IT'S NOT (FUNDAMENTALLY) FAIR! THE RIGHT TO COUNSEL ON THE IMMIGRATION CONSEQUENCES OF JUVENILE MISCONDUCT

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INTRODUCTION

The American juvenile justice system's primary goal is said to be the rehabilitation of youth, not their punishment.[1] To that end, juvenile delinquency proceedings are civil matters governed by a standard of fundamental fairness.[2] But the corresponding belief that a delinquency proceeding is less punitive than an adult criminal proceeding is frequently untrue with regard to its impact on young immigrants.[3] In fact, immigration proceedings have a much greater scope than delinquency proceedings. Immigration consequences affect every aspect of a child's life and future upon removal from the United States, including relationships with family, friends, and society at large; access to education, employment, language, and culture; and even health and safety.

Children are not immune to deportation by virtue of their age of minority—rather, deportations of children are "a routine part of immigration enforcement."[4] Yet existing Supreme Court precedent does not adequately protect noncitizen children in delinquency proceedings. Neither the Court's 1967 decision in *In re Gault* granting children a limited right to counsel in their delinquency proceedings nor the Court's 2010 mandate in *Padilla v. Kentucky*, that adults have the right to advice on immigration consequences, adequately ensures noncitizen children have a fair opportunity to protect themselves from the often harsh impact of our immigration laws.[5] In particular, the *Gault* right to counsel is based on principles of due process under the Fifth Amendment, and the Court has never expressly addressed whether due process necessarily includes a right to counsel on immigration consequences of juvenile delinquency.[6] Further, any extension of *Padilla* to grant protections to noncitizen children in juvenile delinquency proceedings represents an artificial solution to the dilemma because the Sixth Amendment, upon which the

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1. *See* Tamar R. Birckhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959, 970 (2010). *See generally* BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 46–78 (1999).

2. Schall v. Martin, 467 U.S. 253, 263 (1984); Breed v. Jones, 421 U.S. 519, 531 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971); *In re* Gault, 387 U.S. 1, 61-62 (1967) (Black, J., concurring); *id.* at 72 (Harlan, J., concurring in part and dissenting in part). *See also* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 785 n.77 (2010).

3. *See* Fedders, *supra* note 2, at 797 n.155.

4. David B. Thronson, *A Tale of Two Systems: Juvenile Justice System Choices and Their Impact on Young Immigrants*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 130, 133 (Franklin E. Zimring & David S. Tanenhaus eds., 2014).

5. *In re* Gault, 387 U.S. 1, 36–37, 41 (1967); Padilla v. Kentucky, 559 U.S. 356, 373–74 (2010).

6. *Gault*, 387 U.S. at 47-50.

Padilla decision is founded, applies only to *criminal* proceedings, not *civil* proceedings such as juvenile delinquency.[7] Thus, whether youth have a right to counsel on immigration consequences of their delinquency proceedings remains an unsettled matter.

Somehow, in the wake of advocacy after *Padilla*, noncitizen children have been overlooked. Many scholars have explored the right to counsel in other contexts, scrutinizing the text in *Padilla* and the Court's revolutionary decision on the right to counsel generally in *Gideon v. Wainwright* to unearth implicit justifications for the possible expansion of a right to counsel to immigration removal proceedings on behalf of vulnerable populations, including children.[8] Yet scant scholarship exists on the expansion of the right to counsel in juvenile delinquency proceedings, a determinate phase that often precedes immigration removal proceedings, at least with respect to ensuring that a juvenile's right to counsel specifically includes advice regarding immigration consequences. As the law now stands, noncitizen children are more vulnerable than their adult counterparts at all stages of proceedings—in delinquency matters and when it comes to immigration proceedings.

This disparity between the rights of noncitizen youth and noncitizen adults is difficult to square with existing Supreme Court precedent. Immigration laws are generally applied to children on the same terms as to adults.[9] Although the civil label remains "firmly embedded in our conception of removal proceedings," in reality, "the[] deprivation of liberty from a criminal conviction can pale in comparison to the liberty interest at stake in the removal proceeding that the conviction triggers."[10] Recently the Supreme Court has recognized the increased complexity and severity of our deportation laws, has expounded upon its perception of the vulnerability of noncitizens as a class, and perhaps most importantly, has taken an increasingly progressive position with regard to the

7. *See*, *e.g.*, Riya Saha Shah & Lisa S. Campbell, *Ineffective Assistance and Drastic Punishments: The Duty to Inform Juveniles of Collateral Consequences in a Post-*Padilla *Court*, 3 DUKE F. FOR L. & SOC. CHANGE, 163, 175-81 (2011) (noting that "[d]efendants asserting claims for ineffective assistance of counsel for failing to communicate the consequences of a juvenile adjudication have mostly been unsuccessful," and advocating for an obligation to inform juveniles of the same after *Padilla*); Fedders, *supra* note 2, at 803 n.168 (noting that although the Sixth Amendment right-to-counsel standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984) is often used in juvenile cases, that case nonetheless "did not discuss delinquency cases at all"); Ellen Marrus, *Effective Assistance of Counsel in the Wonderland of "Kiddie Court" – Why the Queen of Hearts Trumps* Strickland, 39 CRIM. L. BULL. 393, 409 n.96 (2003).

8. *See* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky: *The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1467–72 (2011); Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282, 2286–87 (2013); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008).

9. *See infra* Part III; *see also* Thronson, *supra* note 4, at 135-39.

10. Markowitz, *supra* note 8, at 289, 294-95.

diminished culpability and unique rehabilitative capacity of children. The Court's recent decisions with respect to juvenile offenders align with the philosophy of the early reformers of the juvenile delinquency system such that the responsibilities of counsel to children in delinquency proceedings should be at least as great as those extended to adults.[11] In particular, the Court has embraced studies in brain science that demonstrate that a child's ability to understand complex laws and regulations and make well-reasoned decisions regarding his or her actions and legal cases are reduced as compared to those of his or her adult counterparts. The Court also has recognized that a youth lacks control over many major outside factors, including the family and home, which contribute to dangerous or dysfunctional situations.[12] The lineage of precedent with respect to the sentencing of juvenile offenders reiterates the principal justification for the independent juvenile court system—developmental differences between adults and children warrant a different kind of system, one that protects the child's ability to rehabilitate fully into society.

The gap between the rights of noncitizen children and adults can be closed by weaving together these existing threads of precedent with another line of decisions demonstrating the Court's long-standing perception of the protections provided by the Fifth and Sixth Amendments as fluid and interdependent. The Sixth Amendment right to counsel "has never been fully independent from due process ideas, especially when applied to the states."[13] In 1963, the Court declared in *Gideon v. Wainwright* that access to counsel in criminal proceedings is a "fundamental right, essential to a fair trial," made obligatory on the states by the Fourteenth Amendment.[14] The *Padilla* Court "acknowledged the close connection between immigration and criminal defense" when it established the right to counsel in adult criminal proceedings.[15] Post-*Gideon* and *Padilla*, the scope of defense services has expanded to incorporate aspects of immigration law into everyday representation in criminal court, including the plea bargaining process.[16] Thus, those first lawyers required under *Gideon* are now "an essential institutional form

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11. Graham v. Florida, 560 U.S. 48, 78 (2010); Marrus, *supra* note 7, at 408–10.

12. Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982); Roper v. Simmons, 543 U.S. 551, 569–71 (2005); Graham v. Florida, 560 U.S. 48, 68–69 (2010); Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012); *see also* Marrus, *supra* note 7, at 410–15.

13. Kanstroom, *supra* note 8, at 1470.

14. Gideon v. Wainwright, 372 U.S. 335, 340–44 (1963). *See also* Eagly, *supra* note 8, at 2284–85 (discussing the expansion of the protections of *Gideon* in the criminal defense context and its potential for expansion with respect to the right to appointed counsel in immigration proceedings).

15. Eagly, *supra* note 8, at 2286.

16. Lafler v. Cooper, 132 S. Ct. 1376, 1384, 1388 (2012); *see also* Eagly, *supra* note 8, at 2286, 2296.

of immigration defense."[17] Taken together, these decisions provide wide berth for the Court to establish a right to counsel on the immigration consequences of juvenile delinquency that is based on the right to due process, the constitutional guideline under which delinquency proceedings already function.

Part I of this Article explains the history and peculiar anatomy of a typical juvenile delinquency proceeding and discusses the potential impacts of juvenile delinquency on immigration status. Part II examines the evolution of the right to counsel in juvenile proceedings, as well as Supreme Court decisions that acknowledge children as a class fundamentally different from adults, even when it comes to the most serious offenses. Part III discusses the right of a noncitizen adult to counsel's advice on the potential impact of criminal proceedings on immigration status and examines the nature of the relationship between the Sixth Amendment right to counsel and the Fifth Amendment right to due process. Finally, Part IV advances the idea that the right to counsel on the immigration consequences of juvenile delinquency can and should be derived from the Fifth Amendment right to due process.

I. TWO LEGAL SYSTEMS

A. *Strengths and Limitations of the Juvenile Justice System*

The early reformers of the juvenile justice system in America believed juveniles presented greater potential for rehabilitation and social integration than their adult counterparts, and endeavored to create a more suitable system that focused on "a sincere effort to find ways for securing [a child's] orderly development in normal society"[18] by "substitut[ing] a scientific and preventative approach for the traditional punitive goals of the criminal law."[19] Using the legal doctrine of *parens patriae*, the reformers proposed an exclusive court system for juveniles where "professionals made discretionary, individualized treatment decisions,"[20] and pushed to classify juvenile delinquency proceedings as a civil system to advance rehabilitation-centered principles and to spare the youth the stigma of involvement in the adult criminal justice system.[21]

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17. Eagly, *supra* note 8, at 2294.

18. Jane Addams, *Introduction*, *in* THE CHILD, THE CLINIC AND THE COURT: A GROUP OF PAPERS 1, 2 (*reprinted* 1970) (1925).

19. FELD, *supra* note 1, at 62.

20. Rebecca J. Gannon, Note, *Apprendi After* Miller *and* Graham, 79 BROOK. L. REV. 347, 350 (2013) (describing *parens patriae* as "the right and responsibility of the state to substitute its own control over children for that of the natural parents when the latter appeared unable or unwilling to meet their responsibilities or when the child posed a problem for the community").

21. *In re* Gault, 387 U.S. 1, 17 (1967); *see also* Jay D. Blitzman, Gault*'s Promise*, 9 BARRY

Decades later, the Supreme Court has maintained a corresponding belief that a juvenile's delinquent "conduct is not deemed so blameworthy that punishment is required to deter him or others."[22] Today, the Supreme Court continues to conceptualize juvenile proceedings as "fundamentally different from an adult criminal trial," although modern juvenile delinquency proceedings often are a peculiar blend of formalities and informalities and vary considerably across jurisdictions and individual cases.[23]

States define "juvenile" for purposes of juvenile court eligibility differently: for example, the maximum age for juvenile jurisdiction in some states is age 18; for others, it is age 16 or 17.[24] The caseload in juvenile courts across the United States is substantial: the Department of Justice reported that approximately one million youth under age 18 were arrested last year.[25] The Justice Department asserts that most often, juveniles enter the juvenile justice system "through law enforcement (i.e., arrest)," impliedly suggesting that other children may enter the system without an arrest or detention (or at least without an arrest or detention that was reported).[26] With regard to a demographical breakdown, although the Department of Justice has begun to track statistics related to the race and gender of juvenile offenders, data with respect to the nationality or citizenship status of arrested juveniles is not readily available. However, other figures from the Department of Homeland Security (DHS) regarding immigrants to the United States signal the potentially great number of noncitizen children who may be impacted by juvenile delinquency proceedings. For example, in fiscal year 2014 youth age 19 or under constituted about 22% of all permanent immigration to

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L. REV. 67, 75 (2007); Justin Witkin, Note, *A Time for Change: Reevaluating the Constitutional Status of Minors*, 47 FLA. L. REV. 113, 129 n.131 (1995) ("A majority of the states provide by statute for the 'best interest of the child' standard.").

