PA. CONS. STAT. ANN. § 6355.

22. *See, e.g., id.* § 6355 (a)(4)(iii)(G).

23. *See* Shiller, *supra* note 19, at 33.

24. *See* Paul Holland & Wallace J. Mlyniec, *What Ever Happened to the Right to Treatment? The Modern Quest for a Historical Promise*, 68 TEMP. L. REV. 1791 (1995).

facility that, in some states, closely resembled an adult prison).[25] More recently, some states have required juvenile courts to consider public safety in choosing incapacitation among disposition options,[26] while others have provided that juvenile courts balance public safety, accountability of the juvenile, and some version of treatment or "competency development."[27] Under any of these models, in all but one state, Washington,[28] juvenile courts retain discretion in deciding what type of disposition to impose. Additionally, under any of these models, the disposition decision may be made by a judge, a state juvenile justice agency, or some combination of the two.[29]

Lastly, juvenile court dispositions, except in Washington, are indeterminate, with no fixed completion date beyond either the natural termination of the juvenile court's jurisdiction—typically age twenty-one—or a period no longer than what an adult would serve for the same crime.[30] The length of any dispositional order generally will turn on the court or administrative agency's determination that the juvenile has successfully completed the requirements of the program or other specific provisions of the disposition order. Some jurisdictions provide for formal judicial review of a youth's progress in placement or on probation;[31] others provide for an administrative review of disposition that frequently occurs behind closed doors.[32] This period following disposition is what we refer to as the "postdisposition" phase of the juvenile court process, when juveniles may be at home, placed elsewhere in their communities, or committed to public or private, secure or nonsecure care facilities—but are still subject to the jurisdiction of the juvenile court or state juvenile justice agency. Included in this postdisposition phase is the

25. *See, e.g.,* 42 PA. CONS. STAT. ANN. § 6352; N.M. STAT. ANN. § 32A-2-19 (West 2004); MISS. CODE ANN. § 43-21-605 (West 1999).

26. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 6352; N.J. STAT. ANN. § 2A:4A-43a(10)-(11) (West 2006); 705 ILL. COMP. STAT. ANN. 405/5-705 (West 2007); OR. REV. STAT. ANN. § 419C.411 (West 2003).

27. 730 ILL. COMP. STAT. ANN. 5/3-2.5-5; KAN. STAT. ANN. § 75-7038 (1994); N.J. STAT. ANN. § 2A:4A-43, Assemb. L. & Pub. Safety Committee Statement, S. 1206- L. 1993, c.133 (N.J. 2007); N.J.STAT. ANN. § 52:17B-169, Assemb. L. & Pub. Safety Comm. Statement, A. 1914 – L. 2001, c.408 (N.J. 2007); 42 PA. CONS. STAT. ANN. § 6301.

28. *See* WASH. REV. CODE. ANN. § 13.40.0357 (West 2004).

29. *See, e.g.*, MICH. COMP. LAWS § 712A.18 (2005).

30. *See, e.g., id.* § 712A.2(a).

31. *See, e.g.*, 237 PA. CODE § 610A (2006); CONN. GEN. STAT. § 46b-141(c) (2004) (postdispositional review hearings for a "serious juvenile offender"); 705 ILL. COMP. STAT. § 405/5-745 (postdispositional reviews "may" occur); MASS. GEN. LAWS 120, § 5(e) (2002); OR. REV. STAT. ANN. § 419C.626.

32. Statutes that are silent as to mandated postdisposition judicial review leave review in the hands of the administrative agencies. *See* N.J. STAT. ANN. 2A:4A-43 (does not explicitly provide for postdispositional hearings).

period of a juvenile's release from an institution or facility when they remain on "aftercare probation"—analogous to adult parole. The commission of a new crime while on aftercare probation, or the violation of the technical rules of aftercare probation (e.g., failure to comply with curfew and school attendance requirements), could lead to a revocation of the juvenile's probationary status and a return to placement.[33]

At any one of the hearings, proceedings, or stages described above, juveniles need assistance of counsel for three fundamental reasons. First, juveniles need lawyers precisely because they are juveniles. Because of their developmental characteristics, juveniles as a class are ill-equipped to understand, manage, or navigate the complexities of the modern juvenile (or adult) justice system on their own. Second, juveniles need lawyers to keep the rehabilitative component of juvenile court in focus and to make sure that they have access to programs, services, and other opportunities designed to meet their individual needs for treatment and rehabilitation. Third, juveniles need lawyers to help blunt the increasingly punitive edge of the juvenile justice system, which threatens to obscure its rehabilitative purpose, and to ensure that their release or discharge from the juvenile justice system occurs in a timely and appropriate manner.

This expansive view of a child's right to counsel derives from the Supreme Court's doctrinal analysis of the procedural due process requirements applicable to youth in the juvenile justice system, state legislation affording youth a right to counsel, and the Supreme Court's jurisprudence on the right to counsel for adult defendants and inmates. For youth involved in juvenile court proceedings, the Court has typically addressed procedural due process rights, including the right to counsel, through a Fourteenth Amendment due process lens.[34] Declining to equate juvenile court proceedings with criminal proceedings, the Court has considered whether specific due process protections are required in juvenile court as a matter of "fundamental fairness"[35] under the Fourteenth Amendment's Due Process Clause, rather than under the specific guarantees of the

33. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 6304(a)(5) (2000); ALASKA STAT. § 12-15-7 (1975).

34. *See In re* Gault, 387 U.S. 1, 4 (1967).

35. *See id.* at 19-20 (stating that the absence of the fundamental requirements of due process has resulted in unfairness to individuals); Kent v. United States, 383 U.S. 541, 553 (1966) (describing the basic requirements of due process and fairness in juvenile courts); McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971) (explaining that the "applicable due process standard in juvenile proceedings . . . is fundamental fairness").

Fifth and Sixth Amendments, with respect to adults subject to criminal prosecutions.

Additionally, in the wake of *Gault*, every state passed a juvenile code that statutorily guaranteed children a right to counsel in juvenile court.[36] Moreover, the original underlying purpose of juvenile court—the rehabilitation of young offenders who, because of their developmental characteristics, were deemed less blameworthy than their adult counterparts[37]—requires a comprehensive right to counsel to ensure meaningful opportunities for rehabilitation, and to address the deficits of youth as they confront a complex legal system.

Support for this broad view of a child's right to counsel may also be found in the Court's decisions defining the parameters of an adult defendant's constitutional right to counsel under the Sixth Amendment, as incorporated by the Fourteenth Amendment. For adults involved in the criminal justice system, the Supreme Court has considered whether the particular stage of proceedings at issue was a "critical stage" for the purpose of determining whether the Sixth Amendment right to counsel applies.[38] Following conviction

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36. *See* National Center for Juvenile Justice, State Juvenile Justice Profiles, http://www.ncjj.org/stateprofiles/.

37. Children were viewed as:

> [M]ore malleable and more amenable to rehabilitation than adults and [it was] believed that they were not solely responsible for their criminal conduct, which was thought to be due to poverty and parental neglect. The juvenile court's focus was not on punishment but on identifying the underlying causes of the delinquent behavior and fashioning an individualized rehabilitative program for each juvenile by meting out individualized, nonstigmatizing, therapeutic dispositions.

RICHARD E. REDDING ET AL., *Juvenile Delinquency: Past and Present*, in JUVENILE DELINQUENCY: PREVENTION, ASSESSMENT, AND INTERVENTION 1, 7 (Kirk Heilbrun et al. eds., 2005).