22. McKeiver v. Pennsylvania, 403 U.S. 528, 552 (1971).

23. Schall v. Martin, 467 U.S. 253, 263 (1984). *See generally* Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 265-66 (2007) (highlighting a myriad of procedural deficiencies in juvenile court and noting that in the context of the "best interests" paradigm, "due process protections . . . have failed to protect juveniles from arbitrary and capricious decision-making"); Mae C. Quinn, *The Other "Missouri Model": Systemic Juvenile Injustice in the Show-Me State*, 78 MO. L. REV. 1193 (2013) (describing both the innovative and outdated qualities of Missouri's juvenile justice system).

24. *See* SAMUEL M. DAVIS, RIGHTS OF JUVENILES 2D: THE JUVENILE JUSTICE SYSTEM 8 (2016).

25. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE ARREST RATE TRENDS, http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa 05200 (last visited Mar. 16, 2016).

26. *Id.* The U.S. Justice Department cites the Federal Bureau of Investigation's Uniform Crime Report for its statistics on "juvenile arrests," explaining that "law enforcement statistics are used as a proxy for examining trends in juvenile crime and offending" and that "[l]aw enforcement provides 'input' for the rest of the juvenile justice system." *Id.*

the United States.[27] DHS statistics on age are not divided with reference to age 18; rather, immigrant youth in these categories are divided into five groups: under 1 year, 1 to 4 years, 5 to 9 years, 10 to 14 years, and 15 to 19 years; or into two groups: under 16 years, and 16 to 20 years.[28] Closer inspection of these reports show that a substantial number of children under age 16 (156,946), including 143,758 children aged 14 or under, and 86,513 under age 10, immigrated lawfully to the United States in fiscal year 2014.[29] Tens of thousands of unaccompanied children also arrive in the United States each year without authorization—an estimated 68,000 in fiscal year 2014 and 40,000 in fiscal year 2015.[30] Furthermore, the State Department estimates that thousands of individuals are trafficked into the United States each year, figures that are even more difficult to track precisely.[31] In total, recent studies suggest that approximately 1.5 million children are present in the United States without authorization.[32]

Each of the foregoing statistics represents children who are not yet U.S. citizens and who are therefore susceptible to removal, regardless of whether they initially entered with lawful status or currently maintain some other form of lawful noncitizen status.[33] Each point of contact a noncitizen child has with law enforcement in the juvenile system triggers potentially devastating consequences for his or her immigration status.[34] Finally, a child's admissions of facts that might constitute a crime or statements with respect to immigration status itself could be used to place

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27. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2014 YEARBOOK OF IMMIGRATION STATISTICS (2016), https://www.dhs.gov/sites/default/files/publications/DHS%202014%20Yearbook.pdf.

28. *Id.*

29. *Id.*

30. U.S. CUSTOMS & BORDER PROTECTION, U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2015 CBP BORDER SECURITY REPORT 1 (2015), https://www.dhs.gov/sites/default/files/publications/CBPFY15BorderSecurityReport_12-21_0.pdf.

31. OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 4 (2009), https://aspe.hhs.gov/basic-report/human-trafficking-and-within-united-states-review-literature#Trafficking; *see also* Thronson, *supra* note 4.

32. JEFFREY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES ii (2009), http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/.

33. Thronson, *supra* note 4, at 132.

34. As a threshold matter, most jurisdictions allow for the transfer of juveniles to adult criminal court for certain types of cases, a process that may be automatic pursuant to operation of statute or by election of the prosecutor, or the result of a discretionary decision by the juvenile court to waive its jurisdiction in a particular case. *See* Randall T. Salekin et al., *Juvenile Waiver to Adult Criminal Courts*, 7 PSYCHOL. PUB. POL'Y & L. 381, 382–83 (2001). This article addresses only the impact of juvenile offenses that are prosecuted and resolved in the *civil* juvenile delinquency system, not those in the *criminal* adult system. Proceedings in the latter system would ostensibly activate Sixth Amendment protections.

a juvenile in a priority category for removal. State authorities who come into contact with a noncitizen child accused of a juvenile offense frequently contact Immigration and Customs Enforcement (ICE) officials and share information about the child with them, or even permit ICE agents to question the child directly about her status without the presence of counsel.[35] For example, a recent study by the University of California-Irvine in Orange County, California, revealed that in 2011 alone, the Orange County Probation Department—in direct violation of state confidentiality laws—referred approximately 170 youth to immigration authorities.[36] In 2015, the state of California recognized these problems through the passage of AB 899, which limits the sharing of juvenile records with ICE. In fact, the legislative language specifically cites the compelling interest of "promoting rehabilitation" of youth in keeping state juvenile records away from federal officials. However, even AB 899 allows for disclosure by the juvenile judge upon petition by ICE, and moreover, most states have no similar protection from federal demands for a child's records.[37]

Typically, a juvenile delinquency matter is initiated by a referral from a member of law enforcement to the Court or the prosecutor's office.[38] A court intake officer or a prosecutor assigned to the juvenile docket may informally meet with the child before any charges are filed to confront him with the accusation and possibly take some ameliorative action without filing formal charges.[39] While these quasi-judicial or

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35. Elizabeth M. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth,* 3 DUKE F. FOR L. & SOC. CHANGE 63, 65 (2011); *see also* Olga Velez, *Liberty and Justice For All: The Violations of Basic Human Rights in Detention Centers Across the United States*, 25 U. FLA J.L. & PUB. POL'Y 187, 188 (2014) (stating that immigrants are given no rights to an attorney).

36. *See* VICTORIA ANDERSON ET AL., UNIV. OF CAL.–IRVINE SCH. OF LAW IMMIGRANT RIGHTS CLINIC, SECOND CHANCES FOR ALL: WHY ORANGE COUNTY PROBATION SHOULD STOP CHOOSING DEPORTATION OVER REHABILITATION FOR IMMIGRANT YOUTH 4 (Annie Lai & Sameer Ashar eds., 2013), http://www.law.uci.edu/academics/real-life-learning/clinics/UCILaw_SecondChances_dec2013.pdf.

37. *Id.*; *see, e.g.*, JUVENILE LAW CTR., FAILED POLICIES, FORFEITED FUTURES: A NATIONWIDE SCORECARD ON JUVENILE RECORDS 6 (2014), http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/scorecard.pdf; RIYA SAHA SHAH & LAUREN FINE, JUVENILE LAW CTR., JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT 13 (2014), http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/national-review.pdf.

38. *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, ACCESS TO COUNSEL 2 (2004), https://www.ncjrs.gov/pdffiles1/ojjdp/204063.pdf; *see also* Marrus, *supra* note 7, at 413 n.113.

39. *See generally* A.B.A. INST. OF JUDICIAL ADMIN., STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/JJ_Standards_Pretrial_Court_Proceedings.authcheckdam.pdf (last visited Feb. 23, 2016) [hereinafter STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS]; *see also* Marrus, *supra* note 7, at 413–14.

extrajudicial efforts ultimately may avoid a formal adjudicative phase before a judge, they nonetheless may have great implications for future immigration matters.[40] In particular, a child may make admissions or concessions to damaging facts or accept formal adjudications indicating guilt without meaningfully exploring the strength of her defense.[41] Indeed, in the absence of formal juvenile proceedings, the child likely will not have the benefit of the presence of counsel, and due to reasons such as a lack of maturity or an inability to understand legal rights and concepts, during interrogation children regularly omit important information, give incriminating statements, and even make false confessions.[42] In general, when it comes to the child's willingness to answer questions and successfully advocate on her own behalf, studies show that juveniles are "more compliant and suggestible" and may fail to appreciate the true impact of a legal proceeding.[43] A child's diminished ability to "withstand intimidation" contributes to an increased likelihood of confessions—even false ones.[44]

More formal delinquency proceedings begin when the prosecuting office files a petition with the juvenile court, which essentially indicts the child and initiates an adjudicative phase that concludes with the entry of a decision by a judge with respect to the child's culpability.[45] During formal proceedings, the youth may regard all parties involved—judge, court staff, caseworkers, police, prosecutor, parents, and even her own lawyer—as fungible authority figures who she must obey.[46] Perhaps as a function of that power imbalance, juvenile courts see very high plea rates—recent studies suggest over 95% of juvenile delinquency proceedings are resolved with a plea of guilty or responsible.[47] For those

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40. *See* Drizin & Luloff, *supra* note 23, at 278.

41. *See* Marrus, *supra* note 7, at 413–14; Drizin & Luloff, *supra* note 23, at 270–75.

42. *See* J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011) (holding that age should be taken into consideration in determining whether a child felt he was in "custody" for purposes of the validity of a Miranda waiver); *see also* Drizin & Luloff, *supra* note 23, at 259–60, 270–92.

43. Drizin & Luloff, *supra* note 23, at 260; *see also* Gannon, *supra* note 20, at 373–74.

44. *See* Drizin & Luloff, *supra* note 23, at 269–70.

45. STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS, *supra* note 39; *see also* Marrus, *supra* note 7.

46. Jahaan Shaheed, *The "Amorphous Reasonable Attorney" Standard: A Checklist Approach to Ineffective Counsel in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 905, 911 (2011); *see also* Birckhead, *supra* note 1 (discussing the undermining impact of the culture of prosecutors in juvenile court in ensuring rigorous advocacy on behalf of children); Fedders, *supra* note 2, at 800–02 (discussing "the trouble with parents").

47. Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency – Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629, 639 n.58 (1995) (noting that "over 95 percent [of juveniles in delinquency proceedings] confessed or pleaded guilty"); *see also* Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1898 (1996) ("[C]ourts accept pleas of guilty in the vast majority of juvenile delinquency cases.").

children whose cases are not resolved by plea, judges are the factfinders, as children in delinquency proceedings do not have a constitutional right to a jury trial.[48] Studies have shown that "juries are more likely to acquit than are judges," demonstrating that bench trials further contribute to a high rate of conviction for juveniles in delinquency matters.[49]

The rehabilitative origins of the juvenile system contribute to a likelihood that the interested participants in a youth's juvenile proceedings (*i.e.*, judge and court staff, probation officers, prosecutor and law enforcement officials, and even the child's defense counsel and parents) will not necessarily be propelled by a concern to ensure the child's legal rights are protected, but instead by a focus on the child's future and rehabilitation.[50] In fact, the child's culpability is often collectively assumed at the outset.[51] Only recently has zealous advocacy become an expectation in juvenile court: the American Bar Association published standards in 1980 that explicitly demanded as much from defense counsel representing juveniles.[52] Even after these standards were established, "[m]any juvenile courts continue to view zealous advocacy [by defense counsel] as 'antithetical to rehabilitation.'"[53] In fact, defense counsel may find herself unwittingly relaxing her commitment to advocacy in the juvenile context in many ways; for example, by discussing plea agreements with parents and judges before discussing with her client.[54] Even committed defense counsel face hurdles in

48. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (plurality opinion) ("[W]e conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."); *see also* Drizin & Luloff, *supra* note 23, at 302–03.

49. Drizin & Luloff, *supra* note 23, at 303 (quoting Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 245 (1984)); Welch v. United States, 604 F.3d 408, 432 (7th Cir. 2007) (Posner, J., dissenting).

50. *See* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructuring the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1127–30 (1991) ("[T]rials in juvenile court are frequently 'only marginally contested,' marked by 'lackadaisical defense efforts.'" (footnote omitted)).

51. *See id.* at 1127; *see also* Drizin & Luloff, *supra* note 23, at 292.

52. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, ACCESS TO COUNSEL 1 (2004), https://www.ncjrs.gov/pdffiles1/ojjdp/204063.pdf; A.B.A. INST. OF JUDICIAL ADMIN., STANDARDS RELATING TO ADJUDICATION 1 (1980), http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/JJ_Standards_Adjudication.pdf; A.B.A. INST. OF JUDICIAL ADMIN., STANDARDS RELATING TO PROSECUTION 43 (1980), http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/JJ_Standards_Prosecution.pdf; *see also* Birckhead, *supra* note 1, at 967.

53. Joshua A. Tepfer & Laura H. Nirider, *Adjudicated Juveniles and Collateral Relief*, 64 ME. L. REV. 553, 557 (2012); Drizin & Luloff, *supra* note 23, at 291; *see also* Shaheed, *supra* note 46, at 909; Birckhead, *supra* note 1, at 967–68.

54. *See* Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 323, 325 (2003); *see also* Birckhead, *supra* note 1, at 967–68; Tepfer & Nirider, *supra* note 53, at 557; Caterina DiTraglia, *The Worst of Both Worlds: Defending Children in Juvenile Court*, 63 MO. L. REV. 477,

effective representation of their child clients—studies indicate that many children do not even know what an attorney is or does.[55] Juveniles also often do not understand a right (such as the right to remain silent) to be an entitlement that cannot be taken away, instead thinking of a right as something they simply are "allowed" to do by authority figures.[56] Finally, well-intentioned parents seeking to teach their child accountability for his or her actions may facilitate and encourage the child's admissions to conduct or discourage the child from seeking the independent advice of counsel, damaging the child's position in the defense at the get-go.[57] Finally, as a whole, children are "less competent trial defendants" and thus are "at special risk of being wrongfully convicted."[58]

Put another way, due to the child's age, vulnerability, and immaturity, the parties may focus on improving a child's situation and steering her or him away from future misconduct, rather than ensuring constitutional rights are protected during the court process.[59] Thus in many respects, the very principles of rehabilitation and reintegration upon which the juvenile system rest disincentivize the parties from ensuring a child's rights are protected to the same degree as an adult.

B. *Real Consequences of Juvenile Delinquency for Noncitizens*

The predominant principles of rehabilitation and reintegration that undergird the juvenile justice system simply do not carry over to immigration law. As this section explains, acts of juvenile delinquency can and do render noncitizens ineligible to obtain immigration status or remain in the United States. Children are not immune to deportation by virtue of their age of minority—rather, deportations of children are "a routine part of immigration enforcement."[60] Significantly, noncitizens (including noncitizen youth) have no statutory right to counsel at government expense in immigration removal proceedings.[61] This reality must be considered in evaluating potential consequences of juvenile

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481–83 (1998) (discussing means for defense attorneys to provide satisfactory advocacy within the culture and framework of juvenile proceedings); Theodore McMillian & Dorothy McMurtry, *The Role of the Defense Lawyer in Juvenile Court – Advocate or Social Worker?*, 14 ST. LOUIS U. L.J. 561, 563 (1970).

55. Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 9–10 (1997); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, LAW & HUM. BEHAV. 3, 8 (2009).

56. Drizin & Luloff, *supra* note 23, at 269.

57. Fedders, *supra* note 2, at 788–90; Drizin & Luloff, *supra* note 23, at 313.

58. Drizin & Luloff, *supra* note 23, at 259–60.

59. *See* Ainsworth, *supra* note 50, at 1127 ("[T]rials in juvenile court are frequently 'only marginally contested,' marked by 'lackadaisical defense efforts.'" (footnote omitted)).

60. Thronson, *supra* note 4.

61. 8 U.S.C. § 1362 (2012); Frankel, *supra* note 35, at 66.

delinquency.[62] In particular, if a noncitizen child (or his or her parent, assuming one is available to assist) does not obtain counsel at his or her own expense in immigration proceedings, the ability to mitigate the impact of any juvenile record on immigration status is gravely crippled.[63] In other words, in the current state of the law, a noncitizen child has no right to counsel with respect to the operation of immigration laws, starting from the delinquency proceeding all the way through a later or simultaneous appearance before the immigration court or agency.

Some case law has developed to offset potentially catastrophic results of the immigration laws on youth with prior delinquencies.[64] Generally, juvenile adjudications are not considered "convictions" for purposes of the immigration laws.[65] The Board of Immigration Appeals (BIA) reasoned in *In re Devison-Charles* that because "[t]he [Federal Juvenile Delinquency Act] makes it clear that a juvenile delinquency proceeding results in the adjudication of a *status* rather than conviction for a crime," juvenile delinquency acts "are not crimes" and "findings of juvenile delinquency are not convictions for immigration purposes."[66] The BIA reasoned that "juvenile delinquency [adjudications] are not criminal proceedings, but are adjudications that are civil in nature."[67] The BIA's decision in *Devison-Charles* is a corollary to its earlier holding in *In re M-U-* that an admission to what would have been a juvenile offense under the Federal Juvenile Delinquency Act (FJDA) is not an admission to a crime, but instead "an admission of juvenile delinquency for which [a noncitizen] would not be deportable."[68]

Even if *Devison* and *M-U-* provide some degree of protection to a

62. *See generally* J.E.F.M. v. Lynch, 107 F. Supp. 3d 1119 (W.D. Wash. 2015); Frankel, *supra* note 35, at 96–107 (arguing in favor of a due process right to counsel for children in immigration proceedings).

63. *See* Frankel, *supra* note 35, at 96–97.

64. *See, e.g.*, *In re* Devison-Charles, 22 I. & N. Dec. 1362 (B.I.A. 2000); *In re* M-U-, 2 I. & N. Dec. 92 (B.I.A. 1944).

65. *Devison-Charles*, 22 I. & N. Dec. at 1365.

66. *Id.* at 1365–66.

67. *Id.* at 1366.

68. *M-U-*, 2 I. & N. Dec. 92, at 93. The BIA stated in *Devison-Charles* that "the standards established by Congress, as embodied in the [FJDA], govern whether an offense is to be considered an act of delinquency or a crime" in a particular case. *Devison-Charles*, 22 I. & N. Dec. 1362, at 1366. Although many practitioners reflexively believe that this rule and the corresponding rule set forth in *M-U-* cover all acts of juvenile delinquency, the substantive provision of the FJDA purporting to explain which specific offenses will be construed as adult offenses is a labyrinth of statutory language, setting forth conditions and contingencies based on many factors, including but not limited to the nature of the offense, the juvenile's criminal record, her family situation and education, and the level of her participation or leadership in the criminal activity. This fact-intensive query mandated by the FJDA in myriad circumstances is a discretionary and case-specific determination that the application of the FJDA in this context contains an impossibly ambiguous dimension and blurs the bright line rules advanced by the BIA.

child in a particular circumstance, they simply do not neutralize all the immigration ineligibility rules that apply to children. Determining the exact reach of the immigration consequences of a juvenile transgression requires an investigation into all applicable statutes, regulations, case law, and even other legal resources such as official memoranda and policy manuals to just begin to understand the terms of art contained in each.[69] As a threshold matter, the categories of ineligibility for relief have continued to expand steadily since the enactment of the Immigration and Nationality Act (INA) in 1952.[70] Eligibility for relief also depends on the specific type of benefit sought, the time at which the relief is sought, and the illegal conduct at issue. The relevant conduct is not necessarily limited to what transpired in court; in addition to the impact of formal court judgments, embedded in the INA are ineligibility grounds based on mere admissions to criminal conduct and even situations where the officer only has a "reason to believe" criminal activity may have occurred.[71]

Firstly, to obtain relief, the immigration laws draw a sharp distinction between noncitizens who entered with the government's advance permission, who may become "deportable," and those who entered without permission, and thus are "inadmissible."[72] Although deportability tends to be a more forgiving standard in consideration of the noncitizen's prior lawful admission, as this Part will show, it contains provisions that render one deportable, which would not necessarily render one inadmissible. Without advocacy by an effective attorney, the juvenile record may contain facts that could give rise to a basis for ineligibility under either provision.[73]

A noncitizen with a single conviction for, or who makes an admission to facts "which constitute the essential elements of a crime involving moral turpitude" (CIMT), a violation of a law "relating to" a controlled substance, or convictions for two or more offenses for which the total sentence to confinement was five years or more, is *inadmissible*.[74]

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69. *See* Lindsay C. Nash, *Considering the Scope of Advisal Duties under* Padilla, 33 CARDOZO L. REV. 549, 569 (2011).

70. César Cuauhtémoc García Hernández, *Criminal Defense after* Padilla v. Kentucky, 26 GEO. IMMIGR. L.J. 475, 482 (2012) (discussing in detail how the categories of ineligibility for relief have expanded).

71. *See* Inadmissible Aliens, 8 U.S.C. § 1182(a) (2012 & Supp. 2013); Deportable Aliens, 8 U.S.C. § 1227(a) (2012); Statute for Requirements of Naturalization, 8 U.S.C. § 1427; Statute for Adjustment of Status of Nonimmigrant to that of Person Admitted for Permanent Residence, 8 U.S.C. § 1255(a); Statute for Adjustment of Status, Cancellation of Removal, 8 U.S.C. § 1229b.

72. *See* 8 U.S.C. § 1182(a); 8 U.S.C. § 1227(a).

73. 8 U.S.C. § 1227(a)(2)(E).

74. 8 U.S.C. § 1182(a)(2)(A)(i), (a)(2)(B). The term "conviction" has a very broad definition in the immigration context, including essentially any finding by a court of culpability, in conjunction with some type of restraint on the person's liberty, such as probation, detention, or

Although *Devison* and *M-U-* may apply where a formal adjudication or admission exists, another ground of inadmissibility renders a noncitizen inadmissible for suspicion of drug-related activity.[75] In particular, any individual who the federal government "knows or has reason to believe" is or was "an illicit trafficker in any controlled substance," or who assisted with such activities, is inadmissible.[76] Likewise, anyone who is the spouse, son, or daughter of a trafficker who has within the preceding five years "obtained any . . . benefit" from such illicit activity "and knew or reasonably should have known" the benefit was the product of illicit drug trafficking is inadmissible—even if she never participated in any trafficking herself.[77] Similarly, a history of or intent to engage in prostitution will also render one inadmissible with or without a criminal record.[78] Again, because no criminal conviction is necessarily required for inadmissibility based on a drug-related offense, or prostitution-related intent or conduct, a child's statements in a meeting without a lawyer before a law enforcement or court officer, or during court-ordered rehabilitative treatment or therapy, could easily trigger a child's inadmissibility.

In general, *deportability* requires a conviction—an admission or suspicion is insufficient to remove an individual who was lawfully admitted. A conviction for some crimes involving moral turpitude (punishable by imprisonment for one year or longer and committed within five years of admission), convictions for two or more crimes involving moral turpitude at any time, a conviction for a domestic violence offense or a violation of a personal protection order, a conviction for an "aggravated felony," or a conviction for an offense "relating to a controlled substance" render a noncitizen deportable.[79] However, again, even without a conviction, the law with respect to drug use in particular is expansive: anyone (including children) who is or was "a drug abuser or addict" after his or her admission to the United States is deportable.[80] Advocacy by an effective attorney could ensure the juvenile record does

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jail. 8 U.S.C. § 1101(a)(48) (2012). Convictions for purposes of immigration laws include deferred adjudications, no contest pleas, and convictions with delayed sentences. *Id.* "Moral turpitude" is a "notoriously imprecise definition" that requires a case-by-case inquiry whether the proscribed conduct is "inherently base, vile, or depraved." Hernández, *supra* note 70, at 506–07. In practice, this definition is hard to pin down: some courts apply the definition broadly, finding that a CIMT includes offenses ranging anywhere from petty theft to rape, while other courts have held that crimes as serious as rape and manslaughter do not involve moral turpitude.

75. 8 U.S.C. § 1182(a)(2)(C); *In re* Devison-Charles, 22 I. & N. Dec. 1362 (B.I.A. 2000); *In re* M-U-, 2 I. & N. Dec. 92 (B.I.A. 1944).

76. 8 U.S.C. § 1182(a)(2)(C)(i).

77. *Id.* § 1182(a)(2)(C)(ii).

78. *Id.* § 1182(a)(2)(D).

79. 8 U.S.C. § 1227(a)(2) (2012).

80. *Id.* § 1227(a)(2)(B)(ii).

not contain facts that could give rise to a finding of deportability under this provision.

The statutory exceptions to and waivers of inadmissibility and deportability are narrowly written and available only for select offenses and if certain additional conditions are met. For example, a statutory *exception* to inadmissibility exists for a CIMT committed before age 18 only if it occurred at least five years before the date of the request for admission.[81] This exception applies only to the CIMT grounds of inadmissibility and only for one offense, not several.[82] A discretionary statutory *waiver* of inadmissibility, available on the same terms and conditions to adults and children and again only for specific offenses, requires a demonstration of additional factors—depending on the particular grounds sought to be waived, the person may have to show he is "rehabilitated," that 15 years or more have passed, or that "extreme hardship" would result to his or her U.S. citizen or lawful permanent resident spouse, parent, son, or daughter.[83] Finally, although other statutory provisions in the INA allow for the inapplicability of certain immigration ineligibility grounds and provide waivers for individuals on the basis of one's particular immigration classification, these allowances are limited to classification and thus are not available to all children seeking to avoid removal from the United States.[84] A juvenile defense attorney versed in even basic immigration law could not only ensure the child can preserve her right to take advantage of the general statutory protections, but perhaps even identify potential immigration relief not previously known to the child.