38. The Sixth Amendment guarantees defendants in criminal trials the right to be represented by counsel at any "critical stage" in the proceedings against them. United States v. Wade, 388 U.S. 218, 227 (1967). Although the Fourteenth Amendment, rather than the Sixth Amendment, applies to children in juvenile adjudications, *In re* Gault, 387 U.S. 1, 4 (1967), courts considering the situation of juveniles have widely held that the Sixth Amendment safeguards the right to counsel for children as well. *See, e.g.*, Deshawn E. *ex rel.* Charlotte E. v. Safir, 156 F.3d 340, 349 (2d Cir. 1998) (applying Sixth Amendment safeguards to the right to counsel in delinquency proceedings); United States v. Myers, 66 F.3d 1364, 1370 (4th Cir. 1995) (applying Sixth Amendment safeguards to juvenile jurisdiction waiver hearings); John L. v. Adams, 969 F.2d 228, 237 (6th Cir. 1992) (observing that the "independent constitutional right to counsel for juvenile appeals" is grounded in the Sixth Amendment's right to counsel); United States v. M.I.M., 932 F.2d 1016, 1018 (1st Cir. 1991) (relying on Sixth Amendment cases in the adult context for its finding that "[i]f a juvenile has a right to counsel, and a right to appeal, she must also have the right to counsel on her first direct appeal"); Reed v. Duter, 416 F.2d 744, 749 (7th Cir. 1969) ("*Gault* must be construed as incorporating in juvenile court procedures, which may

and sentencing, however, the Court has favored a First Amendment "right of access" analysis to determine the extent to which incarcerated inmates must be provided with legal assistance, or at least sufficient library resources to mount challenges to conditions of their confinement.[39]

This Article examines a child's right to counsel in the juvenile justice system in light of the juvenile and adult jurisprudence described above. Part I of this Article considers a youth's right to counsel at all stages of juvenile court proceedings under both the Sixth and Fourteenth Amendments, and also discusses how the developmental characteristics of juveniles further support this right. Part II looks specifically at the right to counsel postdisposition—especially during confinement—and suggests that the particular attributes of youth and the juvenile court itself require a distinctive juvenile jurisprudence on this issue.

I. THE SIXTH AMENDMENT'S "CRITICAL STAGE" ANALYSIS SUPPORTS AN EXPANSIVE VIEW OF JUVENILES' RIGHT TO COUNSEL

In *Gault*, the Court relied on the Due Process Clause of the Fourteenth Amendment to establish a constitutional right to counsel for juveniles during the adjudicatory phase of delinquency proceedings.[40] Since juvenile proceedings had historically been classified as civil rather than criminal, the relevant inquiry was whether juveniles received a "fair hearing" under the Fourteenth Amendment,[41] or whether "fundamental fairness"[42] required the due process protections afforded juveniles by the *Gault* Court. While the Court's opinion in *Gault* may be read to encompass a right to counsel broader than just the trial phase of juvenile court,[43] the Sixth Amendment may also be used to support a broader constitutional right to counsel for juveniles. Indeed, lower courts have routinely held that the Sixth Amendment's right to counsel provision extends to juveniles as well.[44]

If the Sixth Amendment, as incorporated by the Fourteenth Amendment, is applicable to juveniles, the Sixth Amendment's "critical stage" analysis should also be applied to juveniles. As interpreted by the Supreme Court, the Sixth Amendment guarantees

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lead to deprivation of liberty . . . the constitutional safeguards of the Fifth And Sixth Amendments.")

39. Bounds v. Smith, 430 U.S. 817, 821-22 (1977).

40. *See Gault*, 387 U.S. at 41.

41. *Id.*

42. *Id.* at 62 (Black, J., concurring); *see also id.* at 72, 74, 76-77 (Harlan, J., concurring).

43. *See id.* at 36 (majority opinion).

44. *See, e.g.,* cases cited *supra* note 38.

defendants in criminal trials the right to be represented by counsel at any "critical stage" in the proceedings against them.[45] A "critical stage" is "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial"[46] or where substantial rights of the accused may be affected.[47] As the Ninth Circuit further explained in *Menefield v. Borg:*[48]

> First, if failure to pursue strategies or remedies results in a loss of significant rights, then Sixth Amendment protections attach. Second, where skilled counsel would be useful in helping the accused understand the legal confrontation . . . a critical stage exists. Third, the right to counsel applies if the proceeding tests the merits of the accused's case.[49]

The right to counsel applies in any "trial-like" confrontation in which "the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary."[50] As a result, the "Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State."[51]

The Supreme Court presaged this analysis in *Coleman v. Alabama,*[52] holding that preliminary hearings of an adversarial nature are "critical stage[s]" for the purpose of Sixth Amendment analysis.[53] Although the Court's decision rested partly on the fact that the preliminary hearing at issue determined whether the case would proceed to the grand jury, the Court focused largely on the importance of counsel in adversarial hearings.[54] According to the Court:

> [T]he skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. . . . [T]rained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at

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45. United States v. Wade, 388 U.S. 218, 227 (1967).

46. *Id.* at 226.

47. Mempa v. Rhay, 389 U.S. 128, 134 (1967).

48. 881 F.2d 696 (9th Cir.1989)

49. *Menefield,* 881 F.2d at 698-99 (citing *Mempa,* 389 U.S. at 135; United States v. Ash, 413 U.S. 300, 313 (1973); United States v. Bohn, 890 F.2d 1079, 1080-81 (9th Cir. 1989); *see also* Meadows v. Kuhlmann, 812 F.2d 72, 76-77 (2d Cir. 1987).

50. *Ash,* 413 U.S. at 317.

51. Maine v. Moulton, 474 U.S. 159, 176 (1985).

52. 399 U.S. 1 (1970).

53. *Id.* at 9.

54. *Id.*

> the trial. . . . [C]ounsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.[55]

The Court concluded that:

> The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a "critical stage" of the State's criminal process at which the accused is "as much entitled to such aid (of counsel) . . . as at the trial itself."[56]

Like the preliminary hearing at issue in *Coleman*, the detention hearing in juvenile court is used in many jurisdictions to establish whether there is probable cause that the juvenile has committed a delinquent act. For example, under the Juvenile Act of Pennsylvania, a child who has been placed in detention receives an informal hearing within seventy-two hours to determine "whether his detention . . . is required," and "whether probable cause exists that the child has committed a delinquent act."[57]

As an initial determination of probable cause, the detention hearing is also a preliminary hearing that serves to determine whether the case goes forward and, if so, on what charges. Of course, the child's placement pending trial—at home, in another nonsecure setting in the community, or in secure detention—is also determined at this time.[58] Like Alabama's preliminary hearings, detention hearings require the assistance of counsel, because witness interviews may form the basis of trial preparation for the upcoming adjudicatory hearing as well as inform the court's decision to detain or release the child—itself a decision that can have implications for the juvenile as the case goes forward.[59] Counsel at such hearings may

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55. *Id.; cf.* Gerstein v. Pugh, 420 U.S. 103, 122-23 (1975) (declining to extend the Sixth Amendment "critical stage" analysis to probable cause adjudications that were not adversary in nature, and that did not determine whether the case went to trial).

56. *Coleman,* 399 U.S. at 9-10 (citation omitted).

57. 42 PA. CONS. STAT. ANN. § 6332(a) (West 2000). The Pennsylvania Rules of Juvenile Court Procedure clarify that the child's attorney and the child, if unrepresented, may "examine and controvert written reports," "cross-examine witnesses offered against the juvenile," and "offer evidence or witnesses, if any, pertinent to the probable cause or detention determination." 237 PA. CODE § 242 (2007).

58. *See, e.g.,* 42 PA. CONS. STAT. ANN. § 6325; N.J. STAT. ANN. § 2A:4A-38 (2006); MISS. CODE ANN. § 43-21-309 (1999).