The dizzying milieu of exceptions, waivers, and statutory rules ensconced in the INA does not end there. Other forms of immigration relief do not utilize the standards of admissibility or deportability as a benchmark. For example, a noncitizen who applies for asylum does not yet have to prove he is admissible, but rather must show he has not been convicted of "a particularly serious crime."[85] Alas, the phrase

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81. 8 U.S.C. § 1182(a)(2)(A)(ii).

82. *Id.* This specific statutory exception was not addressed by the Board in *Devison* and *M-U-* and thus appears to be a supplement to the protections provided by those cases. *See In re* Devison-Charles, 22 I. & N. Dec. 1362 (B.I.A. 2000); *In re* M-U-, 2 I. & N. Dec. 92 (B.I.A. 1944).

83. 8 U.S.C. § 1182(h). With respect to drug offenses, the waiver is available for only "a single offense of simple possession of 30 grams or less of marijuana," provided the remaining requirements are met. *Id.*

84. *See id.* § 1182(a)(9)(C)(iii) (admissibility waivers for relief under the Violence Against Women Act); *id.* § 1182(d)(14) (admissibility waivers for U and T visas); 8 U.S.C. § 1255(h) (2012) (admissibility waivers related to special immigrant juvenile status for abused, abandoned, or neglected children).

85. 8 U.S.C. § 1158(b)(2)(A)(ii) (2012). If the applicant is granted asylum, he will later need to apply to adjust his status to permanent residency, which requires a demonstration of admissibility. 8 U.S.C. § 1255(a).

"particularly serious crimes" is not defined by the INA—like a CIMT, it requires a case-by-case determination.[86] Naturalization—the process of becoming a citizen after the requisite period of time as a permanent resident—requires a showing of "good moral character" (GMC).[87] The INA does not have a GMC checklist; rather, it defines GMC in the negative, providing a non-exhaustive list of all the ways in which one may lack GMC, incorporating and extending beyond the standards of inadmissibility or deportability.[88] The inexhaustibility of this list of bad character traits necessarily implies a broad power of discretion held by the particular officer making a determination about GMC in a case.

Other forms of relief incorporate and then build off of the existing norm of inadmissibility: for example, cancellation of removal requires an inquiry into inadmissibility, deportability, good moral character and discretion, and the law with respect to establishing eligibility for Family Unity benefits incorporates both inadmissibility and deportability standards as well as adding for a felony, three misdemeanors, particular serious crime, and "aliens who have committed acts of juvenile delinquency which if committed by an adult would be a felony involving violence."[89]

Finally, noncitizen youth seeking Deferred Action for Childhood Arrivals (DACA), a form of executive action that offers a temporary reprieve from removal for individuals who arrived in the United States as children before a certain date, must not have been convicted of a "significant misdemeanor," three or more misdemeanors, or a felony.[90] A significant misdemeanor was defined in subsequent memoranda to include all domestic violence offenses and even drunk driving offenses.[91] Again, the discretionary power possessed by the immigration officer is nearly limitless: in fact, DACA itself is an exercise of prosecutorial discretion, such that noncitizens have no statutory entitlement to be granted DACA—or even appeal its denial—even if they are otherwise

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86. *See* 8 U.S.C. § 1158(b)(2)(A)(ii).

87. 8 U.S.C. § 1427(a) (2012).

88. 8 U.S.C. § 1101(f) (2012).

89. 8 U.S.C. § 1229(b) (2012); U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL 24.4, https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-11139/0-0-0-11314.html (last visited Sept. 26, 2016).

90. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf; U.S. CITIZENSHIP & IMMIGRATION SERVS., *Frequently Asked Questions on Deferred Action for Childhood Arrivals* V, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#criminal_convictions (last updated June 15, 2015) [hereinafter *Frequently Asked Questions*].

91. *Frequently Asked Questions*, *supra* note 90.

technically eligible.[92]

Indeed, "[a] principal feature of the removal system is the broad discretion exercised by immigration officials" and this great discretionary power functions only to restrict, not expand, any waiver of ineligibility.[93] The significance of the fact that discretion in the immigration context can only be used to deny an otherwise approvable application, but cannot be used to replace a missing element, cannot be overstated.[94] Pursuant to several restructures of immigration law in the 1990s, judicial review of most discretionary agency decisions is precluded.[95] The presumptions of the adult players in the juvenile court with regard to the child's culpability, and the parties' efforts to teach an errant child by promoting responsibility in a non-adversarial setting, may wreak havoc on the child's immigration case. In an update to its Policy Manual released just prior to publication of this Article, USCIS stated: "[F]indings of juvenile delinquency may [] be part of a discretionary analysis. USCIS will consider findings of juvenile delinquency on a case-by-case basis based on the totality of the evidence to determine whether a favorable exercise of discretion is warranted."[96] Thus, even if the BIA's holdings in *Devison* and *M-U-* provide technical protections in an individual case, without the assistance of competent counsel during the juvenile proceeding, the noncitizen child's eligibility for relief may be either frustrated or wholly precluded on myriad levels.

II. SUPREME COURT JURISPRUDENCE WITH RESPECT TO THE RIGHTS OF YOUNG OFFENDERS

Since *Gideon*, the states have been required, pursuant to the Sixth Amendment, to appoint counsel to an indigent defendant accused of a

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92. Memorandum from Janet Napolitano, *supra* note 90.

93. Arizona v. United States, 132 S. Ct. 2492, 2499 (2012); Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act*, *Discretion, and the 'Rule' of Immigration Law*, 51 N.Y.U. L. REV. 161, 167 (2007).

94. For a brief discussion of several arguments in favor of expanding discretion to include the discretion *not* to deport, see Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1744 (2011).

95. *See* 8 U.S.C. § 1252 (2012) (no court has jurisdiction to review final orders of removal based on most criminal offenses, discretionary waivers of inadmissibility grounds, and various forms of relief including cancellation of removal, voluntary departure, adjustment of status, and other discretionary relief other than asylum); *see also* Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction in Immigration Law*, 5 INTERCULTURAL HUM. RTS. L. REV. 57 (2010); Kanstroom, *supra* note 93, at 162–63.

96. Department of Homeland Security, U.S. Citizenship & Immigration Services, Policy Manual, Chapter 7—Special Immigrant Juveniles, https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartF-Chapter7.html, last accessed Nov. 5, 2016.

felony.[97] In 1972, the Court in *Argersinger* extended the Sixth Amendment right to counsel to misdemeanors, to the extent the potential for imprisonment exists.[98] These cases, which arose in the Florida state courts, made the Sixth Amendment right to counsel in criminal proceedings obligatory on the states through the due process clause of the Fourteenth Amendment. The right to counsel with respect to civil juvenile proceedings necessarily proceeded within the limits of due process, outside the rules of criminal procedure and the Sixth Amendment, aspiring to a system that spared the youth the stigma of involvement in the adult criminal justice system.[99]

However, over time, the efforts of the early progressive child advocates to promote rehabilitative ideals—irrespective of the rules of criminal procedure—resulted in a juvenile system that often handed down severe sanctions to children without regard to constitutional standards.[100] The U.S. Supreme Court responded to such alarming trends with its momentous decision in *In re Gault*, where it held that youth in civil delinquency proceedings retain important constitutional rights, including the right to counsel.[101] Since *Gault*, the Court has continued to ensure juveniles retain some basic constitutional rights held by adults while also repeatedly acknowledging that cognitive differences between children and adults justify disparate treatment.[102] Consequently, the Supreme Court has created two distinct yet important threads of jurisprudence: one that seeks to ensure juvenile proceedings are infused with constitutional protections extended to adults, and another that aspires to account for the relationship between psychological development and criminal responsibility. The Court's language in these cases strongly suggests that the right to counsel for children is in fact more robust than that extended to adults in criminal proceedings.

A. *The Due Process Right to Counsel in* In re Gault

The *In re Gault* case began with a citizen's complaint that 15-year-old

97. Gideon v. Wainwright, 372 U.S. 335 (1963).

98. Argersinger v. Hamlin, 407 U.S. 25, 30, 37 (1972).

99. *See* Gannon, *supra* note 20 (describing *parens patriae* as "the right and responsibility of the state to substitute its own control over children for that of the natural parents when the latter appeared unable or unwilling to meet their responsibilities or when the child posed a problem for the community").

100. *See* Birckhead, *supra* note 1, at 970–71.

101. *In re* Gault, 387 U.S. 1, 36, 41 (1967); *see also* Barry C. Feld, *The Transformation of the Juvenile Court –Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 349 (1999).

102. Schall v. Martin, 467 U.S. 253, 264–65 (1984) (upholding a preventative detention statute for delinquents).

Gerald Gault had made a harassing phone call.[103] Gerald was promptly taken into custody by Arizona law enforcement officials without any notification to his parents.[104] The following day, Gerald was brought for questioning before the state juvenile judge, and after a second hearing 6 days later, the judge adjudicated him guilty—without any witnesses or counsel present—and sentenced him to juvenile hall until he was 21 years of age.[105]

Upon review of the Supreme Court of Arizona's decision affirming the juvenile judge's order, the U.S. Supreme Court remarked that "[t]he essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case."[106] The Court admonished that "the condition of being a boy does not justify a kangaroo court" and declared that "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[107] The Supreme Court in *Gault* ultimately held that although a juvenile delinquency hearing need not "conform with all of the requirements of a criminal trial," it "must measure up to the essentials of due process and fair treatment," taking note of the early reformers' rehabilitative objectives and of sociologists' findings that "'[u]nless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel.'"[108] Thus the Court tasked itself with determining "the precise impact of the due process requirement upon proceedings by which a determination is made as to whether a juvenile is 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution."[109]

The Supreme Court looked skeptically at many of "the claimed benefits of the juvenile process," for example, observing that labeling the proceedings as "delinquency" rather than "criminal" had evolved to be a rather meaningless distinction.[110] In fact, the Court mused, the term delinquent "has come to involve only slightly less stigma than the term 'criminal' applied to adults."[111] The Court viewed the punishment meted out in a juvenile delinquency proceeding as very real—in the case before

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103. *Gault*, 387 U.S. at 4.
104. *Id.* at 4–5.
105. *Id.* at 5–7.
106. *Id.* at 29.
107. *Id.* at 28, 36.
108. *Id.* at 26, 30.
109. *Id.* at 13–14.
110. *Id.* at 21–24.
111. *Id.* at 23–24.

it, a "boy [] charged with misconduct" in delinquency proceedings faced a reality that was disturbingly criminal upon confinement to an institution:

> His world becomes "a 'building with whitewashed walls, regimented routine and institutional hours . . . .'" Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.[112]

Asserting that "there is no place in our system of law for reaching a result of such tremendous consequences . . . without effective assistance of counsel," the Court echoed its prior decision in *Kent v. United States*, wherein it had cautioned against "procedural arbitrariness" in the juvenile courts in addressing waivers by the juvenile court to the adult court of jurisdiction.[113]

In deciding what protections to issue in *Gault*, the Court considered the published findings and recommendations regarding the importance of assistance of counsel in juvenile proceedings by the President's Commission on Crime in the District of Columbia, the Children's Bureau of the U.S. Department of Health, Education, and Welfare, and the National Council of Juvenile Court Judges.[114] The assistance of counsel, the Court agreed, is "essential for the determination of delinquency" which "carr[ies] with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21."[115] The Court observed:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him."[116]

Specifically, the Court concluded that the Fifth Amendment right to due process:

> requires that in respect of proceedings to determine delinquency

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112. *Id.* at 27.
113. *Id.* at 30 (quoting Kent v. United States, 383 U.S. 541, 554–55 (1966)).
114. *Id.* at 22, 38–40.
115. *Id.* at 36–37.
116. *Id.* at 36.

> which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[117]

In addition to the right to counsel, the Court held that the Fifth Amendment also extends other procedural protections to children in juvenile proceedings, including the right to notice of charges, the right to confrontation and cross-examination of witnesses, and the privilege against self-incrimination.[118]

The tone of the *Gault* opinion suggests the outcome was driven by a concern about the unfettered power wielded by the juvenile delinquency courts. However, the decision nonetheless declined to resolve a number of other important due process questions. First, when it came to rule on whether juveniles had a right to appeal a juvenile court order or the right to a transcript of the proceedings, the Court demurred, stating that such ruling was unnecessary because reversal in Gerald Gault's case was warranted for other reasons.[119] And even though the Court had identified that any claim that juvenile proceedings are confidential is "more rhetoric than reality," the Court in *Gault* ultimately did not require the sealing of records of juvenile proceedings.[120]

The *Gault* Court likewise kept the reigns pulled taught with respect to the limitations of the right to counsel extended by its holding, explicitly stating that its holding did not address "the entire process relating to juvenile 'delinquents.'"[121] Rather, the opinion stressed that due process attached only to "the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be *committed to a state*

117. *Id.* at 41.

118. *Id.* at 33, 42–43, 55–56.

119. *Id.* at 57–58.

120. *Id.* at 24–25. *See* Ashley Nellis, *Addressing the Collateral Consequences of Convictions for Young Offenders*, CHAMPION, 22 n.25 (2011) (explaining that whether a juvenile record is sealed off from access by the general public is a matter that varies from state to state, and even when juvenile records expungement is available, over half of the states set forth exceptions for certain offenses); SHAH & FINE, *supra* note 37; Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195 (2015) (discussing erosion over time of "confidentiality provisions" of juvenile records and explaining the breadth of information accessible to the public on juveniles prosecuted in adult court). Additionally, although juveniles are entitled to the trial standard of "proof beyond a reasonable doubt" after the Court's decision in *In re Winship* in 1970, one year later the Court in *McKeiver v. Pennsylvania* held that fundamental fairness does not require a state to provide juveniles with the right to a jury trial. *In re* Winship, 397 U.S. 358, 364 (1970); McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

121. *Gault*, 387 U.S. at 13.

institution."[122] In other words, *Gault*'s holding did not address the rights applicable to "pre-judicial stages of the juvenile process" such as a bail hearing or arraignment, nor did it cast rules for the post-adjudicative or dispositional processes, such as sentencing or other post-conviction actions.[123] *Gault* also did not discuss the issue of the appropriate orientation for the defense attorney in a juvenile delinquency proceeding—namely, whether counsel's performance should be adversarial and rights-centered or whether the attorney should adopt a more holistic approach aligned with the original ideological principles of juvenile proceedings.[124] Although the American Bar Association later spelled out standards mandating zealous advocacy by defense counsel in juvenile proceedings, the absence of clear Supreme Court guidance on this point perhaps contributes to the existing reality that many juvenile courts still openly disfavor zealous advocacy in the rehabilitative proceedings.[125] Lastly, the *Gault* opinion makes an abbreviated reference to "the emotional and psychological attitude of the juveniles," but lacks any meaningful discussion of the developmental and cognitive differences in children as a basis for extending certain procedural protections to children as a matter of due process.[126]

B. *Developmental Differences Justify Increased Constitutional Protections*

"The push for procedural due process" launched by *Gault* and its progeny may have later "triggered a backlash against the juvenile court" that ultimately "open[ed] the door for a wave of so-called reforms" to the treatment of juveniles that "further blurred the distinction between juvenile and adult court proceedings."[127] Some of these changes ran counter to the intitial reformers' intent. An era "driven by fears of a 'new breed of juvenile superpredator'" invited the public's demand for greater accountability for certain offenses committed by juveniles, and in the 1980s and 1990s, Congress and many state legislatures expanded the jurisdictional reach of adult criminal courts for juveniles who committed certain offenses and created mandatory detention and sentencing schemes.[128] But interestingly, at the same time the Court began to steadily

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122. *Id.* (emphasis added).

123. *Id.*

124. Fedders, *supra* note 2, at 786.

125. *See* Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 246 (2005); Shaheed, *supra* note 46, at 908–09; Tepfer & Nirider, *supra* note 53, at 557–58; Birckhead, *supra* note 1, at 967.

126. *Gault*, 387 U.S. at 26–27; *see* Fedders, *supra* note 2, at 785.

127. Drizin & Luloff, *supra* note 23, at 264–65.

128. Terry A. Maroney, *The Once and Future Juvenile Brain*, *in* CHOOSING THE FUTURE FOR

develop a body of precedent that incrementally increased constitutional protections to youth in the adult criminal justice system.[129] This later line of precedent reflects an enduring belief, shared by the early reformers, that systemic modifications are justified by real cognitive differences between children and adults.[130]

As the Court remarked in *Eddings v. Oklahoma* in 1982, "youth is more than a chronological fact."[131] Rather, "[i]t is a time and condition of life when a person may be most susceptible to influence and to psychological damage."[132] Referring to psychological research showing that brain development is not complete in those under age 18, the *Eddings* Court held that the Eighth Amendment prohibition against cruel and unusual punishment prohibited mandatory death sentences in homicide cases perpetrated by minors.[133] The Court observed that "minors, especially in their earlier years, generally are less mature and responsible than adults" and took special care to note that the young man before the Court "was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve."[134] In remanding the matter to the state court to "consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances[,]" the *Eddings* Court averred that all of these factors must "be duly considered" in assessing whether the death penalty is warranted in a particular case involving a juvenile offender.[135]

Two decades later and for essentially these same reasons, in *Roper v. Simmons* the Court would hold that the Eighth Amendment demands that offending youth be entirely spared the death penalty.[136] The *Roper* Court identified three general cognitive differences between juveniles and adults justifying its complete prohibition on capital punishment.[137] First, the Court observed, as a group youth tend to be impetuous, immature,

AMERICAN JUVENILE JUSTICE 189, 189 (Franklin E. Zimring & David S. Tanenhaus eds., 2014) (describing an era "driven by fears of a 'new breed of juvenile superpredator'"); *see* Drizin & Luloff, *supra* note 23, at 265 (stating that Congress and state legislatures created mandatory detention and sentencing schemes); David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 642 (2002).

129. *See* Eddings v. Oklahoma, 455 U.S. 104, 110–12 (1982); Roper v. Simmons, 543 U.S. 551, 578–79 (2005); Graham v. Florida, 560 U.S. 48, 82 (2010); Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

130. *See Eddings*, 455 U.S. at 115–16; *Roper*, 543 U.S. at 569–70; *Graham*, 560 U.S. at 68; *Miller*, 132 S. Ct. at 2464.

131. *Eddings*, 455 U.S. at 115.

132. *Id*.

133. *See id*. at 116.

134. *Id*. at 115–16.

135. *Id*. at 116–17.

136. Roper v. Simmons, 543 U.S. 551, 578–79 (2005).

137. *Id*. at 569–71.

irresponsible, and reckless, and due to these "signature qualities," existing laws prohibit juveniles from "voting, serving on juries, or marrying without parental consent."[138] Secondly, juveniles are "more vulnerable or susceptible to negative influences and outside pressures," in large part because children "have less control, or less experience with control, over their own environment" and they "lack the freedom that adults have to extricate themselves from a criminogenic setting."[139] Finally, the Court concluded that the character and personality traits of juveniles are "not as well formed as that of an adult" such that a child's actions are less likely to be "evidence of irretrievabl[e] deprav[ity]."[140] Because these qualities of youth are transient and can subside, a strong potential for rehabilitation exists in children.[141] In so finding, the Court cited studies that showed that "a relatively small proportion of adolescents who [experiment] in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood."[142]

The Court took another progressive leap forward in 2010 when it prohibited life sentences without parole for juvenile offenders for non-homicide offenses.[143] Like *Roper*, the *Graham v. Florida* opinion took note of the fact that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds" and that children are "more capable of change than are adults," such that they have "diminished moral responsibility."[144] Accordingly, the Court in *Graham* determined that these distinguishing attributes of youth diminished the legitimate penal goals of retribution, deterrence, incapacitation, and rehabilitation for imposing life without parole on juveniles in non-homicide cases.[145]

The following year in *J.D.B. v. North Carolina* the Court cited both *Roper* and *Graham* for their "commonsense conclusions about behavior and perception" in children as a class to hold that age must be taken into consideration in determining the validity of a Miranda waiver.[146] The Court in *J.D.B.* noted that "these observations restate what 'any parent

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138. *Id.* at 569–70 (quoting Johnson v. Texas, 509 U.S. 350, 368 (1972)).

139. *Id.* at 569 (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

140. *Id.* at 570.

141. *See id.*

142. *Id.* (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

143. Graham v. Florida, 560 U.S. 48, 82 (2010).

144. *Id.* at 68, 72.

145. *Id.* at 71–74.

146. J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)).

knows'—indeed, what any person knows—about children generally," and that the law likewise "has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them."[147] Again the Court took note of the existing "legal disqualifications" already placed on children, such as the ability to enter into marriage and other contracts, which "exhibit the settled understanding that the differentiating characteristics of youth are universal."[148]

In 2012, the Court took yet another bold step in the sentencing context, holding in *Miller v. Alabama* that the Eighth Amendment barred mandatory life imprisonment without parole for juveniles who committed *any* crime—even homicide offenses.[149] The Court held that "making youth (and all that accompanies it) irrelevant to the imposition of that harshest prison sentence, . . . poses too great a risk of disproportionate punishment," noting the "great difficulty" that had been previously identified in *Roper* and *Graham* of "distinguishing at this early age between 'the juvenile offender whose crimes[] reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crimes[] reflect irreparable corruption."[150] Citing the extensive body of research on children's diminished mental capacity that undergirded its rationale in *Eddings*, *Roper*, and *Graham*, *Miller* requires a sentencing court, before imposing a life sentence, "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[151] The fact that "adolescent brain science has hit its stride" in the Court is further evidenced by the Court's decision in *Montgomery v. Louisiana* that the rule in *Miller* barring mandatory life sentences without parole must be applied retroactively to juveniles whose convictions and sentences were final even before *Miller* was decided.[152]

Thus, a great deal of research in the fields of social science, neuroscience and psychology demonstrating legitimate cognitive differences between adults and children bolstered the Court's holdings in these cases.[153] One large scale study of juvenile competence to stand trial confirms that due to developmental immaturity, many juveniles "simply

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147. *Id.* at 273.

148. *Id.*

149. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

150. *Id.* at 2469.

151. *Id.*

152. Maroney, *supra* note 127, at 201; Montgomery v. Louisiana, 136 S. Ct. 718, 736–37 (2016) (retroactively applying the rule in *Miller* to a 70-year-old defendant who committed a murder when he was 16 years old).

153. *See* Maroney, *supra* note 127, at 191; Eddings v. Oklahoma, 455 U.S. 104 (1982); Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); *Miller*, 132 S. Ct. at 2455; *Montgomery*, 136 S. Ct. at 718.

[cannot] think like competent adult counterparts" when it comes to "high-level cognitive tasks such as hypothetical thinking, logical reasoning, long-range planning, and complex decision making."[154] Children are impulsive, unpredictable, and sometimes incapable of providing understandable accounts of salient facts to their counsel and other necessary parties, contributing to negative findings of credibility and outcomes where the child is more easily found culpable.[155] Recent information collected about mental illnesses, intellectual disabilities, and the effects of substance abuse also raises concerns about the overall competency of juveniles to confront accusations of delinquent or criminal misconduct.[156] As the *Roper* Court recognized, a youth lacks control over many major outside factors that contribute to dangerous or dysfunctional situations, including his family and home situation, further diminishing his culpability.[157] These findings, embraced by the Supreme Court, reiterate the principal justification for the juvenile court system: children are different. These differences justify the existence of systems and safeguards that facilitate the child's ability to effectively rehabilitate and reintegrate into society.[158]

III. RIGHT TO COUNSEL ON IMMIGRATION CONSEQUENCES

A. *The Sixth Amendment Right to Counsel in* Padilla v. Kentucky

Jose Padilla, a lawful permanent resident of the United States for over forty years, pled guilty to three misdemeanor drug charges after his criminal defense counsel informed him that "he did not have to worry about immigration status since he had been in the country so long."[159] However, Jose's attorney was wrong. These offenses mandated his deportation.[160] Jose later appealed his conviction, asserting that he received ineffective assistance of counsel.[161] Ultimately, the U.S. Supreme Court held the Sixth Amendment right to effective assistance of counsel in criminal proceedings requires defense counsel to advise their noncitizen clients of the immigration consequences of a conviction.[162]

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154. David R. Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 AM. J.L. & MED. 503, 521 (2006).