59. *See* ROCHELLE STAUFIELD, ANNIE E. CASEY FOUNDATION, JUD. DETENTION ALTERNATIVES INTITIATIVE, PATHWAYS TO JUVENILE DETENTION REFORM (1999), *available at* http://www.aecf.org/Home/KnowledgeCenter/PublicationsSeries/JDAI Pathways.aspx; LISA FELDMAN ET AL., A TALE OF TWO JURISDICTIONS: YOUTH CRIME AND DETENTION RATES IN MARYLAND AND THE DISTRICT OF COLUMBIA 15 (2001), *available at* http://www.buildingblocksforyouth.org/dcmd/dcmd.pdf (quoting Bart

also argue for diversion or appropriate screening or assessment for the child. As described above, the extent to which counsel's presence is useful in such proceedings is magnified when the client is a child, because of the child's developmental status and increased susceptibility to coercion.[60]

In a similar vein, Sixth Amendment jurisprudence on the right to counsel in adult sentencing proceedings supports the provision of counsel to juveniles in disposition hearings that, like adult sentencing hearings, determine whether the defendant will be placed outside her home, and what other consequences or sanctions she will face. Under the Court's critical stage analysis, an adult sentencing hearing is a "critical stage" requiring the provision of counsel.[61] The Third Circuit has observed that "the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the 'bottom-line' for the defendant . . . ."[62] "Even though [a] defendant has no substantive right to a particular sentence . . . . [she] has a legitimate interest in the character of the procedure which leads to the imposition of sentence,"[63] and in having counsel take steps to see that the sentence is based on accurate information.[64]

Further, the Court has made clear that it is the *act* of imposing a sentence—not *when* it is imposed in the course of the criminal proceeding—that makes sentencing a critical stage for the purposes of the Sixth Amendment. In *Mempa v. Rhay*,[65] the Court held that the imposition of a sentence at parole revocation was a "critical stage" for the purposes of the Sixth Amendment.[66] The primary reason for the provision of counsel in such hearings is the substantive right at issue—the "bottom line" that the defendant will face with respect to incarceration, probation, parole, fines, or other possible consequences.

Consistent with this analysis, the disposition hearing in juvenile court is a "critical stage" requiring the provision of counsel for juvenile defendants. Disposition, like sentencing, places a juvenile's liberty squarely at issue—and in jeopardy. This fact alone would trigger a constitutional right to counsel under the Sixth and

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Lubow's statement that "[d]etention is the gateway drug in America's addiction to incarceration").

60. *See* discussion *supra* note 7.

61. *See, e.g.,* Mempa v. Rhay, 389 U.S. 128, 134-35 (1967).

62. United States v. Rosa, 891 F.2d 1074, 1079 (3d Cir. 1989); *see also* Cobb v. Aytch, 643 F.2d 946, 962 (3d Cir. 1981) (citing *Mempa*, 389 U.S. at 134-35).

63. Gardner v. Florida, 430 U.S. 349, 358 (1977).

64. Townsend v. Burke, 334 U.S. 736, 741 (1948).

65. 389 U.S. 128 (1967).

66. *See id.* at 133, 137; *see also* Tully v. Scheu, 607 F.2d 31, 35 (3d Cir. 1979) (holding that a sentence reduction hearing occurring within seventy-five days of the judgment was a "critical stage" for Sixth Amendment purposes).

Fourteenth Amendments. But the disposition hearing in juvenile court places different burdens on juvenile defendants for which an attorney's assistance is vital. Juvenile dispositions require the court to consider the individual characteristics of the juvenile, including, for example, the child's basic or special education needs, or the child's need for mental health services, or other specialized services.[67] Many jurisdictions still require that juvenile dispositions be the least restrictive alternative consistent with the community's interest in public safety; most provide that dispositions include a program of treatment, supervision, and rehabilitation.[68] It would be difficult for an adult defendant to marshal all the facts and evidence necessary to address the myriad individual factors a juvenile court is required to address at disposition; for a child, this task would be impossible without the assistance of counsel. Because the child faces a significant loss of liberty and other potential consequences, combined with the need to address a host of individual factors in advocating for the most appropriate disposition, the disposition hearing is a "critical stage" requiring the assistance of counsel.[69]

The Sixth Amendment "critical stage" analysis also supports a juvenile's right to counsel postdisposition. Since juvenile dispositions

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67. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-246(C) (2007); N.M. STAT. § 32A-2-19 (2004); 42 PA. CONS. STAT. ANN. § 6352 (West 2000).

68. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 6352; *see also* NAT'L JUV. DEF. CTR., ENCOURAGING JUDGES TO SUPPORT ZEALOUS DEFENSE ADVOCACY FROM DETENTION TO POST-DISPOSITION (2006), *available at,* http:/www.njdc.info/pdf/ncjfcj_fact_sheet.pdf.

69. Juveniles in Pennsylvania, for example, are entitled to counsel at disposition review hearings, which are part of the broad and ongoing determination of the child's most appropriate placement. Every nine months, the court must conduct a disposition review hearing at which it considers the same factors and draws the same types of conclusions as in the initial disposition determination, including whether the child's continued placement in custody is necessary. 42 PA. CONS. STAT. ANN. §§ 6351, 6353. The commentary to the Pennsylvania Rules of Juvenile Court Procedure further explain:

> In juvenile proceedings, a juvenile is sent to a placement facility with no specific time limits except to finish the program. There are different types of facilities and different expected times of normal completion of a specific type of program. For example, one residential facility program may take a juvenile who is doing well about a year to complete. In that same residential facility, a juvenile who is misbehaving or not performing, may take four years to complete. A dispositional review hearing tracks the juvenile performance in the placement and the court makes a decision at that hearing to keep the juvenile in the facility, transfer the juvenile to another placement or send the juvenile home. *There are so many variables in this decision and restrictions of a juvenile's liberties that it is absolutely essential for juveniles to be represented at these hearings.*

237 PA. CODE § 150 (2007) (emphasis added). Because, as in an adult sentencing, the child's liberty and treatment are at stake, these hearings warrant the same constitutional protection as the initial disposition determination.

are indeterminate in most jurisdictions,[70] the ultimate duration of any sanction is contingent not only on the underlying charge, but also on the juvenile's successful completion of certain court-ordered, administrative, or programmatic benchmarks; the juvenile's favorable response to any relevant therapeutic intervention; an appropriate plan for reintegration into the juvenile's family, community, and school; and any other specific requirement set by the court or administrative agency for release. In other words, the date of release from commitment, probation, parole, or any other postdisposition sanction, as well as discharge form juvenile court jurisdiction entirely, is discretionary, not fixed.

The Court's definition of a "critical stage," which includes any stage of the prosecution where substantial rights of the accused may be affected, encompasses this postdisposition phase to the extent that counsel can demonstrate the juvenile's readiness for discharge from confinement or other sanction, in accordance with the court's disposition plan.[71] The Ninth Circuit's characterization of a critical stage as including proceedings where "failure to pursue strategies or remedies results in a loss of significant right . . . or where skilled counsel would be useful in helping the accused understand the legal confrontation" is also apt.[72] Certainly the absence of counsel, or the absence of an opportunity or forum for counsel to advocate for the earliest possible release date for the juvenile offender, could lead to an extended—but potentially unwarranted—period of incarceration. Counsel may also play a role in testing the accuracy of agency or program discipline reports or other "failure to adjust" claims that delay a juvenile's release from confinement or postpone discharge from a community-based program. Similarly, the lack of skilled counsel to ensure the juvenile is receiving the necessary services, treatment, education, or other program supports to facilitate his successful completion of the terms of his disposition—or the lack of available programs to provide the recommended treatment or services[73]—could lead to the "loss of significant rights." This is a

70. *See* ROXANNE LIEB, LEE FISH & TODD CROSBY, WASH. ST. INST. FOR PUB. POL'Y, A SUMMARY OF STATE TRENDS IN JUVENILE JUSTICE 14 (Oct. 1994), *available at* http://www.wsipp.wa.gov/rptfiles/jjsumm.pdf.

71. Although not all states specifically provide for a judicial "disposition plan," all state juvenile justice systems involve some type of sanction following adjudication—from probation to placement—whose duration can be influenced by the participation and assistance of counsel. *See* JUVENILE DELINQUENCY GUIDELINES, *supra* note 7.