155. *See* Shaheed, *supra* note 46, at 907–13.

156. Katner, *supra* note 153, at 518–23.

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

158. *Miller,* 132 S. Ct. at 2469.

159. Padilla v. Kentucky, 559 U.S. 356, 359 (2010) (internal quotation marks omitted).

160. *Id.*

161. *Id.*

162. *Id.* at 360, 374. "In all criminal prosecutions, the accused shall enjoy the right . . . to

At the time of Jose's conviction, the collateral consequences doctrine prevailed with respect to an attorney's obligation to inform his client. Under the doctrine, a defendant must be informed of the direct consequences of a plea, which have a "definite, immediate, and largely automatic effect," but need not be informed of any consequences deemed indirect or collateral, or all those "possible ancillary or consequential results which are peculiar to the individual and which may flow from a conviction of a plea of guilty . . . ."[163] Deportation, according to the Court before *Padilla*, "was not a form of criminal punishment, but rather a civil remedy aimed at excluding noncitizens from the country."[164]

The Court in *Padilla* approached the matter before it carefully. The Court framed the question as "whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country." The Court answered that question in the affirmative.[165] The Court observed that while deportation is a civil matter and "is not, in a strict sense, a criminal sanction," it is nonetheless "intimately related to the criminal process," observing that American "law has enmeshed criminal conviction and the penalty of deportation" for nearly one hundred years:

> While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences [of deportation]. The "drastic measure" of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes . . . .[166]

The Court determined that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[167] In

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have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

163. Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1365–66 (1973) (quoting United States v. Sambro, 454 F.2d 918, 920 (1971)).

164. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31, 38 (2010).

165. Padilla, 559 U.S. at 360, 374.

166. *Id.* at 360, 365 (citation omitted).

167. *Id.* at 364. For a thoughtful discussion on how "[t]he recent trend toward harsher and more punitive ways of intermeshing immigration and criminal law represents a decision . . . that is analogous to a life sentence," without taking into consideration events and circumstances considered in the criminal sentencing realm, see Stumpf, *supra* note 94, at 1709.

support, the Court cited other federal court decisions acknowledging the seriousness of deportation as a consequence of conviction, including its own acknowledgement in *INS v. St. Cyr* that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."[168] In *St. Cyr*, decided in 2001, the Court observed that "preserving the possibility of [discretionary relief from deportation] would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial."[169] The *Padilla* Court also cited the Second Circuit's reasoning in *Janvier v. United States* in 1992 that even if deportation itself is a civil action, "the impact of a [criminal] conviction on a noncitizen's ability to remain in the country was a *central issue* to be resolved during the sentencing process—not merely a collateral matter outside the scope of counsel's duty to provide effective representation."[170] For its part, the *Janvier* court had followed the Supreme Court's logic in *Fong Haw Tan v. Phelan* that "forfeiture for misconduct of a residence in this country" is a drastic measure that equates to "banishment or exile" and therefore is indeed a "penalty."[171]

The *Padilla* majority asserted that advice regarding civil deportation consequences "is not categorically removed from the ambit of the Sixth Amendment right to counsel" and thereby carefully declined the invitation to characterize immigration consequences as collateral or direct.[172] The majority noted that it has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland* [*v. Washington*]" and ultimately deemed the collateral versus direct distinction "ill-suited" to evaluating the *Strickland* claim before it due to the unique nature of deportation as "a particularly severe 'penalty.'"[173]

An effective assistance claim under *Strickland* has two elements: first, a defendant must show that her counsel's actions fell below an objective standard of reasonableness; next, she must demonstrate a reasonable probability that but for counsel's errors, the outcome of the proceeding

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168. *Padilla*, 559 U.S. at 368 (quoting Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 322–23 (2001)).

169. *St. Cyr*, 533 U.S. at 323.

170. *Padilla*, 559 U.S. at 363 (citing Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986)).

171. *Janvier*, 793 F.2d at 455 (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

172. *Padilla*, 559 U.S. at 365. Direct consequences have been defined as those that are "immediate and automatic" as a result of a criminal conviction, while collateral consequences are the "indirect sanctions" that result from convictions. *See* Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1111 (2006).

173. *Padilla*, 559 U.S. at 365–66.

would have been different.[174] With respect to the second element, *Strickland* requires a demonstration of prejudice by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[175] Observing that "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders," the *Padilla* Court found it "'most difficult' to divorce the penalty from the conviction in the deportation context."[176] The Court specifically pointed to existing norms set by the American Bar Association, the National Legal Aid and Defender Association, and the Department of Justice requiring defense attorneys to give noncitizens advice with respect to immigration consequences in determining what was reasonable.[177] *Padilla* remarked that an attorney with even "the most rudimentary understanding" of immigration law may be a more effective advocate for his client, and concluded that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."[178] Applying its reasoning to the facts presented, *Padilla* held that the first prong of the *Strickland* test—whether the attorney's performance fell below reasonable norms—is met if a defense attorney failed to give her client appropriate advice regarding the risk of deportation.[179]

Conceding that immigration law is a "legal specialty of its own" in which some attorneys may not be well-versed, the Court decided that the *precise* limits of counsel's responsibilities depended on the clarity of the consequence: in cases like Jose Padilla's, where "[t]he consequences of Padilla's plea could easily be determined," a failure to advise a client that deportation is mandated by the conviction falls below an objective standard of reasonableness.[180] But with respect to the "numerous [other] situations in which the deportation consequences [. . .] are unclear or uncertain," a much less demanding standard applies to defense counsel: in particular, "[w]hen the law is not succinct and straightforward" with regard to the immigration consequences, the defense attorney need only advise the noncitizen that pending criminal charges "may carry a risk of adverse immigration consequences."[181]

Justice Alito, joined by Justice Roberts and writing for the concurrence, agreed with the majority's view on the complexity of our immigration laws, noting in particular the problems created by:

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174. Strickland v. Washington, 466 U.S. 668, 687–88, 694 (1984).
175. *Id*. at 687.
176. *Padilla*, 559 U.S. at 366.
177. *Id*. at 366–68.
178. *Id*. at 367.
179. *Id.* at 371.
180. *Id.* at 369.
181. *Id.*

> significant variations among Circuit interpretations of federal immigration statutes; the frequency with which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the "length and type of sentence" and the determination "whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen[.]"[182]

The concurring opinion also agreed that "any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea."[183] The concurring Justices argued "incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question."[184] When a defendant bases the decision to plead guilty on counsel's misadvice, the Court reasoned, "it seems hard to say that the plea was entered with the advice of a constitutionally competent counsel—or that it embodies a voluntary and intelligent decision to forsake constitutional rights."[185] However, the concurrence advocated for a less demanding standard, arguing that *Strickland*'s test for ineffectiveness should only apply to the extent that a noncitizen received incorrect advice.[186] The majority responded to the concurrence's position by averring that counsel should not be incentivized to "remain silent on matters of great importance" such as "possible exile from this country and separation from their families."[187] Limiting the holding to affirmative misadvice, the majority argued, "would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available."[188]

In dissent, Justice Scalia and Justice Thomas resolutely deemed immigration consequences as collateral, likening them to consequences such as losing the right to bear arms, the loss of professional licenses, or the right to vote.[189] The Justices averred that these are issues that historically and necessarily have been far outside the counseling responsibilities of defense counsel under the Sixth Amendment.[190] The

182. *Id.* at 380 (Alito, J., concurring).
183. *Id.* at 388 (Alito, J., concurring).
184. *Id.* at 385 (Alito, J., concurring).
185. *Id.*
186. *Id.* at 384, 388 (Alito, J., concurring).
187. *Id.* at 370 (majority opinion).
188. *Id.* at 369, 370–71.
189. *Id.* at 390 (Scalia, J., dissenting).
190. *Id.* at 369 (majority opinion); *id.* at 389 (Scalia, J., dissenting).

Sixth Amendment guarantees an accused "legal advice directly related to defense against prosecution of the charged offense," which the dissent argued does not include advice related to the collateral consequences of a conviction as it has "no logical stopping-point."[191] The dissent discerned that the concurrence in particular seemed to be improperly driven by an implied concern about the voluntariness of the plea, and contended that such a concern "properly relates to the Due Process Clauses of the Fifth and Fourteenth Amendments, not to the Sixth Amendment."[192] Observing that Jose Padilla himself had not made any argument that his plea was not knowing or voluntary, the dissent chastised this apparent attempt by the other Justices to "smuggle the claim into the Sixth Amendment."[193]

B. Strickland v. Washington *and Due Process*

For many, *Padilla* represented a bold and much-needed expansion of reasonable notions of attorney competence, but for others (such as Justice Scalia) the majority had used "a sledge where a tack hammer [was] needed."[194] A closer inspection of the rationale undergirding *Strickland* and Supreme Court jurisprudence on the right to counsel reveals that Scalia's allegation that the concurrence's rationale indicated that the issue really was an attempted due process claim in disguise was not entirely misplaced. But even if Scalia's assertion is true, the majority did not disregard the Court's "former interpretive commitments" in right-to-counsel jurisprudence.[195]

The Sixth Amendment right to counsel "has never been fully independent from due process ideas, especially when applied to the states."[196] The Court has long considered the Fifth and Sixth Amendments as interdependent and steered by the same essential principles.[197] In particular, the concept of fairness is so firmly embedded in right-to-counsel jurisprudence that a Sixth Amendment claim cannot avoid a Fifth Amendment inquiry.[198] For example, in holding that a valid plea must be voluntary, knowing, and intelligent, the Supreme Court in *Brady v. United States* in 1970 framed the matter as a Fifth Amendment question that required a consideration of "all of the relevant circumstances surrounding it," including whether the defendant was

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191. *Id.* at 389–90 (Scalia, J., dissenting).
192. *Id.* at 391 (Scalia, J., dissenting).
193. *Id.* at 391–92 (Scalia, J., dissenting).
194. *Id.* at 388.
195. Josh Bowers, *Fundamental Fairness and the Path from Santobello to Padilla: A Response to Professor Bibas*, 2 CAL. L. REV. CIRCUIT 52, 60 (2011).
196. Kanstroom, *supra* note 8, at 1470.
197. *See id.* at 1470–71.
198. *Id.*

"advised by competent counsel."[199] The rule in *Brady* acknowledging the importance of counsel in determining whether Fifth Amendment principles have been compromised traces back to the Supreme Court's 1963 mandate in *Gideon v. Wainwright* that indigent defendants have a right to appointed counsel under the Sixth Amendment because "any person hauled into court, who is too poor to hire a lawyer, cannot be assured a *fair trial* unless counsel is provided for him."[200] The fundamental Sixth Amendment right identified in *Gideon* is made obligatory on the states through the *due process* clause of the Fourteenth Amendment, as is the Sixth Amendment holding in *Padilla* regarding the effectiveness of counsel.[201]

The rule in *Strickland*, technically a Sixth Amendment decision, "is fundamentally a client-focused doctrine intended to ensure that the adversarial criminal process is *fair* to the defendant."[202] The *Strickland* Court observed that previously it had recognized, many times over, that the Sixth Amendment right to counsel "exists, and is needed, in order to protect the fundamental right to a *fair trial*,"[203] which in turn is guaranteed by the due process clause. In particular, the *Strickland* Court explained: "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system."[204] The purpose is simply to ensure that criminal defendants receive a "*fair trial*."[205] The Court explained that "[t]he Constitution guarantees a fair trial through the Due Process Clauses, but it *defines the basic elements of a fair trial* largely through the several provisions of the Sixth Amendment, including the Counsel Clause . . . ."[206]

In articulating the two-prong standard for effective assistance of counsel in 1984, the *Strickland* Court examined its 1932 decision in *Powell v. Alabama*, where it had tackled the issue of appointment of counsel in capital cases.[207] The question before the *Powell* Court was whether the denial of counsel in that case was so substantive that it "infringe[d] the due process clause."[208] In arriving at the conclusion that the defendants' attorneys were so hapless that due process rights had been violated, the Court noted its own previous observations that the right to be heard "would be, in many cases, of little avail if it did not comprehend

199. Brady v. United States, 397 U.S. 742, 748–49, 754, 756 (1970).
200. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (emphasis added).
201. Kanstroom, *supra* note 8, at 1470–71.
202. Nash, *supra* note 69, at 571 (emphasis added).
203. Strickland v. Washington, 466 U.S. 668, 684–85 (1984) (emphasis added).
204. *Id.* at 689 (emphasis added).
205. *Id.* (emphasis added).
206. *Id.* at 684–85 (emphasis added).
207. *Id.* (emphasis added).
208. Powell v. Alabama, 287 U.S. 45, 52 (1932).

the right to be heard by counsel," explaining:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [has] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.[209]

Without counsel, the Court recognized in 1932, even an intelligent juvenile faces wrongful conviction "because he does not know how to establish his innocence."[210] Thus,

> [i]f in any case, *civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, *therefore, of due process in the constitutional sense*.[211]

The Court in *Strickland* also cited its 1938 decision in *Johnson v. Zerbst*, addressing the validity of a waiver of the right to counsel in a criminal matter, wherein it had opined that the "safeguards" of the Sixth Amendment are "necessary to insure fundamental human rights of life and liberty" and that the Sixth Amendment "stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will 'still not be done.'"[212] In *Johnson*, the Court had elaborated on the importance of the Sixth Amendment right to counsel in preserving one's "life or liberty": "[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his *life or liberty*, wherein the prosecution is presented by experienced and learned counsel."[213]

Finally, the *Strickland* Court also visited its 1942 holding in *Adams v. United States ex rel McCann*, another early right to counsel case:

> The accused must have ample opportunity to meet the case of the prosecution. To that end, the Sixth Amendment of the Constitution abolished the rigors of the common law by affording one charged with crime the assistance of counsel for his defense. Such assistance "in the particular situation" of "ignorant defendants in a

209. *Id.* at 68–69.
210. *Id.* at 69.
211. *Id.* (emphasis added).
212. *Strickland*, 466 U.S. at 684; Johnson v. Zerbst, 304 U.S. 458, 462 (1938).
213. *Johnson*, 304 U.S. at 462–63 (emphasis added).

> capital case" led to recognition that "the benefit of counsel was essential to the substance of a hearing", *as guaranteed by the Due Process Clause of the Fourteenth Amendment*, in criminal prosecutions in the state courts.[214]

In *Adams*, the Court had commented that "[t]he relation of trial by jury to civil rights – especially in criminal cases – is fully revealed by the history which gave rise to the provisions of the Constitution which guarantee that right," remarking that the "procedural devices" contained in the Bill of Rights were not written "as abstract rubrics in an elegant code but in order to assure *fairness and justice* before any person could be deprived of 'life, liberty, or property.'"[215]

In the spirit of these decisions, *Strickland* stated that in setting the standard for effective defense counsel it was guided by "its purpose—to ensure a *fair trial*."[216] *Strickland* defined "a *fair* trial [as] one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding."[217] According to *Strickland*, "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."[218] The defense attorney thus plays "the role necessary to ensure that the trial *is fair* [because it] is critical to the ability of the adversarial system to produce just results."[219] Because counsel is a crucial part of "the adversarial system embodied in the Sixth Amendment," a claim of ineffectiveness must show "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[220] Importantly, *Strickland* does not "exhaustively define the obligations of counsel"—rather, the assistance must be "reasonable considering all the circumstances."[221]

With this body of precedent as the backdrop, the *Padilla* Court concluded that the severity of deportation as a sanction and the increased convergence of civil deportation law with the criminal system together showed "how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation."[222] After *Padilla*, the flexible limits of effective assistance articulated by *Strickland* now encompass advice on

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214. *Strickland*, 466 U.S. at 685 (emphasis added); Adams v. United States *ex rel* (1984); McCann v. United States, 317 U.S. 269, 275 (1942).

215. *McCann*, 317 U.S. at 276 (emphasis added).

216. *Strickland*, 466 U.S. at 686 (emphasis added).

217. *Id.* at 685 (emphasis added).

218. *Id.*

219. *Id*. (emphasis added).

220. *Id.* at 685–86.

221. *Id.* at 688.

222. Padilla v. Kentucky, 559 U.S. 356, 373–74 (2010).

immigration consequences, a holding that arguably implies that the Court believed that without this advice, the outcome for Jose Padilla was unfair or unjust—a result that *Strickland* had counseled must be avoided.[223] In this regard, although *Padilla* clearly cites the Sixth Amendment right to counsel as its foundational principle, the decision reverberates with notions of due process (just as Scalia apparently suspected), and properly so.[224] Time and again, in *Powell, Johnson, Adams, Strickland,* and most recently (albeit silently) in *Padilla*, the Supreme Court has recognized that effective assistance of counsel is a means by which the objectives of due process—namely, life and liberty—are achieved.[225] Put another way, because the Sixth Amendment is "necessary to insure fundamental rights of life and liberty," the Sixth Amendment simply cannot be divorced from the Fifth Amendment right to due process.[226] Thus, any alleged smuggling of a Fifth Amendment claim into a Sixth Amendment argument would be supported soundly by existing Supreme Court precedent.[227]

IV. A DUE PROCESS RIGHT TO COUNSEL ON IMMIGRATION CONSEQUENCES FOR NONCITIZENS IN JUVENILE DELINQUENCY PROCEEDINGS

The *Padilla* Court confirmed what many noncitizens have known for years: that the immigration sanctions triggered by a noncitizen's interaction with the criminal justice system have increased in frequency and severity.[228] Each point of contact between a child and authorities in juvenile delinquency proceedings potentially puts a noncitizen youth's current and future immigration status in peril. For decades, the Supreme Court has used the differences between adult and juvenile brains to justify and enhance constitutional protections for offending juveniles in the criminal sentencing context; yet, the rights afforded to noncitizen adults in criminal proceedings have outpaced the rights extended to noncitizen children in juvenile proceedings.[229]

Put simply, the *Padilla* decision gives noncitizens in adult criminal

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223. *Strickland*, 466 U.S. at 685 (emphasis added).

224. *Padilla*, 559 U.S. at 391 (Scalia, J., dissenting).

225. *Id.* at 373–74; *Strickland*, 466 U.S. at 686; Adams v. United States *ex rel* McCann, 317 U.S. 269, 276 (1942); Johnson v. Zerbst, 304 U.S. 458, 462 (1938); Powell v. Alabama, 287 U.S. 45, 71–72 (1932).

226. *Johnson*, 304 U.S. at 462.

227. For a discussion of the implicit challenges made by the *Padilla* Court and its implications for the lack of constitutional right to counsel in civil immigration proceedings, see KANSTROOM, *supra* note 8, at 1481–83.

228. *Padilla*, 559 U.S. at 373–74.

229. *See* Shaheed, *supra* note 46, at 907.

proceedings a right to counsel on immigration consequences, but it does not ensure that children in *civil* juvenile delinquency proceedings have that same right.[230] Neither *Padilla* nor *Strickland*, the foundation upon which *Padilla* was constructed, addressed delinquency cases at all.[231] In fact, the Supreme Court has conspicuously avoided a Sixth Amendment analysis in determining the extent of the constitutional protections in juvenile proceedings, instead finding that juvenile delinquency proceedings are governed by the Fifth Amendment right to due process.[232] But *Gault*'s mandate that due process requires the appointment of counsel in juvenile court cannot be used to close the gap between the rights of a noncitizen child versus that of a noncitizen adult.[233] Unlike *Padilla*, where the Court specifically noted that "informed consideration of possible deportation" at the plea bargaining stage "can only benefit the State and noncitizen defendants" by enabling them to "reach agreements that that better satisfy the interests of both parties," the *Gault* decision failed to address both immigration consequences *and* the right to counsel in the pre-adjudicatory phases like plea negotiation.[234] In particular, the *Gault* Court used deliberately restrictive language, stating that its holding applied only to the adjudicative phase, not to pre-adjudicatory or dispositional phases, of a juvenile proceeding.[235] Further, an immigration proceeding is a matter more remote from an adjudicative phase than the dispositional stage of the same proceeding. Thus, the directives in *Gault* cannot fairly be extended to create a right for juveniles analogous to the right for adults created by *Padilla*.[236] In summary, the law remains in a state of troubling contradiction: noncitizen children are more vulnerable than their adult counterparts to the devastating results regularly triggered by our immigration laws.

Mercifully, existing federal precedent suggests that this gap could be closed by the Court with little difficulty. As discussed in Part III, the Supreme Court has long recognized an axiomatic relationship between the right to a fair trial and the role of counsel. In particular, the precedent undergirding *Padilla* shows that the rule in *Padilla* is sustained by the same ideals of fairness upon which *Gault* was built, thereby furnishing a foothold for the Court to find that basic principles of due process require

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230. *Padilla*, 559 U.S. at 374.

231. *Id.* at 366; *see* Strickland v. Washington, 466 U.S. 668 (1984).

232. McKeiver v. Pennsylvania, 403 U.S. 528, 540–45 (1971).

233. *In re* Gault, 387 U.S. 1, 41 (1967).

234. *Padilla*, 559 U.S. at 373; *see Gault*, 387 U.S. at 34–40.

235. *Gault*, 387 U.S. at 30.

236. *Compare Padilla*, 559 U.S. at 366 (describing the rights to adults regarding their right to counsel), *with Gault*, 387 U.S. at 55 (describing the rights to juveniles regarding their right to counsel).

an analogue to *Padilla* in the civil juvenile delinquency system.[237]

Put another way, *Gault* supplies the basic premise: children are entitled to due process of law in juvenile delinquency proceedings.[238] The Court recognizes that "due process is flexible and calls for such procedural protections as the particular situation demands,"[239] and this flexibility allows it to respond appropriately to situations involving vulnerable populations by adapting existing standards to fix untenable situations. Furthermore, due process protections under the Fifth Amendment "are universal in their application" and "appl[y] to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[240]

An analysis of what due process specifically requires here necessitates a consideration of what is at stake—an assessment similar to the one made in *Padilla*.[241] Juvenile proceedings, like immigration proceedings, are technically civil, but they are nonetheless highly punitive. Liberty, as the *Gault* Court noted, is indeed an important right; however, as the Supreme Court has repeatedly recognized, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."[242] Unlike the varied assortment of potential penalties in criminal and delinquency proceedings (*e.g.*, length of detention, mandatory treatment, reporting requirements, and other possible punitive and rehabilitative probationary terms) outcomes in immigration matters are of a distinctively binary nature.[243] The immigration laws activated by a delinquency proceeding will set a noncitizen on a path that will impact every aspect of her life going forward—her relationships with her family, friends, and society at large, her education and work experiences, and her cultural experiences.[244] As *Gault* emphasized in the context of confinement, our system of law should not tolerate "reaching a result of such tremendous consequences

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237. *Padilla*, 559 U.S. at 374.

238. *Gault*, 387 U.S. at 30.

239. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

240. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

241. *Padilla*, 559 U.S. at 364.

242. Gault, 387 U.S. at 30 (quoting Kent v. United States, 383 U.S. 541, 554 (1966)); INS v. St. Cyr., 533 U.S. 289, 322–23 (2001).

243. For a discussion of the evolution of immigration sanctions from including penalties such as incarceration, fines, and hard labor, to a binary system of deportation/exclusion, as well as a proposal for a system of graduated sanctions in immigration law, see Stumpf, *supra* note 94, at 1683.

244. *Id.* For a discussion of the evolution of immigration sanctions from including penalties such as incarceration, fines, and hard labor, to a binary system of deportation/exclusion, as well as a proposal for a system of graduated sanctions in immigration law, see Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009).