72. Menefield v. Borg, 881 F.2d 696, 698-99 (9th Cir. 1989).

73. The lawyer's role in a delinquency case does not end after disposition. A juvenile's attorney continues to provide meaningful assistance to her client even after the disposition hearing. *See generally* TEN CORE PRINCIPLES, *supra* note 7 (urging juvenile defense attorneys to "provide[] independent post-conviction monitoring of each child's treatment, placement or program to ensure that rehabilitative needs are met,"

compelling argument for counsel to assist youth postdisposition, because youth, in most jurisdictions, retain a right to treatment and rehabilitation in the least-restrictive setting once adjudicated, consistent with public safety concerns.[74] This scenario differs dramatically from the adult criminal justice system, where adult inmates have no comparable "right to rehabilitation," and sentences are generally determinate, leaving counsel only a limited role to play postsentencing for adult inmates.

A. State Legislation and the Fourteenth Amendment

Since *Gault*, most states have mandated, through legislation, that juveniles are entitled to counsel throughout the entirety of the juvenile court process.[75] But even in those states that do not guarantee youth the assistance of counsel at all stages of juvenile court proceedings,[76] the Fourteenth Amendment may still require that counsel be provided beyond the trial stage. The Supreme Court has established that due process requires the effective assistance of counsel for mandatory, nondiscretionary court proceedings.[77] In *Evitts v. Lucey*, the Supreme Court held that when a state grants

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and if their needs are not, to "interven[e] and advoca[te] before the appropriate authority"); A CALL FOR JUSTICE, supra note 7, at 38 ("Legal representation should also be provided the juvenile in all proceedings arising from or related to a delinquency" action.) (quoting IJA-ABA JUV. JUST. STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 2.3 (1980).

74. *See, e.g.,* 42 PA. CONS. STAT. ANN. § 6352.

75. For example, the Juvenile Act of Pennsylvania provides that a juvenile has a right to counsel "at all stages of any proceedings." *Id.* § 6337. *See also In re* A.M., 766 A.2d 1263, 1264 (Pa. Super. Ct. 2001) (stating that juveniles in Pennsylvania are entitled to be represented by counsel at any stage of a delinquency proceeding); *In re* Smith, 573 A.2d 1077, 1080 (Pa. Super. Ct. 1990) (recognizing a juvenile's interest in maintaining physical liberty); *In re* Davis, 546 A.2d 1149, 1152 (Pa. Super. Ct. 1988) (following the principle that "all stages of any proceedings" includes detention hearings, delinquency adjudications, disposition hearings, and disposition reviews); 42 PA. CONS. STAT. ANN. § 6332 (Supp. 2007) (establishing that an informal detention hearing must be held within seventy-two hours after a child is placed in detention or shelter care); 42 PA. CONS. STAT. ANN. §§ 6341, 6351 (West 2000) (mandating that a court must make delinquency adjudications, and, if the child is adjudicated delinquent, must hold hearings to determine the appropriate disposition); 237 PA. CODE § 610 (2007) (requiring that "when [a] juvenile is removed from the home, the court hold dispositional review hearings at least every six months"). The Pennsylvania Code further provides that "[o]nce an appearance is entered . . . counsel shall represent the juvenile until final judgment, including any proceeding upon direct appeal and dispositional review, unless permitted to withdraw." 237 PA. CODE § 150(B).

76. *See* Tory J. Caeti et al., *Juvenile Right to Counsel: A National Comparison of State Legal Codes*, 23 AM. J. CRIM. L. 611, 627 (1996) (identifying seventeen states and the District of Columbia that have enacted statutes providing juvenile offenders with a right to counsel, but that, unlike similar statutes in other states, do not guarantee a right to counsel at "all stages" of juvenile court proceedings).

77. *See* Ross v. Moffitt, 417 U.S. 600, 617 (1974).

defendants an appeal as of a right, defendants are entitled to the effective assistance of counsel for the appeal.[78] To the extent that the various stages of juvenile proceedings are mandatory rather than discretionary, similar reasoning must apply. In other words, to the extent the state has granted juveniles a hearing as of right at detention or preliminary hearings, disposition hearings, and, in some jurisdictions, postdisposition review hearings, the right to the effective assistance of counsel at each mandated hearing is constitutionally protected.

B. The Distinctive Developmental Characteristics of Youth Require the Assistance of Counsel at all Stages of the Juvenile Court Process

The distinct developmental status of youth further supports the need for the assistance of skilled counsel throughout the entirety of a delinquency proceeding. While common sense tells us that children have more difficulty understanding and navigating the legal process than adults, this widely held view is underscored by social science research. Developmental psychologists have long recognized that adolescence is a period of major development across many domains, including the realm of cognition. During the teenage years, youth begin to develop the ability to think abstractly about the possible (including alternative possibilities), not just the real, and to form and test hypotheses about the world around them.[79]

Scholarship on moral development explains why a juvenile would be more inclined than an adult to acquiesce to authority. Adolescence is marked by "conventional" morality—"conforming to

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78. 469 U.S. 387 (1985).

> The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. For instance, although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process clause. . . . Similarly, a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with the Due Process Clause.

Id. at 400-01 (citation omitted).

79. Stanley I. Greenspan & John F. Curry, *Extending Piaget's Approach to Intellectual Functioning*, *in* 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 402, 406-07 (Harold I. Kaplan & Benjamin J. Sadock eds., 7th ed. 2000); *see also* PATRICIA PURITZ ET AL., KIDS ARE DIFFERENT: HOW KNOWLEDGE OF ADOLESCENT DEVELOPMENT THEORY CAN AID DECISION-MAKING IN COURT 7 (Lourdes M. Rosado ed., 2000); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. Crim. L. & Criminology 137, 157 (1997); R. MURRAY THOMAS, COMPARING THEORIES OF CHILD DEVELOPMENT 273-318 (3d ed. 1992); COMM. ON CHILD PSYCHIATRY, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, HOW OLD IS OLD ENOUGH? THE AGES OF RIGHTS AND RESPONSIBILITIES 19-35 (1989).

and upholding the rules and expectations and conventions of society or authority just because they are society's rules, expectations, or conventions."[80] The conformity characteristic of adolescence means that juveniles are generally more compliant and vulnerable to coercion.

A child's susceptibility to coercion heightens the need for the assistance of counsel in juvenile proceedings. A "fair hearing," as required by the Fourteenth Amendment, must be free from coercion. Research has shown that many juveniles are unable to understand their rights, and are therefore unable to properly exercise or waive them. For example, studies examining a juvenile's ability to comprehend *Miranda* warnings demonstrate that many juveniles do not understand the terms of *Miranda* well enough to make a valid waiver.[81] Even when juveniles are able to understand the words of a *Miranda* warning, they are not as equipped to effectively exercise their rights.[82] It is more difficult for juveniles to understand rights as an entitlement "that they can exercise without adverse consequences."[83] Additionally, "[s]ocial expectations of obedience to authority and children's lower social status make them more vulnerable than adults during interrogation."[84]

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80. LAWRENCE KOHLBERG, THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES 172-73 (1984).

81. *See, e.g.,* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 356 (2003); MACARTHUR FOUND. RES. NETWORK ON ADOLESCENT DEV. AND JUV. JUST., ISSUE BRIEF 1: ADOLESCENT LEGAL COMPETENCE IN COURT, http://www.adjj.org/downloads/9805issue_brief1.pdf (last visited Nov. 15, 2007); YOUTH ON TRIAL, *supra* note 6; THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 106-07 (1981) (reporting that only about half of mid-adolescents understand the *Miranda* warning, a rate lower than that of adults); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1152 (1980) (reporting that the majority of juveniles who received *Miranda* warnings did not understand them well enough to waive their rights; that only 20.9% of the juveniles, as compared with 42.3% of the adults, exhibited understanding of all four components of a *Miranda* warning; and 55.3% of juveniles, as contrasted with 23.1% of the adults, manifested no comprehension of at least one of the four warnings).