. . . without effective assistance of counsel."[245]

As the Supreme Court in *Powell* observed about the unrepresented defendant, "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law, [and] lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one."[246] The Court readily conceded in *Padilla* that the law with regard to the deportation and criminal systems can be incredibly difficult to understand for even experienced lawyers, let alone an unrepresented noncitizen who is part of a "class of clients least able to represent themselves."[247] A child's status as a noncitizen likewise amplifies her vulnerability in juvenile delinquency proceedings: noncitizen youth may lack knowledge in American law and experience linguistic and cultural barriers to interacting with the juvenile justice system, rendering her unable to argue its interpretation or offer facts that would have made her case and ultimately protect her from deportation.[248] Youth, as well as the caregivers and other authority figures in their lives, may be altogether ignorant of their immigration status and therefore uninformed with respect to the attendant vulnerabilities of noncitizens. If the child's parents are also immigrants, they too may be unfamiliar with the American legal system, increasing the likelihood of their son or daughter making a critical misstep during each phase of a juvenile delinquency proceeding.[249]

The rehabilitative paradigm under which the juvenile delinquency court operates does not exist in immigration law; immigration laws are generally applied to children on the same terms as to adults.[250] Although a narrow line of administrative precedent offers an avenue of relief for some juveniles with adjudications, the language of these decisions masks a statutory analysis that is indefensibly theoretical in many situations, ultimately undermining the very protections the cases set out to establish.[251] Finally, the broad discretionary power granted to immigration officials to deny an application for relief functions as an additional required element, such that every single fact, and every statement and decision a child makes during the juvenile delinquency process could have serious consequences for immigration eligibility and therefore the child's entire future.

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245. *Gault*, 387 U.S. at 30 (quoting *Kent*, 383 U.S. at 554).

246. Powell v. Alabama, 287 U.S. 45, 69 (1932).

247. Padilla v. Kentucky, 559 U.S. 356, 369, 371 (2010).

248. *See generally* THRONSON, *supra* note 4, at 239–40.

249. *See* Frankel, *supra* note 35, at 65.

250. *See supra* Part III; *see also* THRONSON, *supra* note 4, at 135–39.

251. *See supra* text accompanying note 68 (discussing the interplay between *In re Devison*, 22 I. & N. Dec. 1362, 1370 (B.I.A. 2000); *In re* M-U-, 2 I. & N. Dec. 92 (B.I.A. 1944); 18 U.S.C. 5032 (2010)).

Just like an adult in criminal proceedings, under certain circumstances a noncitizen child in juvenile delinquency proceedings faces "banishment or exile" by operation of harsh immigration laws.[252] But the harm that may befall a child upon removal from the United States may be even more devastating than that which an adult may face. For example, the separation of a child from a parent or guardian by way of the child's denial of admission or deportation may be an unavoidable consequence.[253] Banned from the United States and without a parent or legal guardian, in the best of situations, the child may confront major obstacles in life with respect to education, family relationships and support network, and access to medical and other services; at worst, the child faces foster care, orphan status, or even life on the streets.[254] One damaging potential outcome of deportation is similar to that which the Court in *Gault* anticipated as a result of detention: separation from "mother and father and sisters and brothers and friends and classmates."[255] This separation would constrict a child's ability to rehabilitate and reintegrate successfully into society, contrary to the intent of the early reformers of juvenile delinquency proceedings. Ultimately, no consequence of a juvenile proceeding can change a child's life "as drastically as automatic forcible removal from the country in which one resides."[256]

Thus, the consequences of deportation are just as high as they were with respect to the consequences of juvenile detentions in *Gault*. As *Gault* maintained, a "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."[257] Juveniles cannot be expected to know and comprehend risks that the Court did not even expect noncitizen adults to know without "access to counsel's skill and knowledge."[258] In fact, immigration law is so complex that the *Padilla* majority even reduced the expectations of performance placed on *attorneys*, acknowledging that in many situations in immigration law the precise impact is "unclear or uncertain."[259] Noncitizen children cannot be expected to understand the

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252. Janvier v. United States, 793 F.2d 449, 454 (2d Cir. 1986).

253. *See* Frankel, *supra* note 35, at 66.

254. *Id.*

255. *In re* Gault, 387 U.S. 1, 27 (1967).

256. Joanna Rosenberg, Note, *A Game Changer? The Impact of* Padilla v. Kentucky *on the Collateral Consequences Rule and Ineffective Assistance of Counsel Claims*, 82 FORDHAM L. REV. 1407, 1441 (2013).

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

258. Strickland v. Washington, 466 U.S. 668, 685 (1984); *see* Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1121 (2006).

259. Padilla v. Kentucky, 559 U.S. 356, 369 (2010).

immigration laws and forecast their long-term implications if neither a noncitizen adult nor a licensed attorney is expected to do so.

Padilla recognized a defense lawyer's responsibility to "actively negotiate and competently advise their clients on whether a bargain is substantively desirable."[260] Although neither *Gideon* nor *Gault* ensured a right to counsel at pre-judicial stages, the Court has applied the Sixth Amendment's protections in the plea bargaining context, holding in *Lafler v. Cooper*[261] and *Missouri v. Frye*[262] that ineffectiveness leading defendants to reject plea bargains can satisfy both the performance and prejudice prongs of *Strickland v. Washington*.[263] As Justice Stevens' majority opinion in *Padilla* noted, 95% of adult criminal convictions result from guilty pleas.[264] Likewise, as noted in Part I of this Article, case resolutions by guilty plea in juvenile cases are just as high.[265] In light of the foregoing, the right to counsel for noncitizen juveniles should be at least as expansive as the rights extended to noncitizen adults.

Juvenile judges cannot fairly be held responsible for ensuring a noncitizen child is informed of the unique dangers he may face as a result of a juvenile proceeding. Juvenile courts carry a heavy caseload and already bear great responsibility with respect to all children hauled before them, citizens and noncitizens alike, many of whom face difficult and dangerous situations at home and at school that the judge may be trying to repair or otherwise appropriately address to the extent possible from the bench.[266] Moreover, judges are largely absent during the plea-bargaining process, further necessitating that this duty rest upon the shoulders of the child's counsel.[267] Finally, in some juvenile courts, a failure to ensure a right to counsel with respect to noncitizens may result in a situation where the juvenile court system can be effectively commandeered by immigration enforcement officials as a barrier-free child deportation system that not only guts the juvenile court's rehabilitative principles but ultimately yields disparate treatment between

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260. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1142 (2012).

261. Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012).

262. Missouri v. Frye, 132 S. Ct. 1399, 1410 (2012).

263. Bibas, *supra* note 259, at 1142.

264. *Padilla*, 559 U.S. at 372.

265. Cowden & McKee, *supra* note 47, at 639 (noting that "over 95 percent [of juveniles in delinquency proceedings] confessed or pleaded guilty").

266. ABA INST. OF JUDICIAL ADMIN., JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO ADJUDICATION, 3.3(A) (1980) [hereinafter JUVENILE JUSTICE STANDARDS] (Responsibilities of the juvenile court judge with respect to plea agreements); *see also* Bibas, *supra* note 259, at 1142.

267. Bibas, *supra* note 259, at 1142. JUVENILE JUSTICE STANDARDS, *supra* note 265, 3.3(A) (regarding responsibilities of the juvenile court judge with respect to plea agreements); *see also* Bibas, *supra* note 259, at 1142.

citizen and noncitizen children in the juvenile court system.[268] Recognizing a due process right to counsel for noncitizens on the immigration consequences of juvenile delinquency, and ensuring this right is satisfied at an early stage of the proceedings, will ensure the already overburdened juvenile courts are not shouldering more responsibility than they can efficiently handle.

The Supreme Court's recent decisions with respect to juvenile offenders align with the philosophy of the early reformers and thus should influence the Court's approach in defining the responsibilities of counsel to noncitizen children in delinquency proceedings.[269] Advances in brain science demonstrate that fundamental differences exist between juvenile and adult minds: a child's ability to understand complex laws and regulations and make well-reasoned decisions regarding his or her actions and legal cases is reduced as compared to that of their adult counterparts.[270] Likewise, the Court has repeatedly demonstrated an appreciation that children have diminished abilities to assess risks, control impulses, and consider future consequences; the court also recognizes that a youth lacks control over many major outside factors, including her family and home situations, which contribute to dangerous or dysfunctional situations.[271] The results of these studies, embraced by the Supreme Court, reiterate the principal justification for the juvenile court system: the developmental differences between adults and children warrant a system that protects the child's ability to rehabilitate fully.

Extending our notions of due process to include a right to advice on immigration consequences in juvenile proceedings would be a modest yet much-needed upgrade to the rights of noncitizen children. The unique attributes and limitations of both children and noncitizens in legal proceedings, as well as the sustained and severe consequences of removal from the United States, are matters that the Supreme Court has repeatedly deemed critical considerations when it comes to extending other constitutional protections.[272] Further, the rehabilitative philosophy of juvenile justice reinforces the notion that children must have at least the same rights as adults in order to successfully reintegrate into society.[273]

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268. ANDERSON ET AL., *supra* note 36, at 4.

269. Eddings v. Oklahoma, 455 U.S. 104 (1982); Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 132 S. Ct. 2455 (2012); Montgomery v. Louisiana, 136 S. Ct. 718 (*Louisiana*, 577 U.S. ___ (Jan 25, 2016)).

270. *Eddings*, 455 U.S. at 104; *Roper*, 543 U.S. at 569–70; *Graham*, 560 U.S. at 68; *Miller*, 132 S. Ct. at 2464–65.

271. *Eddings*, 455 U.S. at 115–16; *Roper*, 543 U.S. at 569–70; *Graham*, 560 U.S. at 68; *Miller*, 132 S. Ct. at 2464; *see also* Marrus, *supra* note 7, at 113.

272. *See Eddings*, 455 U.S. at 116; *Roper*, 543 U.S. at 569–70; *Graham*, 560 U.S. at 68; *Miller*, 132 S. Ct. at 2464–65; *see also* Padilla v. Kentucky, 559 U.S. 356, 369 (2010) (discussing noncitizens and removal from United States).

273. *See generally* BARRY FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE

Thus, the "particular situation" to be assessed in this due process inquiry involves an exceptionally vulnerable population that may not comprehend, for social and psychological reasons, that a juvenile delinquency proceeding may mean not one, but two life-altering and potentially ruinous actions by the state: detention and deportation.[274] The possibly life-spanning effects of juvenile delinquency proceedings for children make it gravely important for the Supreme Court to explicitly rule on whether due process entitles youth to the right to counsel on the immigration consequences of their juvenile proceedings.

CONCLUSION

Although most practitioners reflexively believe that a delinquency proceeding is less punitive than an adult criminal proceeding, this is simply not true with regard to its impact on young immigrants.[275] Yet, the Supreme Court has never stated that children have a right to counsel on the immigration consequences of their civil delinquency proceedings. Because delinquency proceedings are civil matters governed by Fifth Amendment principles of due process and fundamental fairness, the Court's Sixth Amendment decision in *Padilla v. Kentucky* in 2010 extending the right to counsel on the immigration consequences of criminal proceedings does not protect children in civil juvenile delinquency matters.[276] Thus, noncitizen children have fewer clear constitutional protections than their adult counterparts.

Fortunately, weaving together several threads of existing Supreme Court precedent can close the unsettling gap created by this legal inconsistency. First, the Supreme Court historically has conceived of the Fifth and Sixth Amendments as fluid and interdependent, essentially maintaining that the "safeguards" of the Sixth Amendment are necessary to ensure that the Fifth Amendment principles of fundamental fairness and due process are met. Next, the *Padilla* opinion demonstrates that the Supreme Court continues to recognize the increased complexity and severity of our deportation laws as well as the vulnerability of noncitizens as a class. Finally, in a series of decisions issued in matters involving

JUVENILE COURT 46–78 (1999) (discussing evolution of Chapter 2: The Juvenile Court and the idea of juvenile rehabilitation within the criminal justice system).

274. Adams v. United States *ex rel* McCann, 317 U.S. 269, 276 (1942).

275. *See* A.B.A., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 6 (*reprinted* June 2002), http://njdc.info/appointment-of-counselaccess-to-counsel/http://njdc.info/appointment-of-counse laccess-to-counsel/ (last accessed Feb. 23, 2016) (discussing representation in Delinquency Proceedings generally); see also Fedders, *supra* note 2, n.155.

276. *In re* Gault, 387 U.S. 1, 34–42 (1967); Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010).

youth in the criminal sentencing process, the Court confirms its increasingly compassionate perspective regarding the diminished culpability and unique rehabilitative capacity of children. Together, these decisions provide a strong foothold for the Court to establish a right to counsel on the immigration consequences of juvenile delinquency based on the Fifth Amendment right to due process, the constitutional principles under which delinquency proceedings already operate.