82. *See* Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 11 (1997) (distinguishing between understanding words and appreciating the rights conveyed by the *Miranda* warning); Kimberly Larson, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of* Miranda, 48 VILL. L. REV. 629, 649-53 (2003) (reviewing the social psychological research and juveniles' limited understanding of the concept of rights as an entitlement to be exercised).

83. Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 229-30 (2006).

84. *Id.* at 230.

These findings have implications for a juvenile's capacity to navigate juvenile court proceedings without counsel. In the absence of counsel, a youth's diminished comprehension of the legal setting will make her more susceptible to coercion. Her limited ability to understand the content and consequences of the process will hinder her ability to obtain the best outcome for herself. Juveniles' susceptibility to coercion, combined with their limited education, intellectual development, and maturity suggests the need for heightened legal protections.[85]

II. INCARCERATED JUVENILES' RIGHT TO COUNSEL: CAN *JOHN L. V. ADAMS* SURVIVE *LEWIS V. CASEY*?

As discussed above, a delinquent child's right to counsel must include postdisposition representation to ensure fulfillment of the child's right to treatment and rehabilitation, as well as to minimize confinement to the least restrictive and shortest duration necessary to achieve the objectives of the court and the community. This

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85. The recognition that children require heightened legal protections due to their susceptibility to coercion pervades Supreme Court jurisprudence. Before *Gault* and before *Miranda,* the Supreme Court recognized that greater procedural safeguards were vital in order to compensate for a child's vulnerability to coercive influences. In *Haley v. Ohio*, the Court emphasized that the teenage defendant could not be judged under the same standards as a "mature man," but because he was "a mere child—an easy victim of the law," special care was to be used. 332 U.S. 596, 599 (1948). The Court stressed that because of the inherent insecurity and immaturity of the young defendant, he could not be expected to withstand much pressure from law enforcement on his own:

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces . . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.

Id. at 599-600. The Court reinforced this view in *Gallegos v. Colorado*, emphasizing that the juvenile defendants are generally "not equal . . . in knowledge and understanding of the consequences." 370 U.S. 49, 54 (1962). In *Gallegos,* the fourteen-year-old defendant's confession, which he signed after being held five days without access to a parent or a lawyer, was found to be involuntary. *Id.* ("[A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police.").

The recognition of youths' susceptibility to coercion extends beyond the parameters of children in the justice system, and can be found throughout cases regarding children and the Establishment Clause. In *Lee v. Weisman*, the Supreme Court concluded that the law must particularly protect children from the social pressures inherent in church-state entanglements. 505 U.S. 577, 587 (1992), The Court's analysis reflects a concern regarding the ease with which a child is influenced by others. *See id.*

includes presently unreviewable administrative decisions, which can repeatedly extend the term of confinement with no participation by the youth's counsel at all. We argue that this postdisposition right to counsel derives from the Sixth Amendment's critical stage analysis and the Fourteenth Amendment's fundamental fairness doctrine as applied to juveniles. The postdisposition role of counsel addressed in Part I focused particularly on counsel's role in ensuring access to appropriate services postdisposition, and limiting the actual period of the court's jurisdiction over the juvenile. As this section will discuss, adjudicated juveniles who are incarcerated or committed to residential programs as part of the court's dispositional order may also assert a right to counsel pursuant to the "right of access to the courts" doctrine found in the First Amendment,[86] specifically to address conditions of their confinement that may violate their rights under the Constitution or other provisions of federal law. This "right of access" doctrine, which the Supreme Court has applied narrowly to adult inmates, should be read more expansively for juveniles. The more limited ability of youth to identify, comprehend, and assert their legal rights while incarcerated without the assistance of counsel requires that juveniles' status be taken into account in considering the proper scope of their constitutional right of access to the courts under the First Amendment.[87]

Like the right to counsel at trial, the constitutional right of access to the courts was first articulated in cases involving adult inmates. "An inmate's right of unfettered access to the courts is as fundamental a right as any other he may hold. All other rights . . . are illusory without it."[88] This right of access was first recognized by the United States Supreme Court in *Ex parte Hull*.[89] At issue in that case was a regulation promulgated by Michigan prison officials requiring inmates to submit all legal documents for approval to the prison's institutional welfare office and then to the parole board's legal investigator. The Supreme Court held the regulation invalid, noting that the propriety of legal materials is for a "court *alone* to determine."[90] *Hull* essentially established the principle that prison officials cannot position themselves as "gatekeepers" for the courts. This principle endures today. For decades, the Supreme Court has

86. *See Ex parte* Hull, 312 U.S. 546 (1941) (recognizing an inmate's right of access to the courts); Bounds v. Smith, 430 U.S. 817 (1977) (elaborating on the state's affirmative obligation to make meaningful an inmate's right of access to the courts).

87. *See* discussion of distinctive treatment of juveniles under the Constitution *supra* Part I.

88. Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973). *See* McCarthy v. Madigan, 503 U.S. 140, 153 (1992) (noting right to file a court action is fundamental because it is "preservative of all rights") (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

89. 312 U.S. 546 (1941).

90. *Id.* at 549 (emphasis added).

repeatedly invalidated regulations that prohibit inmates from advising or assisting one another in the preparation of habeas corpus petitions.[91]

In *Bounds v. Smith,*[92] the Supreme Court elaborated on the state's affirmative obligation to make an inmate's constitutional right of access "adequate, effective, and meaningful."[93] The Court held in *Bounds* that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[94]

More recently, however, the Court revisited and significantly limited *Bounds* in *Lewis v. Casey*.[95] In *Lewis*, the Arizona Department of Corrections (ADOC) appealed an injunction imposed by the District Court for the District of Arizona—upheld by the Ninth Circuit—requiring the ADOC to significantly upgrade their law library facilities.[96] Justice Scalia, writing for the majority, reversed because of the failure to find imminent actual injury resulting from the existing conditions.[97] In reversing the lower courts, the Supreme Court did not abandon its earlier holdings that prisoners have a constitutional right of access to the courts, but the majority imposed two significant procedural limitations on class actions. First, the Court held that named plaintiffs in a class action must not only allege, but also prove, that they suffered actual injury of the type for which they seek a remedy.[98] This means that named plaintiffs must prove, for example, that they had lost a court case because they could not have known of some requirement due to deficiencies in the legal assistance they were provided, or that they could not file a complaint because of inadequacies in a library or legal assistance program, and

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91. *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969). *See also* Wolff v. McDonnell, 418 U.S. 539, 570 (1974) (stating that, where difficult to "collect and present the evidence necessary for . . . comprehension of the case," an inmate should be "free to seek the aid of a fellow inmate").

92. 430 U.S. 817 (1977).

93. *Id.* at 822-23 (requiring states to provide inmates with adequate law libraries or assistance from persons trained in the law). *See also* Griffin v. Illinois, 351 U.S. 12 (1956) (invalidating rules requiring indigent criminal defendants to pay for trial transcripts or fees necessary to have appeals or habeas petitions heard); Douglas v. California, 372 U.S. 353 (1963) (requiring states to provide assistance of counsel on appeal as of right for all indigent criminal defendants).

94. *Bounds*, 430 U.S. at 828.

95. 518 U.S. 343 (1996).

96. *Id.* at 346-49.

97. *Id.* at 349-53 n.3.

98. *Id.* at 351 (stating that the inmate must "demonstrate that the alleged shortcomings in the library or legal assistance program hindered . . . efforts to pursue a legal claim").

therefore "suffered arguably actionable harm."[99] Second, the Court held that systemwide relief could only be ordered for widespread violations of the specific type suffered by named plaintiffs.[100] As such, *Lewis* modified the Court's prior articulation of the right of access to the courts in two respects: (1) by clarifying that every such claim must be founded upon actual injury, and (2) by restricting the scope of the right to only certain types of claims. *Lewis* made clear that actual injury is a "constitutional prerequisite" which not only ensures "serious and adversarial treatment," but also "keeps courts within certain traditional bounds vis-a-vis the other branches, concrete adverseness or not."[101] Further, the right of access is only guaranteed for direct and collateral attacks upon a conviction or sentence, and civil rights actions challenging the conditions of confinement.[102] Even among these types of claims, actual injury will exist only if "a *nonfrivolous* legal claim had been frustrated or was being impeded."[103] To state a claim for interference with the right of access to the courts, an adult inmate must now establish that inadequate facilities or interfering regulations have actually frustrated or impeded a nonfrivolous (1) criminal trial or appeal, (2) habeas proceeding, or (3) section 1983 case challenging the condition of his confinement.[104]

Subsequent to the Supreme Court's decision in *Bounds*, but prior to *Lewis*, the Sixth Circuit confronted a similar question concerning an incarcerated juvenile's right of access to the courts in *John L. v. Adams*.[105] *John L.* involved a class of incarcerated juveniles confined in secure facilities operated by the Tennessee Department of Youth Development, who alleged a denial of the right of access to courts.[106] The district court entered summary judgment in favor of the juveniles, holding that courts have an affirmative obligation to provide access to the courts—simply refraining from placing obstacles in their way is insufficient.[107] While an adequate law library may be sufficient for adult inmates, "a juvenile's need for access to the courts may even be greater than an adult's in that

99. *Id.*

100. *Id.*

101. *Id.* at 353 n.3.

102. *Id.* at 354.

103. *Id.* at 353 (emphasis added).

104. *Id.* at 354-55. *See also* Sands v. Lewis, 886 F.2d 1166, 1171 (9th Cir. 1989) (requiring a prisoner to allege an "instance in which [he] was actually denied access to the courts").

105. 969 F.2d 228 (6th Cir. 1992).

106. *Id.* at 230.

107. John L. v. Adams, 750 F. Supp. 288, 291 (M.D. Tenn. 1990).

access to the courts assists the rehabilitative process."[108] The court also recognized that what qualifies as meaningful access to the courts is contingent upon the capacity of the inmate. "The determination of whether or not an inmate is provided with meaningful access to the courts requires taking into account the experience and intelligence of the inmate. . . . [C]ourts recognize that an adequate law library does not provide meaningful access to the courts for inmates unable to comprehend legal materials."[109]

On appeal, the Sixth Circuit held that "incarcerated juveniles do have a constitutional right of access to the courts, and that in order to make this right meaningful the State [must] provide the [juveniles] with access to an attorney."[110] The court reiterated that the developmental and educational status of juveniles preclude meaningful access to the courts in the absence of access to counsel.[111]

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108. *Id.* at 292.

109. *Id*. at 295. *See also* Hadix v. Johnson, 694 F. Supp. 259, 288 (E.D. Mich. 1988) (concluding that "the right of court access requires that the State provide [some source] of assistance for literate and illiterate inmates alike").

110. 969 F.2d at 229.

111. Other than *John L.,* only two other federal cases have addressed an incarcerated juvenile's right of access to the courts. In *Morgan v. Sproat*, 432 F. Supp. 130, 1158 (S.D. Miss. 1977), a federal district court in Mississippi held that the constitutional right of access to the courts applied to juveniles who had been committed to state "training" schools. *Id.* at 1158. With respect to the right of access, the court perceived no distinction between incarcerated adults and incarcerated juveniles. *Id.* The First Circuit has also recognized a right of access to courts for incarcerated juveniles, although in a slightly different context. In *Germany v. Vance*, 868 F.2d 9 (1st Cir.1989), the plaintiff had been adjudicated a delinquent for an alleged assault on her father. *Id.* at 12. Eventually, the plaintiff was committed to the custody of the Massachusetts Department of Youth Services (MDYS). *Id.* While the plaintiff was in MDYS custody, her mother told one of the plaintiff's caseworkers, defendant Carol Vance, that the assault for which the plaintiff had been incarcerated had been fabricated by the plaintiff's father. *Id*. The father was present when this statement was made, and he did not deny it. *Id.* Vance submitted a report on her conversation with the plaintiff's parents to her supervisor, defendant John Paladino. *Id.* Neither Vance nor Paladino told the plaintiff about the statements. *Id.* About three months later, when the plaintiff's case was transferred to another caseworker, the plaintiff was told of the statement. *Id.* at 13. The plaintiff was not released from MDYS custody until over a year later, and brought a § 1983 suit against the caseworkers and supervisors. *Id.* In reviewing the district court's grant of summary judgment for the plaintiff against Vance and Paladino, the court of appeals stated:

> As already suggested, plaintiff's status as a juvenile offers no excuse. Defendants contend that "the Constitutional requirements of *Bounds* have never been applied to juvenile correctional systems." We reject any implication that the constitutional right of access to the courts does not apply to juveniles in [Department of Youth Services] custody. The Supreme Court has clearly recognized the due process rights of minors in the adjudicatory stage of the juvenile process.

The court recognized that, without assistance, the juveniles could not make effective use of legal materials. The combined effects of their youth, their lack of experience with the criminal system, and their relatively short confinement meant that there could not be a system of "writ writers," as might be available in an adult correctional facility.[112]

The discussion above raises an obvious question: given the Supreme Court's more pinched view of an adult inmate's right of access under the First Amendment in *Lewis*, can incarcerated youth continue to rely on the reasoning of the Sixth Circuit's decision in *John L.* to demand legal assistance to assert claims arising out of their own confinement? *Lewis* actually provides insight into how the Court might address this issue. In explaining its earlier holding in *Bounds*, the Court wrote in *Lewis*:

> This misreads *Bounds,* which as we have said guarantees no particular methodology *but rather the conferral of a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts.* When any inmate, even an illiterate or non-English-speaking inmate, shows that an actionable claim of this nature which he desired to bring has been lost or rejected, or that the presentation of such a claim is currently being prevented, because this capability of filing suit has not been provided, he demonstrates that the State has failed to furnish "*adequate* law libraries or *adequate* assistance from persons trained in the law." . . . [I]t is

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Id. at 16. The court recognized that the stigma of being found to have violated the law and the resulting incarceration are the key similarities between juveniles and adults that make it logical for juveniles to be entitled to the right of access to courts. *Id.*

112. *John L.*, 969 F.2d at 234. The court also noted ample authority involving other classes of incarcerated inmates, where access to a law library or legal resource materials without the assistance of counsel was deemed insufficient to vindicate the inmate's right of access to the courts. *See* Ward v. Kort, 762 F.2d 856, 858 (10th Cir. 1985) (committed mental patients); Cruz v. Hauck, 627 F.2d 710, 721 n.21 (5th Cir. 1980) (non-English-speaking or illiterate inmates); Hadix v. Johnson, 694 F.Supp. 259, 288 (E.D. Mich. 1988) (illiterate and segregated prisoners); United States *ex rel.* Para-Professional Law Clinic v. Kane, 656 F. Supp. 1099, 1105 (E.D. Pa. 1987) (illiterate inmates and those in administrative or disciplinary custody), *aff'd* , 835 F.2d 285 (3d Cir. 1987); Smith v. Bounds, 610 F. Supp. 597 (E.D.N.C. 1985) (illiterate inmates and those in administrative confinement), *aff'd on reh'g,* 841 F.2d 77 (4th Cir. 1988) (en banc); Canterino v. Wilson, 562 F. Supp. 106, 110 (W.D. Ky. 1983) (low level of education among inmates was relevant factor in determining that state must provide more than law library to ensure meaningful access to the courts), *aff'd,* 875 F.2d 862 (6th Cir. 1989); Glover v. Johnson, 478 F. Supp. 1075 (E.D. Mich. 1979) (female prison where there were no writ writers); Stevenson v. Reed, 391 F. Supp. 1375, 1380-82 (N.D. Miss. 1975) (illiterate inmates), *aff'd,* 530 F.2d 1207 (5th Cir. 1976).

> that capability, rather than the capability of turning pages in a law library, that is the touchstone.[113]

Accordingly, the Court's rejection of the systemic relief awarded by the lower courts in *Lewis* reflected the Court's concern with the "fit" of the remedy to the injury, not with the propriety of affording any relief at all. Even accepting the two isolated examples of actual injury found by the district court, concerning illiterate or non-English-speaking inmates, the Supreme Court found these two individual examples insufficient to warrant classwide relief. "Having rejected petitioners' argument that the injuries suffered by [an illiterate and a non-English-speaking inmate] do not count, we turn to the question whether those injuries, and the other findings of the District Court, support the injunction ordered in this case."[114] Significantly, language and literacy barriers were thus deemed sufficient to require heightened procedural protections for those *individuals* who were truly hampered in their "capability" to access the courts, even if deemed otherwise insufficient to support *classwide* relief.

The inherent "disabilities" of incarcerated youth—as manifested in higher documented rates of mental disabilities, developmental immaturity, histories of poor academic performance, and diminished literacy rates[115]—place juveniles at a similar disadvantage to the two disadvantaged inmates identified in *Lewis*, in terms of their "capability" to access the courts and present legal claims on their own. Indeed, as described by the district court in *Lewis*, the difficulties experienced by the two inmates are strikingly comparable to the types of difficulties youth would likely encounter:

> Moreover, even the best law library is of no use to prisoners who are functionally illiterate in English. Library books, even if adequate in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate.
>
> Meaningful access to the courts requires direct assistance for prisoners who because of language factors or lack of access to

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113. Lewis v. Casey, 518 U.S. 343, 356-57 (1996) (quoting Bounds v. Smith, 430 U.S. 817, 828 (1977) (first emphasis added).

114. *Id*. at 357.

115. *See* N. Cowardin, *Learning Disabilities and Illiteracy in the Juvenile and Criminal Justice Systems*, *in* SENTENCING ADVOCACY RESOURCE MANUAL 1 (Nat'l Ass'n of Sent'g Advoc. ed., 1997). According to one estimate, at least one youth in five who comes in contact with the system has a serious mental health disorder that impairs his functioning and requires professional treatment. Joseph J. Cocozza & Kathleen Skowyra, *Youth with Mental Health Disorders: Issues and Emerging Responses*, JUV. JUST., Apr. 2000, at 3, 6.

> the law library, or for other reasons are unable to perform adequate legal research and writing.[116]

While the Supreme Court in *Lewis* rejected the overall conclusions of the district court, the Court stopped short of denying relief to plaintiffs who lack the educational or intellectual ability to access courts without counsel.[117] That the average youth generally will lag behind the average adult in cognitive capacity is now widely accepted and well documented.[118] To the extent that incarcerated juveniles as a class share these generally acknowledged deficits of youth, the barriers to systemic relief in *Lewis* should not bar classwide relief to incarcerated juveniles.

Additionally, it is hardly unprecedented for the Court to take juvenile status into account in interpreting the rights of children and youth under the Constitution. As Justice Frankfurter aptly observed, "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning it [sic] uncritically transferred to determination of a state's duty towards children."[119] Accordingly, the Supreme Court has consistently considered the developmental and social differences of youth in measuring the scope and breadth of minors' constitutional rights, interpreting the Constitution to ensure that youth are protected when developmental immaturity requires a departure from the analysis applied to adults. At times, this jurisprudential approach has clearly afforded youth more protection than adults, as recently demonstrated in the Court's decision in *Roper v. Simmons*,[120] striking the juvenile death penalty as unconstitutional under the Eighth Amendment. In holding the death penalty for juveniles unconstitutional, the Court observed,

> [A]s any parent knows and as the scientific and sociological studies . . . tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." . . . In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent . . . .

116. Casey v. Lewis, 834 F. Supp. 1553, 1567 (D. Ariz. 1992) (citations omitted).

117. *See* Lewis v. Casey, 518 U.S. 343 (1996).

118. *See supra* note 6.

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

120. 543 U.S. 551 (2005).

> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures including peer pressure . . . .
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.
>
> These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult."[121]

In other cases, the Court has used this doctrinal approach to apply constitutional provisions more stringently to juveniles. Only two years after deciding *Roper*, the Court recently limited the scope of the First Amendment rights of youths in *Morse v. Frederick,* where the Court upheld a school principal's disciplinary action against a student for displaying what the principal deemed an offensive banner at a rally away from school grounds. In supporting the school official's action, the Court reiterated the principle that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[122] Other juvenile-specific applications of the Constitution abound. From cases involving the voluntariness of juvenile confessions during custodial interrogation under the Fourth Amendment (where juveniles have been afforded greater consideration),[123] or their rights to be free from suspicionless,

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121. *Id.* at 569-70 (citations omitted).

122. Morse v. Frederick, 127 S. Ct. 2618, 2621 (2007) (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

123. As the Court instructed in *Haley v. Ohio*:

> [A teenager] *cannot be judged by the more exacting standards of maturity*. [T]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad . . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.

332 U.S. 596, 599-600 (1948) (emphasis added).

In *Gault,* the Court reiterated its concerns about youths' special vulnerability that were present in *Haley*: "The greatest care must be taken to assure that [a minor's] admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." 387 U.S. 1, 55 (1967).

More recently, in a per curiam opinion in *Kaupp v. Texas,* 538 U.S. 626 (2003), the Court held a seventeen-year-old's confession must be suppressed following an illegal arrest—absent undisclosed intervening evidence in the record—under the Fourth and

warrantless searches in schools under the Fourth Amendment (where the Fourth Amendment's proscriptions have been read more narrowly with regard to juveniles),[124] to cases involving youth's freedom to make reproductive choices (where their immature

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Fourteenth Amendments. The Court applied earlier precedents in considering the defendant's status as a seventeen-year-old:

> A *17-year-old boy* was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated "we need to go and talk." . . . [The boy's] "[o]kay" in response to [the officer's] statement is no showing of consent under the circumstances. *[The officer] offered [the boy] no choice, and a group of police officers rousing an adolescent out of bed in the middle of the night with the words "we need to go and talk" presents no option but "to go."* There is no reason to think [the boy's] answer was anything more than a mere submission to a claim of lawful authority.

Id. at 631 (emphasis added). *See* Yarborough v. Alvarado, 541 U.S. 652, 667 (2004) (holding that youth was not a vital consideration when determining whether an individual is in custody for purposes of triggering *Miranda* warnings prior to interrogation). *Alvarado* did not disturb the Court's precedents holding that youth is an important factor in assessing the voluntariness of a confession under the Due Process Clause. Moreover, *Alvarado* reached the Court by way of a habeas petition. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, the Court only analyzed whether the state court's interpretation of the law in *Alvarado* was reasonable, not whether it was correct. *Id.* at 663-64.

124. For instance, the Court has repeatedly held that Fourth Amendment strictures may be relaxed when dealing with youth in public schools, because youth as a class are in need of adult guidance and control. Accordingly, the Court has sustained the constitutionality of warrantless searches by school officials of students' belongings upon reasonable suspicion that a student has violated school rules or the law. New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985). *See also* Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 664-65 (1995) (upholding random, suspicionless drug testing of student athletes); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 838 (2002) (upholding random suspiciousless drug testing of students engaged in extracurricular activities).

To support these Fourth Amendment rulings, the Court has observed:

> Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.,* the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians.

Vernonia Sch. Dist., 515 U.S. at 654 (citation omitted). This echoes the Court's earlier declaration in *Schall v. Martin*, where the Court explained the rejection of a constitutional challenge to the preventive detention of juveniles charged with delinquent acts by noting:

> [J]uveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to care for themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as parens patriae.

467 U.S. 253, 265 (1984) (emphasis added and citation omitted); *cf. Vernonia Sch. Dist.,* 515 U.S. at 655 (when parents place their children in school, they delegate custodial power to the latter, permitting the school a degree of supervision and control over their children that could not be exercised over free adults). *See also T.L.O.*, 469 U.S. at 339.

judgment has lead to a more restrictive approach),[125] to cases under the First Amendment (where access to pornography or the imposition of mandatory school prayer has been more strictly monitored in the name of *protecting* youth),[126] the Court has regularly invoked juvenile

125. In a series of cases involving state restrictions on minors' reproductive choices, the Court has said that "during the formative years of childhood and adolescence, *minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them*." Bellotti v. Baird, 443 U.S. 622, 635 (1979) (emphasis added). The court also noted that "*immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences . . . .*" *Id.* at 640 (emphasis added). *See also* Hodgson v. Minnesota, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose *immaturity, inexperience, and lack of judgment* may sometimes impair their ability to exercise their rights wisely.") (emphasis added).

For this reason, the Court has held that states may choose to require that minors consult their parents before obtaining an abortion. *Id.* at 458 (O'Connor, J., concurring in part) (obsserving that the liberty interest of a minor deciding to bear a child can be limited by the parental notice requirement, given that immature minors often lack ability to make fully informed decisions); *Bellotti*, 443 U.S. at 640 (determining that because minors often lack capacity to make fully informed choices, the state may reasonably determine that parental consent is desirable). Similarly, in *Parham v. J.R.*, the Court rejected a constitutional challenge to Georgia's civil commitment scheme that authorized parents and other third parties to involuntarily commit minors under the age of eighteen. 442 U.S. 584 (1979). In so doing, the Court stressed that "[m]ost children, *even in adolescence, simply are not able to make sound judgments concerning many decisions . . . .*" *Id.* at 603 (emphasis added).

126. In *Ashcroft v. ACLU*, the Court agreed that protecting minors from harmful images on the Internet is a compelling government interest. 542 U.S. 656, 677 (2004) (Breyer, J., dissenting). The Court split only on whether the Child Online Protection Act used the least restrictive means necessary to further the compelling government interest. *See id.* at 673 (majority opinion); *id.* at 675 (Stevens, J., concurring); *id.* at 676 (Scalia, J., dissenting); *id.* at 677 (Breyer, J., dissenting). Additionally, in *Ginsberg v. New York*, the Court upheld a state statute restricting the sale of obscene material to minors. 390 U.S. 629, 637 (1968). Such a restriction was permissible for youth, but not adults, because *"a child—like someone in a captive audience—is not possessed of that full capacity for individual choice* which is the presupposition of First Amendment guarantees." *Id.* at 649-50 (Stewart, J., concurring) (emphasis added). *See also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273-74 (1988) (holding that public school authorities may censor school-sponsored publications).

Similarly, the Court has upheld a state's right to restrict when a minor can work, on the premise that "[t]he state's authority over children's activities is broader than over like actions of adults." Prince v. Massachusetts, 321 U.S. 158, 168 (1944). Although the current Court has never ruled on the issue, lower courts have also upheld legislative restrictions on minors' liberty in the form of juvenile curfews. In upholding the constitutionality of juvenile curfews, courts have again relied on the Court's consistent refrain that minors' "immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely," Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993) (quoting Hodgson, 497 U.S. at 444 (1996)), and that juveniles lack the fundamental right of free movement, Hutchins v. District of Columbia, 188 F.3d 531, 538-39 (D.C. Cir. 1999) (en banc) (citing *Vernonia Sch. Dist.*, 515 U.S. at 646; *Schall*, 467 U.S. at 265). *See also* Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998) (citing *Vernonia Sch. Dist.*, 515 U.S. at 654).

status to carve out a distinctive juvenile jurisprudence under the Constitution. With respect to juveniles' access to counsel postdisposition—especially during periods of confinement when they are particularly isolated and hampered in their ability to advocate for themselves—the courts should recognize an explicit right to counsel so that claims associated with a sentence (or conditions of a sentence or confinement) can be raised and adjudicated by the court. Recognizing that the common deficits of youth will inevitably impede their ability to identify, assert, and file claims alleging violations of their federal rights while incarcerated in juvenile facilities *without the assistance of legal counsel* is entirely consistent with the Court's historic treatment of juveniles under the Constitution. To whatever extent *Lewis* now places obstacles in the path of adult inmates seeking to redress violations of their rights in prison, its reasoning is inapplicable to the special status and condition of incarcerated juveniles.

III. CONCLUSION

The right to counsel for juveniles charged with delinquency or adjudicated delinquent means nothing if it does not also include a right to effective assistance of counsel. Similarly, the right to counsel for juveniles charged with delinquency or adjudicated delinquent means nothing if it does not also include a right to counsel at all stages of the juvenile court process, including pretrial proceedings

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These themes are echoed in the Court's public school prayer decisions. In holding that prayers delivered by clergy at public high school graduation ceremonies violate the Establishment Clause of the First Amendment, the Court, in *Lee v. Weisman*, placed great emphasis on the "public pressure, as well as peer pressure," that such state sanctioned religious practices impose on impressionable students. 505 U.S. 577, 593 (1992). The Court opined that "[f]inding no violation under these circumstances would place objectors in the dilemma of participating [in the prayer], with all that implies, or protesting." *Id.* The Court stressed that it was not addressing whether the government could put citizens to such a choice when those "affected . . . are mature adults," rather than "primary and secondary school children," who are "often susceptible to pressure from their peers towards conformity . . . in matters of social convention." *Id.* In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), the Court held that prayers authorized by a vote of the student body and delivered by a student prior to the start of public high school football games violated the Establishment Clause. The Court noted "the immense social pressure" on students "to be involved in the extracurricular event that is American high school football." *Id.* at 311. As the Court described it, "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one," and, in the high school setting, "the delivery of a pre-game prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.* at 312. In contrast, the Court rejected an Establishment Clause challenge to the delivery of prayers at the start of legislative sessions, where the audience that is present invariably is made up almost exclusively of adults. Marsh v. Chambers, 463 U.S. 783 (1983); *see Lee*, 505 U.S. at 597 (distinguishing between "atmosphere" at legislative sessions and public high schools).

and postadjudication periods of supervision, whether in the community, in residential programs, or in juvenile correctional facilities. In jurisdictions where judicial review of the disposition is provided, the right to counsel plainly attaches, whether relying on statutory law or constitutional guarantees. In jurisdictions where the court's role appears to end at disposition, and where youth are committed to the custody of a state administrative agency to determine the placement and duration of the commitment, youth retain a right to counsel to both ensure the availability and provision of appropriate services—educational, behavioral and physical health services—and to prevent arbitrary extensions of placement without the assistance of counsel. Additionally, a juvenile's emotional, psychological and cognitive deficits leave her ill-equipped to conduct her own representation and protect her own rights without the assistance of counsel.

Finally, once incarcerated, juveniles have a constitutional right of access to the courts that must reflect their unique developmental status. Their general inability to assert violations of their constitutional rights in confinement, or to assert other violations of their rights arising out of their sentences—whether because of their cognitive disadvantages or because of technical filing requirements that deny them access to the courts except through an adult[127]—makes the availability of legal assistance by attorneys essential to fulfillment of this right of access to the courts. As the Supreme Court has developed a special juvenile jurisprudence when construing various other provisions of the Constitution, the right of access must likewise be analyzed through a juvenile lens. Juvenile status requires access to and assistance of counsel for incarcerated youth.

127. *See* FED. R. CIV. P. 17(c).